

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
In the Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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

RECEIVED

DEC 12 2014

SC Court of Appeals

14467

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

v.

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

PETITION FOR REHEARING

The appellant requests rehearing of the decision in this appeal on the following grounds.

I. The decision overlooks the critical issue of whether the chain of assignment of the debt was valid.

At issue in this case is whether the assignment by FIA Card Services to the debt buyer, CACH, was valid, because in order to assign it, FIA Card Services must own it. It did not.

The issuer of the debt here was Bank of America, NA, not FIA Card Services. The appellant demonstrated with credible evidence that Bank of America does business with two separately chartered banks, Bank of America N.A., and FIA Card Services. Therefore, Bank of America N.A. must first assign the debt to FIA Card Services, before the latter entity may assign

the debt to another. “„[E]very link in the chain between the party to which the debt was originally owed and the party trying to collect the debt must be proven by competent evidence in order to demonstrate standing.” *CACH, L.L.C v. Askew*, 358 S.W.3d 58 (Mo. 2012) at 62. This was a critical issue in this appeal. The opinion dismisses this issue with a footnote, saying merely that “FIA is a wholly owned subsidiary of Bank of America Corporation.” At that, the conclusion of the court is in the context of whether the judgment obtained by CACH was based on inadmissible hearsay.

The appellate court should squarely confront the issue of whether FIA Card Services actually owned the debt in order to assign it.

II. The hearsay business records were not sufficiently reliable to establish that the appellant owed this debt.

CACH used its employee to introduce the records of Bank of America sent to CACH under the business records exception to the rule against hearsay, attempting to utilize Rule 803(6) of the South Carolina Rules of Evidence.

The decision of this court rests upon the reliability of these records, introduced into evidence by an employee of another entity which merely obtained them from “a computer,” in the words of the employee, Magic West. [ROA at p. 43]

The touchstone of any admissible hearsay is its reliability, yet Bank of America, in sending its records from “a computer” does not even vouch for their integrity. When Bank of America assigned its loans to CACH, it disclaimed it was transmitting them, along with the records “without representations or warranties of any type, kind, character or nature, express or implied...” ROA, p. 60, 97. Bank of America does not trust its own records, nor vouches for them.

Moreover, Mr. West may well be trained in Bank of America procedures, and those of other banks as well, he has no knowledge of these specific accounts or their integrity. Instead, he testified that he was generally familiar with Bank of America's practices, but not its practice with regard to these accounts – accounts even Bank of America would not vouch for.

The records used by CACH in obtaining its judgment, introduced in evidence by its own employee, were not admissible as its own business records.

CONCLUSION

The appellant therefore respectfully requests rehearing in this case on the grounds raised above.

JOHN D. ELLIOTT
Attorney for Appellant
P.O. Box 607
1122 Lady Street, 5th Floor
Columbia, SC 29202
Phone: 803.252.9236
Fax: 803.799.2079
E-Mail: jayel@mindspring.com

BY: 
JOHN D. ELLIOTT

Columbia, South Carolina

December 12th, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
In the Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Court of Appeals No. 2012-213531

RECEIVED

DEC 12 2014

SC Court of Appeals

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

v.

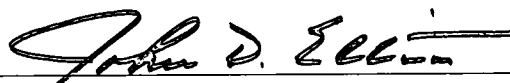
Toby Hoffman, Jr., a/k/a
Carl W. Hoffman, Jr.....Appellant,

CERTIFICATE OF SERVICE

Counsel certifies he has served the Petition for Rehearing on all parties by depositing a copy of the same in the United States Mail, postage prepaid, on this 12th day of December, 2014:

Edward H. Overcash, Jr., Esquire
Law Offices of Ed Overcash, L.L.C.
33 Villa Road, Suite 401
Greenville SC 29615

Manuel H. Newburger, Esquire
Barron & Newburger P.C.
1212 Guadalupe, Suite 104
Austin TX 78701



JOHN D. ELLIOTT
Attorney for the Appellant

John D. Elliott

ATTORNEY AT LAW

THE NBSC BUILDING
1122 LADY STREET, FIFTH FLOOR
Post Office Box 607
Columbia, South Carolina 29202

phone (803) 252-9236
fax (803) 799-2079
email jayel@mindspring.com

December 12th, 2014

HAND DELIVERED

Clerk, South Carolina Court of Appeals
Edgar Brown Building
Columbia, South Carolina

RECEIVED

DEC 12 2014

SC Court of Appeals

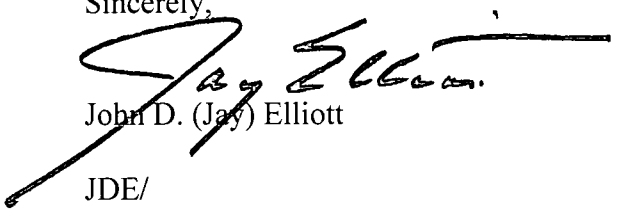
**RE: CACH LLC vs. Toby Hoffman, a/k/a Carol W. Hoffman, Jr.
Court of Appeals No. 2012-213531**

Dear Honorable Clerk:

Enclosed please find the original and six (6) copies of a petition for rehearing in this case, together with the filing fee of \$25.00. The decision of the court was rendered December 3rd, 2014.

By copy of this letter I am serving opposing counsel, and a certificate of service is included as well.

Sincerely,


John D. (Jay) Elliott

JDE/

ENCL.

CC: EDWARD H. OVERCASH, JR., ESQUIRE
MANUEL H. NEWBURGER, ESQUIRE