STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Richland County
In the Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2015-000218

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

v.

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

**MOTION TO STRIKE ARGUMENT IN RESPONDENT'S BRIEF**

The appellant moves for an order of the court striking one argument in the brief of respondent, CACH, L.L.C. Argument I.A of the brief of respondent urges this court to recognize the Adoptive Business Records doctrine in this action for collection by a debt buyer. That argument has been raised for the first time in this litigation, and was never presented to the trial judge for decision.

Rule 242(d)(2) of the South Carolina Appellate Court Rules permits "[O]nly those questions raised in the Court of Appeals and in the petition for rehearing" to be addressed by this court. It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. *Creech v. South Carolina Wildlife and Marine Resources Dep't.,* 328 S.C. 24, 491 S.E.2d 571 (1997). That

principle applies as well to responsive argument. *Cf.*, *Wilder Corporation v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998), where this court ruled that the respondent seller in a commercial real estate venture had properly preserved issues it had raised at trial and in the Court of Appeals sufficient for review by this court.

The doctrine which the respondent seeks to advance now was never raised in the bench trial of this case, and the appellant was never given an opportunity to challenge the factual basis for the admission of such records on that theory. Furthermore, the doctrine was never raised in the court of appeals to permit the appellant to explore that additional sustaining ground to uphold the judgment against the alleged debtor. And while a party need not use the precise name of the legal doctrine in order to preserve an issue, "the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, __(2011), citing *Wilder*, *supra*, 330 S.C. at 76, 497 S.E.2d at 733. Likewise, the appellant must be given the same opportunity in this grant of *certiorari*.

The respondent has submitted a novel question, for the first time in this appeal, noting "[t]his Court does not appear to have ruled on the issue..." in its opening at Argument I.A, respondent's brief, page 5. That novel question requires a factual exploration which is not present on this record. The trial court nor the appellant have been given an opportunity to address whether this doctrine should now be recognized in this case. That argument should be excised, leaving the remainder of the arguments advanced in the respondent's brief for consideration by this court.

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September 22nd, 2015

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**CERTIFICATE OF SERVICE**

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Counsel certifies he has served the foregoing motion to strike argument on all parties by depositing a copy of the same in the United States Mail, postage prepaid, on this 22nd day of September, 2015:

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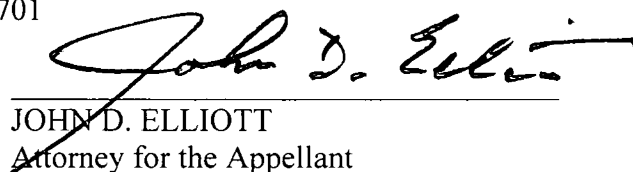

JOHN D. ELLIOTT
Attorney for the Appellant