

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Richland County  
In the Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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Case No. 2011-CP-40-2389  
Court of Appeals No. 2012-213531

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CACH, L.L.C.....Respondent,

v.

Toby Hoffman, Jr., a/k/a  
Carl W. Hoffman, Jr.....Appellant,

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REPLY BRIEF OF APPELLANT

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**SC Court of Appeals**

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**CACH L.L.C. DID NOT CARRY ITS BURDEN  
OF PROOF WITH COMPETENT TESTIMONY  
AND EVIDENCE**

In this action to collect a debt, albeit one which was allegedly assigned to the respondent, CACH, Inc. had the burden of proof to establish the debt. See, *Demas v. Convention Motor Inns*, 268 S.C. 186, 193, 232 S.E.2d 274, \_\_\_ (1977), citing *Baker v. Mutual Loan and Investment Co.*, 218 S.C. 47, 61 S.E.2d 387 (1950), “[t]he burden of proof is upon the party who by the pleadings has the affirmative on the issue.” *Id.*, at 218 S.C. 53, 61 S.E.2d \_\_\_.

CACH relied exclusively on the testimony of Magic West, an employee of its parent company, to validate the business records of Bank of America to prove, first, the validity of its assignment to his employer, and second, the credit records of the Bank of America to prove the debt.

Under the business records exception to the hearsay rule, at Rule 803(6) of the S.C. Rules of Evidence, and the Uniform Business Records as Evidence Act at S.C. Code Ann. Section 19-5-510 (2012 Supp.), admissibility requires competent evidence by a qualified witness as to the method of preparation of the documents, made in the “ordinary course of business,” “at or near the time” of the events recorded. See, *South Carolina National Bank v. Jones*, 302 S.C. 154, 155, 394 S.E.2d 323, \_\_\_ (1990).

The mere act of receiving and holding documents, however, does not convert those documents into the business records of the holder. See, e.g., *Asset Acceptance v. Lodge*, 325 S.W.2d 525 (Mo.App.2010), ruling that the assignee debt-buyer’s legal director, despite his “expertise” regarding the assimilation of records in the credit industry, was not qualified to establish either the debt or his company’s rights to it.

CACH, Inc. simply did not have sufficient, competent evidence to prove its claim against Mr. Hoffman.

Moreover, while CACH argues that his absence from the trial of the case is proof of his debt, this does not absolve CACH from carrying its burden of proof, even by a preponderance. *See, Gadson ex rel. Gadson v. ECO Services*, 374 S.C. 171, 178, 648 S.E.2d 585, \_\_ (2007), holding that a plaintiff bears the burden of proof and cannot rely on the absence of a party-witness to “fill the void of evidence.”

### CONCLUSION

CACH, Inc. had the burden of establishing its claims against Mr. Hoffman with a preponderance of competent evidence and testimony. It did not do so. The judgment of the circuit court should be reversed.

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By:   
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December 16<sup>th</sup>, 2013

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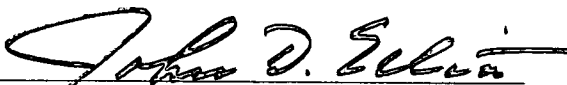
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**CERTIFICATE OF SERVICE**

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Counsel certifies he has served the foregoing Reply Brief on all parties by depositing a copy of the same in the United States Mail, postage prepaid, and by facsimile, on this 16<sup>th</sup> day of December, 2013:

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