SC91780

IN THE SUPREME COURT OF THE STATE OF MISSOURI

CACH, LLC,
Plaintiff/Respondent,

vs.

Jon Askew,
Defendant/Appellant

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
TWENTY-FIRST JUDICIAL CIRCUIT
DIVISION NO. 34

Honorable Dale W. Hood
Judge

ON TRANSFER FROM THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

BRIEF OF MISSOURI CREDITORS BAR, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Submitted by:
David J. Weimer, MBE #31478
Kramer & Frank, P.C.
1125 Grand Boulevard, Suite 600
Kansas City, Missouri 64106
(816) 471-0030/Fax (816) 472-0963
David.Weimer@lawusa.com
Attorneys for Missouri Creditors Bar, Inc.

Table of Contents

Table of Cases, Statutes, & Other Authorities

Cases

Other Authorities

Rules

Treatises & Practice Aids

Other

Statement of Interest

Missouri Creditors Bar, Inc. ("MCBI") is a Missouri non-profit, mutual benefit corporation formed for three basic purposes. First, it promotes, furthers, and advances the interests of the creditors' bar by educating the public concerning credit and the collection of consumer debt. Second, it educates the creditors' bar concerning credit and the collection of consumer debt. And third, it advocates in favor of an environment compatible with the zealous and ethical representation of creditors while providing a forum for discussion and mutual cooperation. (Articles of Incorporation of a Nonprofit Corporation (Missouri Creditors Bar, Inc.) MCBI member lawyers and firms represent creditors in every circuit court in the state of Missouri.

MCBI is composed of law firms and solo practitioners representing creditors in consumer collection matters, including counsel for Respondent in this matter. Attorneys engaged in defending the interests of creditors and collection lawyers are also welcomed. It is a statewide bar association and is affiliated with the National Association of Retail Collection Attorneys. Because of its primary focus on practice in Missouri courts, and the fact that the lawyers represented by it practice in every circuit court in the State, MCBI is uniquely positioned to speak to the practice of debtor/creditor law in Missouri, and the effect of appellate decisions on that practice.

MCBI will address points 1 and 2 of Appellant's brief because it believes that CACH will adequately respond to points 3 and 4, and because MCBI believes that it can make a significant contribution to the discussion of points 1 and 2 that it expects no other party to raise. The *amicus* brief filed by the National Consumer Law Center seeks to transform this case from an evidentiary question to a debate about the practices of the debt buying industry. MCBI will rely on others to explain the practices and societal value of the industry. But such a debate begs the question of the societal costs of allowing some people to avoid their just debts by denying access to the courts because of modern business practices.

Statement of Jurisdiction

MCBI accepts the Statement of Jurisdiction of Respondent CACH, LLC.

Statement of Facts

MCBI accepts the Statement of Facts of Respondent CACH, LLC.

Objection to the Statement of Facts of NCLC

In its effort to demonize the debt-buying industry as a whole and thus redirect this Court's attention from the important legal issues at stake in this case, NCLC failed to comply with the requirements of Rule 84.04. Under that rule, a

party filing a brief in this Court must make specific page references to the record on appeal to support every statement of fact contained in the brief. Mo.S.Ct.R. 84.04(i). NCLC's so-called Statement of Facts contains not one reference to the record. Instead it is a recitation culled from publications authored by consumer advocacy organizations, including itself. The record below lacks a single reference to any of these publications. Moreover, the parade of horribles represented by these recitations never manifested in the case before this Court. The Court should disregard NCLC's Statement of Facts in its entirety.

Objection to the Statement of Facts of Appellant

While much of the Statement of Facts proffered by Defendant/Appellant Jon Askew complies with Rule 84.04, it contains a substantial amount of argument. Rule 84.04 prohibits the introduction of argument into the "fair and concise statement of the facts relevant to the questions presented...." Mo.S.Ct.R. 84.04(c). Examples of such argument include comment on what CACH's witness Diana Eakins supposedly did not testify (AppSubBr 7, 8, 9, 10), comment on what the Bill of Sale (Ex. 7) did not contain (AppSubBr 8), comment on what documents were not offered into evidence (AppSubBr 8), comment on what the Credit Card Agreement (Ex. 11) did not contain (AppSubBr 9), and analysis of the date of publication of Exhibit 11 (AppSubBr 10). Defendant also recites testimony of

witnesses—testimony that the trial court presumably rejected or disbelieved in reaching its judgment—as if that testimony constituted the facts of the case. *See* AppSubBr 8 (Defendant did not know whether he had received statements), 10 (Defendant did not believe that he ever received a copy of the contract and did not agree to its terms). Presenting a one-sided or slanted view of the facts does not satisfy this Court's requirement of a "fair and concise statement of the facts." *See Brancato v. Wholesale Tool Co., Inc.*, 950 S.W.2d 551, 555 (Mo.App. E.D. 1997); *S.R. v. S.M.R.*, 709 S.W.2d 910, 912 (Mo.App. E.D. 1986). MCBI therefore urges the Court to accept the Statement of Facts offered by CACH instead.

Argument

1. The trial court correctly exercised its discretion in admitting Exhibits 7, 9, and 11 into evidence, because Missouri law requires a party objecting to the admission of evidence to make a timely, specific objection and objections not made at trial preserve nothing for review, in that Defendant objected to the exhibits in question only on the ground that CACH failed to lay a proper foundation for an exception to the hearsay rule, but the exhibits in question are not

hearsay because they constitute verbal acts. (Response to Appellant's Point 1)

The trial court correctly denied Appellant/Defendant Jon Askew's objection to Exhibits 7, 9, and 11 because those documents do not constitute hearsay. Defendant preserved only an objection that CACH supposedly failed to lay an adequate foundation for the trial court to admit these documents into evidence under the business records exception to the hearsay rule. To the extent that it was necessary to do so with regard to Exhibits 7, 9, and 11 (as well as Exhibit 2), the brief of CACH more than adequately addresses that issue, so it would serve no purpose for MCBI to repeat those arguments here. But MCBI does suggest an alternative ground for the trial court's admission of Exhibits 7, 9, and 11.

A. The standard of review

The high barrier to reversal provided by the applicable standard of review makes a reversal on the sole ground preserved by Defendant inappropriate. As Defendant admits in his brief, an appellate court may reverse a trial court's rulings on matters of evidence only if the trial court abused its discretion. *E.g., Klotz v. St. Anthony's Medical Center,* 311 S.W.3d 752, 760 (Mo. banc 2010). "A trial court will be found to have abused its discretion when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as

to shock the sense of justice and indicate a lack of careful consideration." *Id., quoting Swartz v. Gale Webb Transp. Co.*, 215 S.W.3d 127, 130 (Mo. banc 2007) (internal quotation marks omitted). Here the Court is being asked to find that the trial court abused its discretion by denying what amounts to the wrong objection.

On appeal, Defendant is limited to the issues he properly preserved at trial. Here, as in the *Klotz* case, Defendant limited his objection to whether CACH laid a sufficient foundation under the Uniform Business Records as Evidence Act. Defendant may not now, on appeal, expand his objection to include any other objection: "Generally, 'allegations of error not presented to or expressly decided by the trial court shall not be considered in any civil appeal from a jury tried case.' *Rule 84.13(a).*" *Egelhof v. Holt,* 875 S.W.2d 543, 549 (Mo. banc 1994). Here, if Defendant had raised a different objection at trial, CACH would have had an opportunity to correct any problem; courts require a specific, timely objection to a foundational question because it provides a reasonable opportunity to correct any defect. *E.g., Discover Bank v. Smith,* 326 S.W.3d 120, 125 (Mo.App. S.D. 2010). A party, moreover, may not assign fault to the trial court for failing to sustain an objection that he never made. *E.g., State v. Smith,* 90 S.W.3d 132, 142 (Mo.App. W.D. 2002). Missouri law thus restricts Defendant to the objection he actually made.

This Court, however, is not limited to the reasoning at trial in affirming the result. Instead, it may look beyond any reasons given for the trial court's ruling in determining whether to affirm the decision, and will affirm if the ruling was correct on any basis. *E.g., Moore v. Ford Motor Co.,* 332 S.W.3d 749, 766 (Mo. banc 2011). Of course, it would be harsh indeed to convict the trial court of using the wrong reasoning when Defendant based the only objection he made on the wrong legal concept. Each of these premises points, in this case, to an affirmance.

B. Exhibits 7, 9, and 11 do not constitute hearsay

Defendant's theory depends upon the assumption that, absent a proper foundation under the business records exception to the hearsay rule, Exhibits 7, 9, and 11 are inadmissible hearsay. Given Defendant's reliance on this theory, therefore, one might expect Defendant to spend considerable effort establishing that the evidence he seeks to exclude constitutes hearsay. Instead, he ignores this critical question altogether. But the exhibits in question are not hearsay; they are verbal acts. As such, they are not subject to an objection based on hearsay, making the question of whether CACH laid an adequate foundation under the Uniform Business Records as Evidence Act irrelevant.

Some out-of-court statements are not hearsay because the proponent does not offer them to prove the truth of the matter asserted. Thus, for example,

contracts are not subject to an objection that the document is inadmissible hearsay. Parties do not offer contracts to prove the truth of the statements made in the document; rather, they offer them to prove that the statements were made and thus to prove the terms of the agreement. *E.g., Henges Assocs., Inc. v. Indus. Foam Prods., Inc.,* 787 S.W.2d 898, 900 (Mo.App. E.D. 1990) (admitting testimony regarding exclusion of certain warranties). Therefore, "[a] contract…is a form of verbal act to which the law attaches duties and liabilities and therefore not hearsay." *Mueller v. Abdnor,* 972 F.2d 931, 937 (8th Cir. 1992) (applying Missouri law); *see also Estate of Oden v. Oden,* 905 S.W.2d 914, 918 (Mo.App. E.D. 1995). Missouri courts thus admit evidence of the terms of contracts even though they are out-of-court statements because they are not hearsay. *Deck v. Bird,* 810 S.W.2d 728, 730 (Mo.App. E.D. 1991) (admitting testimony regarding terms of a partnership agreement); *Henges Assocs.,* 787 S.W.2d at 900. Examination of Exhibits 7, 9, and 11, reveals that none of those documents constitutes hearsay.

Exhibits 7 and 9 should be considered together because they are essentially bound together. Diana Eakins identified Exhibit 7 as the bill of sale of the account in question from Washington Mutual to Worldwide Asset Purchasing. (TR 22, 23). And she identified Exhibit 9 as a redacted copy of the spreadsheet listing purchased accounts that accompanied the bill of sale. (TR 23, 24). A bill of sale is

a document with independent legal significance—a verbal act—because it transfers ownership of property from one party to another. *See Sawyer v. Sanderson,* 113 Mo.App. 233, 243, 88 S.W. 151, 153 (Mo.App. 1905) ("The bill of sale is conclusive evidence of a formal transfer"). Thus, it is not subject to exclusion from evidence on the ground that it is hearsay. *Pearson v. Allied Fin. Co.,* 366 S.W.2d 6, 10 (Mo.App. 1963) ("It is contended that the bill of sale is 'hearsay evidence'. The obvious absurdity of this contention relieves us from a further consideration of it."). Exhibits 7 and 9 are not hearsay and so the trial court could not have been so arbitrary and capricious as to shock one's sense of justice when it denied an objection that they were.

Likewise, Exhibit 11 also does not constitute hearsay. Eakins identified Exhibit 11 as the credit card agreement issued by Providian Bank along with Defendant's credit card. TR 44. As previously noted, contracts are verbal acts to which the law attaches independent legal significance. *See, e.g., Mueller,* 972 F.2d at 937. As such, they are not hearsay. Thus, the trial court did not abuse its discretion when it denied Defendant's ill-conceived hearsay objection.

C. The rule urged by Defendant would adversely affect creditors attempting to recover valid debts.

Defendant and its ally urge this Court to adopt a rule that would severely affect the ability of all sorts of creditors to collect valid debts, as well as affecting the introduction of evidence in many other types of cases. Many businesses depend for their existence on documents generated by other businesses. Banks, for example, depend on the documents generated by their customers to determine whether to grant a loan. Contractors depend on documents generated by subcontractors to make a bid on and to bill a project. It is an imperative of modern business that evidentiary rules are not likely to change.

A familiar example will illustrate the dilemma created by the rule urged by Defendant. Many automobile lenders purchase retail installment contracts from dealers rather than engage in direct lending. *Cf.* Federal Trade Comm'n, Facts for Consumers: Understanding Vehicle Financing, available at http://www.ftc.gov/bcp/edu/pubs/consumer/autos/aut04.shtm (downloaded 11/12/11). The practice results from business advantages gained by both the dealer and the lender. And it also results in advantages to the consumer: convenience, access to multiple lenders [with concomitant access to more competitive interest rates], and possible access to special lending programs. FTC, Understanding Vehicle Financing, *supra*. In such a situation, the dealer typically assigns the retail installment contract to a lender shortly after the sale is consummated. *E.g., Moore*

Equip. Co. v. Halferty, 980 S.W.2d 578, 586 (Mo.App. W.D. 1998). The lender then owns and typically services the loan.

If the consumer later defaults on the loan, the lender must prove its claim for breach of the contract. To prove such a claim, the lender must prove the existence and terms of an agreement. *E.g., D.R. Sherry Const., Ltd. v. Am. Family Mut. Ins. Co.*, 316 S.W.3d 899, 904 (Mo. banc 2010). Ordinarily one would prove the terms of such an agreement by introducing the agreement document. But if the consumer denies execution of the contract—a not-uncommon event, regardless of merit—the lender could not, under the rule urged by Defendant, introduce that contract into evidence without testimony from the dealer or the testimony of a hand-writing expert. In the wake of the recent financial crisis and restructuring of two of the big three auto makers, about 2,000 dealerships were terminated. *See* Canis & Platzer, U.S. Motor Vehicle Industry Restructuring & Dealership Terminations, Congressional Research Service, 21 (2009). Obtaining testimony from dealerships accordingly has become problematic. And the amount typically at stake in such matters does not justify the expense of expert testimony. Yet the lender has a valid debt that remains due and owing, and a duty to its shareholders to recover those funds, but the debtor has just raised the cost of litigation enough to gain immunity.

While it may seem unnecessary to say so, MCBI members often find themselves in the position of reminding others that it is legal to collect a valid debt.

Just over two weeks ago, a Kansas City television station broadcast a story claiming that a creditor had a man arrested for failing to pay his admitted debt. KCTV5 Investigations: Modern Debtors' Prison, transcript available at http://www.kctv5.com/story/15894440/kctv5-investigations-modern-debtors-prisons, broadcast October 28, 2011. As a by-the-way, the report mentions that the real reason the police arrested him is that he failed to obey a court order, *id.*, but the implication is clear: creditors and especially their debt collectors and attorneys are fair game. The *amicus curiae* brief of NCLC contains little more than broad generalizations about debt buyers calculated to tar all debt buyers with the misdeeds of a few, regardless of whether the debt buyer in this case committed any misdeeds toward anyone, much less Defendant.

As a result of the prevalence of this anything-goes-it's-just-a-debt-buyer attitude, creditors in general and debt buyers in particular are meeting increased resistance to their claims, again regardless of merit. In the recent past, a judge of an associate circuit division of a Missouri circuit court circulated a document entitled "Just Say No to Default Judgments" in which the author advances the novel theory that there can be no default judgments in cases brought under Chapter 517. Appendix, A-10. Represented defendants in debt collection cases routinely deny all allegations in the plaintiff's petition despite the requirement of Rule 55.03 that "denials of factual contentions are warranted on the evidence...." Mo.S.Ct.R.

55.03(c)(4); *see also Gulf Oil Corp. v. Bill's Farm Center, Inc.*, 52 Fed.R.Dec. 114, 118-19 (W.D.Mo. 1970) ("General denials or the equivalent are no longer permitted under the Federal Rules of Civil Procedure.") (citing Rule 11, the model for Mo.S.Ct.R. 55.03); *and Gibson v. Coldwell Banker Burnet,* 659 N.W.2d 782, 788 (Minn.App. 2003) (citing Minnesota's version of Rule 11). (For a discussion of this problem, *see* Card, Arnold, & Schnake, 15 Mo.Prac., Civil Rules Practice § 55.03-02 (2011 ed.) ("The revision of the factual validity requirement [of Rule 55.03] responds to the perception that sanctions are meted out more often and with greater harshness to plaintiffs than to defendants."). In the absence of any constraints, debtors presume to require a plaintiff to prove every element of its claim even where, as here, they admittedly owe a debt.

Indeed, represented defendants routinely file counterclaims founded on the federal Fair Debt Collection Practices Act in purchased debt cases, often to improve their bargaining position and not because the claim has any real merit. Debtors' attorneys file cookie-cutter pleadings without taking into account the facts of the given case, *see* A-12, *et seq.*, even though at least one court has found that the use of such pleadings in cases as individualized as FDCPA claims is highly suspect. *See, e.g., Tatro v. Homecomings Fin. Network, Inc.,* No. 3-10-cv-00346, 2011 WL 240255 *3 (D.Nev.) ("The situation may be intensely frustrating and emotional for clients and counsel alike, but this is no reason to abandon all

pretense of compliance with the pleading standards and turn the filing of legal complaints into an exercise in catharsis that serves no purpose but to occupy the resources of the courts with a never-ending stream of identical, legally implausible claims."). The identical nature of the counterclaims, combined with their use by multiple attorneys in multiple jurisdictions underscores the cynicism of the practice. Indeed, at least one court has recognized that the FDCPA spawned a cottage industry comprised of "professional plaintiffs" and their attorneys. *Miller v. Javitch, Block & Rathbone,* 561 F.3d 588, 596 (6th Cir. 2009) ("'[T]here comes a point where this Court should not be ignorant as judges of what we know as men.'"). Here Defendant filed a similar counterclaim, although he abandoned it after this Court accepted transfer of this appeal.

NCLC undoubtedly would see such tactics as justified. In its *amicus* brief, it suggests that creditors should simply accept the loss represented by the debtor's failure to pay a just debt as a "tax write-off[]," since the consumer has suffered enough due to "the consequences of bad credit." NCLC Brief, 6. NCLC offers no support for its suggestion that creditors are now both taking tax write-offs and selling their delinquent accounts. Instead, it uses this claim to preface its parade of horribles—sales of accounts with no warranty, unavailability of account records, pursuing the wrong person for a debt, inability to challenge erroneous transactions, bringing suit outside the applicable statute of limitations, bringing suit on paid

debt. NCLC Brief, 7-10. The obvious fallacy of using these claims as a premise for this Court's ruling in this case is that the record does not support the conclusion that any of them occurred here. In fact, the opposite is true, which destroyed the profit model of the debtors' bar, based as it is on the expectation of mutual dismissals in the face of expensive even if frivolous FDCPA counterclaims.

The most egregious exaggeration in NCLC's brief, however, is its claim that the Uniform Business Records as Evidence Act is a consumer protection statute. Actually, the legislature passed it expressly to make it easier for businesses to prove their claims, including their claims against consumers. *See Melton v. St. Louis Pub. Serv. Co.,* 363 Mo. 474, 485, 251 S.W.2d 663, 669 (Mo. banc 1952) (approving the use of the Act to lay a foundation for hospital records against an individual personal injury claimant). "The . . . Act has the purpose of avoiding the many antiquated and technical rules of common law regarding the admissibility of business records into evidence." *Id.* "The purpose of these statutes [§§ 490.660-490.690 R.S.Mo.] was to broaden the scope of admissibility of records made in the regular course of business as an exception to the hearsay rule." *State v. Davis,* 608 S.W.2d 437, 439 (Mo.App. E.D. 1980). In other words, it "make[s] admissible records or other entries which without the law would be inadmissible." *Adler v. Ewing,* 347 S.W.2d 396, 401 (Mo.App. 1961). But it does not extend the same recognition to the records of individuals. *E.g., Mitchell v. St. Louis Argus Pub.*

Co., 459 S.W.2d 1, 6 (Mo.App. 1970). The notion that the Act is a consumer protection statute is errant nonsense.

Here the records offered by CACH included a contract and a bill of sale with its attachment. Those documents are not hearsay and therefore are not subject to the objection made by Defendant at trial. Nevertheless, CACH established each of the elements necessary to admit them as business records, as it did with the other documents it offered. The trial court therefore correctly admitted them into evidence.

2. The trial court correctly ruled that CACH, LLC, possessed standing to sue, because the law requires a party bringing a claim to demonstrate a personal stake in the outcome of the case, in that CACH proved that it purchased the right to collect Defendant's credit card account from a party with the ability to convey that right by oral testimony and the bills of sale conveying the account. (Response to Appellant's Point 2)

CACH adequately proved its standing to sue. The concept of standing is designed to assure that the parties before the court have a sufficient interest in the outcome of the matter that they can be expected to adequately represent their

respective interests. CACH proved that it purchased the right to collect Defendant's credit card account, which certainly constitutes a sufficient interest. More to the point, though, Defendant's entire argument once again depends upon his false assumption that the documents used to bolster CACH's testimonial evidence of ownership constitute hearsay. Since they do not, leaving Defendant with no valid objection to their introduction into evidence, Defendant's entire argument necessarily fails.

A. The standard of review

The parties tried this case to the court. This Court established the standard of review applicable to such matters in *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. banc 1976). Under that standard, "the decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Id.* Defendant suggests that standing is purely a question of law. AppSubBr, 24.

While that proposition is true where the facts supporting standing are not disputed, *see State ex rel. St. Louis Retail Group v. Kraiberg,* 343 S.W.3d 712, 715 (Mo.App. E.D. 2011) (appellate court reviews trial court's finding of standing "based on 'the petition along with any other non-contested facts accepted as true

by the parties at the time the motion to dismiss was argued.'"), here the facts are the only dispute. Defendant could not reasonably dispute standing if CACH is the owner of Defendant's credit card account. So the question is really one of the sufficiency of the evidence. In such a case, this Court should defer to the trial court's findings of fact, given the trial court's greater familiarity with the facts and its opportunity to view the witnesses. *Cf. Doe v. Merritt,* 261 S.W.3d 672, 673 (Mo.App. S.D. 2008) (abandoning de novo standard applicable to review of summary judgments and adopting *Murphy v. Carron* standard where the parties disputed the remedy, not the claim). Under either standard, though, this Court must affirm the trial court's conclusion that CACH had standing to sue since the trial court had sufficient evidence to conclude that CACH owned the account.

B. CACH proved that it owned Defendant's credit card account.

As noted, ordinarily standing is a question of law. To establish standing, a party must have some stake in the outcome of the litigation, although even an attenuated, slight, or remote interest will suffice. *E.g., St. Louis Ass'n of Realtors v. City of Ferguson,* --- S.W.3d ----, 2011 WL 5110213, *1 (Mo. banc). In other words, to have standing to sue, the plaintiff must be affected directly and adversely. *Id.*; *see also Sprint Communications Co., L.P. v. APCC Servs., Inc.,* 554

U.S. 269, 273 (2008). Here no one could reasonably dispute that CACH has standing, given the findings made by the trial court.

CACH proved that it had standing to sue. Either bare legal title to or an equitable interest in an account will suffice. *Sprint Communications,* 554 U.S. at 280. Eakins testified that CACH purchased the account in question for valuable consideration. TR 18, 23. She also identified documents showing the chain of assignment of the account from Washington Mutual through Worldwide Asset Purchasing to CACH. Exhibits 7, 9, and 11; TR 18, 22, 23, 45, 46. CACH has an injury in fact, has a connection between Defendant's default and CACH's loss, and a judgment in its favor will remedy its injury. *See Sprint Communications,* 554 U.S. at 273-74. Yet Defendant is unconvinced and wants something more.

Apparently what Defendant feels is missing is the testimony of a representative of the other parties involved in the transaction. That desire, however fervently expressed, depends for its strength on the assumption that the supporting documents are hearsay and therefore inadmissible since CACH supposedly failed to lay a sufficient foundation for their admission under the Uniform Business Records as Evidence Act. MCBI will permit CACH to defend the strength of the foundation that it laid, but MCBI has already demonstrated the fallacy of Defendant's assumption. Although they are certainly out-of-court statements, neither contracts, *Deck,* 810 S.W.2d at 730, nor bills of sale, *Pearson,*

366 S.W.2d at 10, constitute hearsay. Since Defendant made no other objection to their admission, they come into evidence and bolster the testimony of Eakins that CACH in fact owns the account.

And since this is a civil case, not a criminal charge, CACH only bore the burden of proving it more likely true than not that it owned the account. Sometimes referred to as the preponderance-of-the-evidence standard, Missouri instructs civil juries that the burden of a plaintiff is "'to cause you to believe that such a proposition is more likely true than not.'" *Morgan v. State,* 272 S.W.2d 909, 912 (Mo.App. W.D. 2009), *quoting* M.A.I. 3.01. CACH did not, in other words, have to prove its ownership beyond a reasonable doubt, much less beyond all doubt, which seems to be the standard Defendant implicitly urges the Court to accept. CACH certainly met its burden.

C. CACH did not bear a burden to prove each step in the chain of title through testimony of the prior owners.

CACH provided sufficient proof of the validity of the two assignments in the chain of title pertaining to Defendant's credit card account. Defendant urges the Court to adopt a new rule—that to prove an assignment, the assignee must obtain the testimony of all prior owners to establish the chain of title. That has never been the law in Missouri.

Instead, the purported owner of the account may testify to ownership. *Keystone Agency v. Herrin,* 585 S.W.2d 313, 315 (Mo.App. W.D. 1979). But even if the law required CACH to prove the validity of the assignment solely through a written document, the assignee need only prove the authenticity and execution of the assignment. *E.g., Cummins v. Dixon,* 265 S.W.2d 386, 394-95 (Mo. 1954). And the proof necessary to establish the assignment depends on the nature of the dispute. *Pohle v. Hooten,* 518 S.W.2d 464, 466 (Mo.App. 1975). Here Defendant lacked any evidence at all that CACH did not purchase the account or even that someone else claimed an interest in it. Under the circumstances of this case, then, the quantum of proof was more than adequate.

Defendant's reliance on the *Mitchell* case is misplaced. As Defendant notes, in that case, the issue was not the validity of the second assignment of the stocks at issue, but the first. *Mitchell,* 459 S.W.2d at 6. That reasoning arose from the unique facts of the case, however, not from some immutable rule of assignments. In *Mitchell*, Mr. Reed died intestate possessed of ten shares of stock (among other things). *Id.* at 3. His heirs comprised his widow and his two children. *Id.* The children each conveyed their interest in the stock to the widow, who thereafter conveyed the stock to Mitchell. *Id.* at 3-4. The children then each executed another assignment, this time to St. Louis Argus Publishing. *Id.* at 3. Thus, the only question presented by the case was whether the initial assignment to the

widow was effective, a question that turned on Michigan probate law, not the rules of evidence. *Id.* at 6. Here Defendant raises no such specter of a double assignment.

But a claim of a spectral "other assignee," even if made, does not defeat CACH's claim of standing. As the United States Supreme Court noted, it is very possible to have more than one claimant on the same account. *Sprint Communications,* 554 U.S. at 280. If Defendant were aware of such a claimant, he should have taken steps to join it in this action, or at least made the trial court aware of it. In the absence of such an action, we can disregard this argument as the diversion it is.

Adopting the rule urged by Defendant, moreover, would have serious consequences for all sorts of claims. Owners, for example, of untitled personal property would be forced to prove the validity of the assignment from the manufacturer to the wholesaler, and from the wholesaler to the retailer, in addition to that from the retailer to themselves. Defendant's attempt, AppSubBr 27-28, to distinguish this Court's 2010 decision in *Renaissance Leasing, LLC v. Vermeer Mfg. Co.,* 322 S.W.3d 112 (Mo. banc 2010), is unconvincing. In that case, this Court held that one party may transfer non-titled property to another party without written documentation; indeed, any competent evidence of ownership will do. *Vermeer,* 322 S.W.2d at 122. The only distinction this Court drew was between

titled and non-titled property. *Id.* Defendant attempts to limit this Court's holding to the issues discussed in one of the cases it cited in support of its holding.

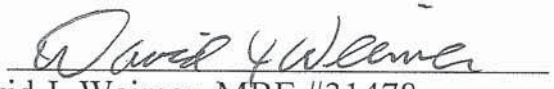
But this Court is not so bound. And the case cited does not create the limits urged by Defendant. Defendant notes that transfers of intangible personal property "ordinarily" entail "a formal instrument of creation or transfer." *Hallmark v. Stillings,* 648 S.W.2d 230, 233-34 (Mo.App. 1983). But Missouri courts—including the *Hallmark* court that supposedly went out of its way to distinguish such transfers—have never held that such transfers may ***only*** occur in such a manner. To the contrary, this Court held that any personal property may be transferred without a formal writing unless it is titled property, *Vermeer, supra,* for the obvious reasons noted above. A rule like that urged by Defendant could swiftly bring commerce in all sorts of commodities to a halt.

Conclusion

This Court should resist the urgings of Defendant and his allies to adopt rules of evidence and standing that would strike a severe blow to commerce in Missouri. Missouri courts are capable, without virtually denying access to the courts to creditors or even debt buyers, of separating bad claims from good and giving debtors the fair opportunity to defend to which our Constitution entitles them. Debtors, contrary to the paternalistic musings of the NCLC, are generally

capable of determining whether they owe a debt and disputing it when they believe that they do not. They should not, however, be permitted to deny even debts that they know they owe, but rather should be held to the same standard as all litigants: to admit that which is true so that the aim of the lawsuit—the resolution of a true dispute—can be fulfilled. The trial court correctly decided this case, and this Court should affirm that decision.

Respectfully submitted,
KRAMER & FRANK, P.C.

By: 

David J. Weimer, MBE #31478
1125 Grand Boulevard, Suite 600
Kansas City, Missouri 64106
(816) 471-0030/Fax (816) 472-0963
dweimer@lawusa.com
ATTORNEYS FOR AMICUS CURIAE
MISSOURI CREDITORS BAR, INC.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Mo.S.Ct.R. 84.06(b) and contains <<6,610>> words as counted by the word processing program used to prepare the brief, Microsoft Word.

Respectfully submitted,
KRAMER & FRANK, P.C.

By: David J. Weimer

David J. Weimer, MBE #31478
1101 Walnut, Suite 1202
Kansas City, Missouri 64106
(816)471-0030/Fax (816)472-0963
dweimer@lawusa.com
ATTORNEYS FOR PLAINTIFF

Certificate of Service

The undersigned certifies that he delivered one copy of the foregoing, via U.S. mail, postage prepaid, and one copy via electronic transmission, this 15 day of November, 2011, to:

Dennis M. Devereux
Attorney at Law
7 Pines Court, Suite C
St. Louis, Missouri 63141
devereuxdennis@yahoo.com
and
James J. Daher
James J. Daher, LLC
1221 Locust Street, Suite 1000
St. Louis, Missouri 63103
st.louisattorney@sbcglobal.net
ATTORNEYS FOR APPELLANT

and

Karen L. Jones
Evans & Dixon, LLC
1 Metropolitan Square, Suite 2500
St. Louis, Missouri 63102
kjones@evans-dixon.com
ATTORNEYS FOR RESPONDENT

and

Gina Chiala
Slough, Connealy, Irwin & Madden, LLC
1627 Main Street, Suite 900
Kansas City, Missouri 64108
Chiala@scimlaw.com
ATTORNEYS FOR AMICUS CURIAE
NCLC

and

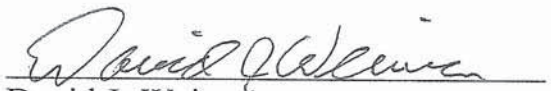
Eric B. Wetzel
Kozeny & McCubbin, L.C.
12400 Olive Boulevard, Suite 555
St. Louis, Missouri 63141
ewetzel@km-law.com
ATTORNEYS FOR AMICUS CURIAE
NARCA

and

Joshua C. Dickinson
Spencer Fane Britt & Browne, LLP
1000 Walnut Street, Suite 1400
Kansas City, Missouri 64106
jdickinson@spencerfane.com
ATTORNEYS FOR AMICUS
CURIAE
DBA

and

Michelle A. Fox
Kutak Rock LLP
1010 Grand Boulevard, Suite 500
Kansas City, Missouri 64106
michelle.fox@kutakrock.com
ATTORNEYS FOR AMICUS
CURIAE
CLLA



David J. Weimer