

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2014-000129-001 DT

05/29/2014

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT

J. Eaton

Deputy

MIDLAND FUNDING LLC

BARRY BURSEY

v.

NICOLE ACTIS (001)
ROBERT J ACTIS (001)

JOHN N SKIBA

HIGHLAND JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC2013-021091RC.

Defendants-Appellants Nicole Actis and Robert J. Actis (Defendants) appeal the Highland Justice Court's determination that they were responsible for a credit card debt. Defendants contend the trial court erred. For the reasons stated below, this Court affirms the trial court's judgment.

I. FACTUAL BACKGROUND.

On February 4, 2013, Plaintiff Midland Funding LLC. filed a Complaint against Defendants alleging Defendants failed to pay a credit card debt with Chase Bank and Plaintiff was a successor in interest to the debt. Plaintiff alleged Defendants entered a credit card agreement with Chase Bank for a credit card ending with the numbers 8247 and agreed to the terms and conditions of the credit card. Plaintiff claimed Defendants failed to pay this debt and owed a principal amount of \$4,620.57 plus interest. Plaintiff claimed to be a successor in interest to this debt. Plaintiff requested the principal amount of the debt, interest at the rate of ten per cent (10%) from the date of default—December 31, 2010—plus costs and attorneys' fees. Plaintiff suggested a reasonable amount of these fees would be \$1,394.08.

The trial court held trial on October 23, 2013. During trial, Plaintiff introduced testimony from David Patton—an employee of Midland Credit Management—as well as various documents which Plaintiff asserted supported its claim. Defense counsel argued (1) these documents were impermissible hearsay; and (2) Mr. Patton had no knowledge of the record keeping practices of the several intermediary entities and lacked the necessary foundation or knowledge to testify about transactions between two companies—Hilco Receivable and Equable Ascent Financial—with whom he had no relationship. The crux of Defendants' claim was that Mr. Patton is not a qualifying witness for purposes of Ariz. R. of Evid. Rule 803(6).

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Mr. Patton testified he (1) was employed by Midland Credit Management (MCM), a debt servicer on behalf of Midland Funding; and (2) maintains Midland Funding's books of record.¹ He stated he was a custodian of records and senior Legal Specialist at MCM and had been a custodian of records for approximately eighteen months and a senior legal specialist for approximately six months.² He identified his training and asserted he had reviewed Defendants' accounts.³ He reviewed the Affidavit of Mycah Struck—Plaintiff's Exhibit I, identified the affidavit as having been written by Mycah Struck and stated 8247 were the last four digits of the Chase account Midland purchased.⁴ Defense counsel objected to the admission of this exhibit (1) based on hearsay; (2) because the affidavit was conclusory as there were no attachments referenced in the affidavit; and (3) because it was made in preparation for litigation as demonstrated by the caption of State of Arizona with the parties' names.⁵ The trial court sustained this objection.

Mr. Patton identified Plaintiff's Exhibit II, which included a copy of the Bill of Sale from Chase Bank to Hilco Receivables, LLC. and said a series of accounts was sold on January 7, 2011.⁶ The witness stated Hilco Receivables became Equable Ascent Financial LLC. (EAF).⁷ He specified he knew Hilco merged with EAF from documents EAF gave to Midland when Midland purchased accounts from EAF.⁸

Mr. Patton stated Midland Funding purchased these accounts from EAF on May 14, 2012.⁹ He said he knew Defendants' account was included in this purchase because the account was in the electronic sales file EAF¹⁰ transferred on May 14, 2012.¹¹ Plaintiff moved to admit Exhibit II—the two bills of sale and the merger documents—and Defendant objected to the Bill of Sale between Chase and Hilco based on (1) hearsay; and (2) lack of the foundation needed for admission according to Rule 803(6). Defense counsel argued the witness did not provide any testimony about the preparation or retention of the document and the document was not complete.¹² Defense counsel also objected to the Bill of Sale between Equable and Midland for the same reasons since this Bill of Sale states (1) there was an electronic file attached; (2) part of the document was redacted; and (3) there was no testimony about how the record was kept and if it was kept in the normal course of business.¹³ Defense counsel also objected to the merger

¹ Audio transcript, October 23, 2013, at 3:42:57–3:43:18.

² *Id.* at 3:43:18–50.

³ *Id.* at 3:44:01–3:45:02.

⁴ *Id.* at 3:45:53–3:48:34.

⁵ *Id.* at 3:48:36–3:49:18.

⁶ *Id.* at 3:50:14–3:51:01.

⁷ *Id.* at 3:50:54–56; 3:51:26–30.

⁸ *Id.* at 3:51:46–3:52:17. Exhibit II included documents showing this merger.

⁹ *Id.* at 3:52:42–57.

¹⁰ *Id.* at 3:53:29–43.

¹¹ *Id.* at 3:54:14–17.

¹² *Id.* at 3:57:19–3:58:27.

¹³ *Id.* at 3:58:28–3:59:16.

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documents and claimed they were hearsay and the witness was not competent to testify about the merger between these two entities.¹⁴ Plaintiff responded *State v. Parker*¹⁵ governed; there was no dispute MCM relied on the documents presented to the court; and MCM kept these records in the ordinary course of business so the records would fall under the business record exception.¹⁶ The trial court admitted Exhibit II.¹⁷

Mr. Patton spoke about the field data sheet—Plaintiff’s Exhibit III. The exhibit listed the document was printed from electronic records provided to Midland Funding by EAF on May 14, 2012, the date of the transaction between Midland Funding LLC and EAF.¹⁸ He said he verified the information on the field data sheet against the electronic records that were transferred from information transferred by EAF at the time of the sale.¹⁹ Mr. Patton (1) stated the field data sheet was for Nicole K. Actis and the account with the last four digits of 8247; and (2) reviewed the remaining information on the field data sheet.²⁰ Defense counsel objected to the admission of the document as hearsay and argued there was no testimony that the information within the document was recorded on or about the time the event occurred.²¹ Defense counsel noted the field data sheet was produced in 2012, but the information related to an account from 2010. Plaintiff’s counsel opposed this objection and the trial court withheld ruling on the objection at that time.²²

Mr. Patton testified about the series of credit card statements provided by Chase; reviewed the contents of these statements, including the name and address and last four digits of the account number, and noted these matched the information on the field data sheet.²³ He stated this is the same information that was transferred and downloaded at the time of the transaction and was currently on his computer.²⁴ He also matched the balance amount listed with the field data sheet and noted payments had been made on the account.²⁵ Mr. Patton stated the credit card statements were transferred to Midland Funding on May 14, 2012, and, since that time, MCM — and Midland Funding—kept the documents in the ordinary course of business and relied on them.²⁶ Defense counsel objected to the admission of these documents as hearsay and argued *State v. Parker* does not eliminate the requirements of Rule 803(6) and the witness did not pro-

¹⁴ *Id.* at 3:59:19–50.

¹⁵ *State v. Parker*, 231 Ariz. 391, 296 P.3d 54 (Ariz. 2013).

¹⁶ Audio transcript, *id.* at 3:59:59–4:00:59.

¹⁷ *Id.* at 4:01:00–06.

¹⁸ *Id.* at 4:01:23–4:02:01.

¹⁹ *Id.* at 4:02:11–4:03:22.

²⁰ *Id.* at 4:03:41–4:05:33.

²¹ *Id.* at 4:05:33–4:06:06.

²² *Id.* at 4:07:26–31.

²³ *Id.* at 4:12:28–4:13:24.

²⁴ *Id.* at 4:13:24–35.

²⁵ *Id.* at 4:13:35–4:14:22. Plaintiff’s counsel noted this sum also matched the affidavit. However, the trial court had already ruled the affidavit was inadmissible.

²⁶ *Id.* at 4:15:10–53.

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vide any testimony about how Chase created these documents.²⁷ Plaintiff's counsel asserted the documents were admissible under *State v. Parker*.²⁸ The trial court withheld its ruling on the admissibility of these documents.

On cross-examination, Defense counsel asked if the witness had worked for or received training from Chase Bank, Hilco Receivables or EAF about how they maintain and process records; and Mr. Patton stated he had not worked for any of these entities and had received no training about how these entities maintained their records.²⁹ Mr. Patton stated the first time he reviewed the documents he previously discussed was the morning of the trial.³⁰ Mr. Patton (1) confirmed he had not reviewed any original application or contract between Chase Bank and Ms. Actis; (2) stated the agreement was not supplied to Midland; and (3) did not know if the account had originally been held by a financial institution other than Chase.³¹

Defense counsel directed Mr. Patton's attention to Plaintiff's Exhibit II, re the Bill of Sale between Chase Bank and Hilco Receivables and the witness said he did not know when the document was created or if it was created at or about the time the transaction occurred.³² The witness admitted he had no knowledge about how Chase Bank, or Hilco Receivables maintain their records and he had no knowledge about the procedures relating to the sales transaction including the Actis account.³³ Defense counsel also asked about the Bill of Sale between EAF and Midland Funding and Mr. Patton responded he did not have any independent knowledge about when the document was created or if it was created at or near the time when the transaction occurred.³⁴ Mr. Patton stated he did not have any information about how EAF maintained its records.³⁵ He admitted this Bill of Sale had redacted information and did not contain any specific information about what was transferred or any information about Defendants.³⁶

Defense counsel also questioned Mr. Patton about the field data sheet—Plaintiff's Exhibit III—and Mr. Patton testified he knew the charge off amount was \$4,620.57 because it was (1) the amount reflected in the document; (2) the same amount reflected in Midland Credit Management's computer system; and (3) was created May 14, 2012.³⁷ Mr. Patton acknowledged he was not involved in creating the document.³⁸

²⁷ *Id.* at 4:15:57–4:16:31.

²⁸ *Id.* at 4:16:31–4:17:47.

²⁹ *Id.* at 4:18:18–53.

³⁰ *Id.* at 4:18:53–4:11:11.

³¹ *Id.* at 4:11:18–4:20:09.

³² *Id.* at 4:20:43–58.

³³ *Id.* at 4:21:00–4:22:35.

³⁴ *Id.* at 4:22:39–4:23:06.

³⁵ *Id.* at 4:23:06–14.

³⁶ *Id.* at 4:23:14–48.

³⁷ *Id.* at 4:23:59–4:25:02.

³⁸ *Id.* at 4:25:02–08.

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The witness identified Plaintiff's Exhibit IV and questioned Mr. Patton about the billing statements—and asked about the 29.99% interest rate.³⁹ Thereafter, Defense counsel also questioned Mr. Patton about a letter sent by MCM; and he replied (1) the validation letter was usually sent to the account holder after MCM purchased an account; and (2) the letter stated Midland Funding purchased the account from an original creditor and the account was being serviced by MCM.⁴⁰ Defendant had the document admitted as Defendant's Exhibit I. The witness acknowledged this document reflected a 0% interest rate, but when Defense counsel asked Mr. Patton to explain the discrepancy between the requested 10% interest rate in Plaintiff's pleadings as compared with the interest rate of 29.99% in Plaintiff's Exhibit IV and the 0% interest in Defense Exhibit I, Mr. Patton explained the original creditor could seek interest but MCM does not seek interest when it sends out collection letters and relies on its law firms in setting requested interest once it refers the case to a law firm.⁴¹ Counsel asked Mr. Patton if he had reviewed any documents prior to the hearing to determine what the actual interest rate was when the account was opened and Mr. Patton responded he had not done so.⁴²

The trial court admitted Plaintiff's Exhibit III after stating (1) Defense counsel did not show the exhibit was not trustworthy; and (2) Defense counsel's objection went to the weight as opposed to the admissibility of the document.⁴³ The trial court also admitted Plaintiff's Exhibit IV after finding (1) these statements were supporting documentation for the alleged debt; (2) the rules for regulating banks were strict; and (3) the issue was trustworthiness and bank records were generally trustworthy.⁴⁴

In closing, Plaintiff's counsel argued the case involved the purchase of a debt; there was no record of any payment or settlement of the account; and his client was seeking payment for this debt.⁴⁵ Defense counsel maintained Plaintiff did not demonstrate (1) any contract between Chase Bank and Defendants; (2) how Plaintiff arrived at the amount requested; or (3) that Plaintiff met its burden and proved its case; and (4) Plaintiff's witness testified he reviewed the documents for the first time that morning; (5) the interest rates on Plaintiff's proffered documents are not the same; (6) Plaintiff's witness—Mr. Patton—lacked the information to testify about transactions that occurred years before he worked for MCM; (7) Plaintiff did not provide Exhibit 1 from the Sales Agreement; (8) the field data sheet was created for litigation purposes and there was no chain of title.⁴⁶ Plaintiff's counsel maintained it met its burden of proof because Defense counsel provided no contrary evidence.⁴⁷

³⁹ *Id.* at 4:26:02–4:27:26.

⁴⁰ *Id.* at 4:27:26–46.

⁴¹ *Id.* at 4:29:58–4:30:45.

⁴² *Id.* at 4:30:45–58.

⁴³ *Id.* at 4:32:01–21.

⁴⁴ *Id.* at 4:32:26–4:33:03.

⁴⁵ *Id.* at 4:33:18–4:34:07.

⁴⁶ *Id.* at 4:34:18–4:37:01.

⁴⁷ *Id.* at 4:37:05–4:39:19.

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The trial court took the matter under advisement and issued its determination on October 31, 2013, finding Defendants responsible for the debt. Defendants timely filed their Notice of Appeal on November 12, 2013 and Plaintiff filed a responsive memorandum. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. *Did The Trial Court Err By Admitting Plaintiff's Proffered Exhibits II–IV.*

Standard of Review

The appellate court reviews a trial court's evidentiary rulings for a clear abuse of discretion and does not reverse unless unfair prejudice results. *Larsen v. Decker*, 196 Ariz. 239, 995 P.2d 281, ¶ 6 (Ct. App. 2000). Rulings on the admissibility of hearsay are reviewed for an abuse of discretion. *State v. Parker*, 231 Ariz. 391, 296 P.3d 54, ¶ 8 (Ariz. 2013).

We review a trial court's ruling on the admissibility of evidence under a hearsay exception for abuse of discretion. *State v. Tucker*, 205 Ariz. 157, 165, ¶ 41, 68 P.3d 110, 118 (2003).

Absent an abuse of discretion, the trial court's decision is not changed on appeal *Brown v. U.S. Fidelity and Guar. Co.*, 194 Ariz. 85, 977 P.2d 807, ¶ 7 (Ct. App. 1998).

Abuse of Discretion

In addressing the role of the appellate court when determining discretionary conduct the Arizona Supreme Court held:

Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers, and witnesses, and who can better assess the impact of what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to "look over the shoulder" of the trial judge and, if appropriate, substitute our judgment for his or hers.

State v. Chapple, 135 Ariz. 281, 297 n. 18, 660 P.2d 1208, 1224 n.18 (1983) (citation omitted).⁴⁸ In reviewing a case for an abuse of discretion, this Court must determine if there was sufficient

⁴⁸ The Arizona Supreme Court noted in *State v. Benson*, 232 Ariz. 452, 307 P.3d 19 ¶ 66 (July 31, 2013) that a different standard for the abuse of discretion is used in death penalty cases as the legislature enacted A.R.S. 13–756 Docket Code 512

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evidence for the trial court's determination. The appellate court must not re-weigh the evidence to see if it would reach the same conclusion as the original trier-of-fact. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Instead, the appellate court must find if the trial court could find sufficient evidence to support its decision.

Where this Court reviews the trial court's actions based on an abuse of discretion standard, this Court will not change or revise the trial court's determination if there is a reasonable basis for the order. A court abuses its discretion when there is no evidence supporting the court's conclusion or the court's reasons are untenable, legally incorrect, or amount to a denial of justice. *Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, 141 P.3d 824 ¶ 17 (Ct. App. 2006). In determining if the trial court abused its discretion, this Court must consider the standards for an abuse of discretion claim. The Supreme Court of Arizona stated:

In exercising its discretion, the trial court is not authorized to act arbitrarily or inequitably, nor to make decisions unsupported by facts or sound legal policy. . . . Neither does discretion leave a court free to misapply law or legal principle.

City of Phoenix v. Geyley, 144 Ariz. 323, 328–329, 697 P.2d 1073, 1078–1079 (1985) (citations omitted). Thus, a trial court abuses its discretion if it:

- 1) applied the incorrect substantive law or preliminary injunction standard; 2) based its decision on a clearly erroneous finding of fact that is material to the decision to grant or deny the injunction; or 3) applied an acceptable preliminary injunction standard in a manner that results in an abuse of discretion.

McCarthy Western Constructors v. Phoenix Resort Corp., 169 Ariz. 520, 523, 821 P.2d 181, 184 (Ct. App. 1991) (citation omitted).

Plaintiffs' Exhibits and the Hearsay Rule

Defendants claimed Plaintiff's Exhibits II, III, and IV were inadmissible because these exhibits were hearsay while Plaintiff argued the documents were admissible under Ariz. R. of Evid. Rule 803(6) because records of regularly conducted activity may be admissible provided certain conditions are met. These are listed as:

- 6) Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:
 - (A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;
 - (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
 - (C) making the record was a regular practice of that activity;

(A) after *Chapple* was decided. Although the case is "red flagged" by Westlaw, nothing in the case suggests it applies to civil matters.

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(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

Ariz. R. Evid. 803(6). Defendants maintained Mr. Patton was not a proper custodian of records with first-hand knowledge acquired in the course of a regularly conducted business activity and could not testify the record was made at or near the time it was recorded as required by Ariz. R. Evid. Rule 803(6). To support their contention, Defendants asserted Mr. Patton was not either a custodian of the records or a properly qualified person. Ariz. R. Evid. Rules 803(6) requires a custodian or other qualified person to certify (1) the record was made near the time of the occurrence or from information provided by a person with knowledge of the matter; (2) the record was made as a regular practice; and (3) the record was kept in the course of regularly conducted activity. Defendants alleged Mr. Patton is unable to provide this information because he was not employed by anyone other than MCM and did not have the requisite knowledge as to Chase's record creation and retention practices or those of EAF.

Persuasively, the Second Circuit Court of Appeals held it was not an abuse of discretion for a trial court to admit documents as business records pursuant to Fed. R. Evid. 803(6) even if the documents were the records of a business entity other than that of one of the parties if there were sufficient indicia of reliability. The Second Circuit determined the foundation for the documents could be laid by a witness who was not an employee of the entity that owned or prepared them provided the records were prepared in the course of the business entity's regular practice. *Saks Intern., Inc. v. M/V Export Champion*, 817 F.2d. 1011, 1013 (2nd Cir. 1987) Arizona's Rule 803(6) parallels the federal rule. Mr. Patton did not state the records about Defendants were prepared in the course of either Chase Banks's or EAF's regular practice and did not attest to having any personal knowledge about the regular business practices of either entity. These factors militate against any determination that Mr. Patton was either a custodian of records or a qualified witness.

In commenting on Rule 803(6) the Arizona Court of Appeals said:

Rule 803(6) requires either the custodian of records or "other qualified witness" testify that the record was made 1) contemporaneously, or nearly so, with the underlying event; 2) "by, or from information transmitted by, a person with firsthand knowledge acquired in the course of a regularly conducted business activity;" 3) completely in the course of that activity; and 4) as a regular practice for that activity. Portions of the business record that "indicate a lack of trustworthiness" or "lack an appropriate foundation" shall not be admitted. Ariz. R. Evid. 803(6), Stewart testified he was "a supervisor of the security services section" of the Pima County jail, had supervised intake of new inmates at the jail for "maybe a year" during the "eight or nine years" he had been a sergeant, and had actually worked as an "ID tech" for two to three years. He also testified the

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process for booking inmates was the same, although occurring in a different location, as when he had been supervising intake. He described the process in some detail, including the fact that inmate information was recorded by a jail employee as it was received from the inmate being booked. Finally, Stewart testified he was familiar with arrangements for storing inmate property receipts at the jail, although he had not supervised that process, and such receipts were routinely created as part of the normal course of business at the jail.

Based on this record, we cannot say the trial court abused its discretion in finding Stewart a qualified witness with respect to the jail records. *See Larsen*, 196 Ariz. 239, ¶ 19, 995 P.2d at 285; *Petzoldt*, 172 Ariz. at 275, 836 P.2d at 985. Accordingly, we conclude the trial court did not abuse its discretion in admitting the receipt and statements that he read from the jail admission form under Rule 803(6). *See Tucker*, 205 Ariz. 157, ¶ 41, 68 P.3d at 118; *King*, 213 Ariz. 632, ¶ 7, 146 P.3d at 1277.

State v. McCurdy, 216 Ariz. 567, 169 P.3d 931, ¶¶ 9–10 (Ct. App. 2007). However, Mr. Patton did routinely review records MCM received in its regular course of business and MCM did rely on these documents.

The Bill of Sale Between Chase Bank and EAF

Although Mr. Patton is a legal specialist with MCM and MCM is the company that “services” Plaintiff’s account, Mr. Patton testified he only reviewed the documents the morning of the trial. He could not—and did not—state the records transferred by Chase were made contemporaneously or nearly so or that they were made by or from information transmitted by a person with firsthand knowledge acquired in the course of a regularly conducted business activity. However, and as the trial court later discussed, bank records are usually found to be reliable.

When Defense counsel specifically asked Mr. Patton if he could provide any information about when the records were transferred, Mr. Patton indicated he was unable to do so. He was also unable to comment about the reliability of the documents or identify exactly which accounts had been transferred from Chase to EAF. He did not explain how the field data sheet MCM created from EAF’s records related to Exhibit 1 of the Sales Agreement between Chase and EAF. Rather than explain this relationship or testify about it, Mr. Patton mainly read the field data sheet into the record. Mr. Patton provided no information about the accounts allegedly transferred by Exhibit 1 to the Sales Agreement from Chase to EAF. Exhibit 1 to the Agreement was not included with Plaintiff’s records and Mr. Patton could not demonstrate (1) he knew if Defendants’ account had actually been transferred by this Exhibit; (2) the contents of Exhibit 1 to the Sales Agreement executed by Chase; or the relationship between the contents of Exhibit 1 and the contents of the unspecified accounts EAF later transferred to Midland Funding LLC. Defendants argued this lack of knowledge made Mr. Patton an unqualified witness for purposes of discussing the Sales Agreement between Chase and EAF. However, and despite Mr. Patton’s lack of knowledge about this specific transaction, the trial court found the documents were admissible. To do so, the trial court needed to consider Mr. Patton as a qualified witness.

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Persuasively, the Third Circuit Court of Appeals established the standard for determining a qualified witness. The Third Circuit ruled:

Rule 803(6) does not require the foundation evidence for the admission of a business record to be provided by the record's custodian. Instead, the rule authorizes parties to elicit the evidence from any "other qualified witness." Fed. R. Evid. 803(6). We have recognized that the term "other qualified witness" should be construed broadly, and that a qualified witness " 'need not be an employee of the [record-keeping] entity so long as he understands the system.' " *Pellulo*, 964 F.2d at 201 (quoting 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 803(6)[02], at 803–178). Thus, a qualified witness only need "have familiarity with the record-keeping system" and the ability to attest to the foundational requirements of Rule 803(6). *Id.* at 201–02. The foundation requirements to which a qualified witness must attest are:

- (1) [that] the declarant in the records had knowledge to make accurate statements;
- (2) that the declarant recorded statements contemporaneously with the actions which were the subject of the reports; (3) that the declarant made the record in the regular course of the business activity; and (4) that such records were regularly kept by the business.

United States v. Console, 13 F.3d 641, 656-57 (3d Cir. 1993). Although Mr. Patton did not testify he knew if the recorded statements were contemporaneously recorded with the actions that were the subject of the report, Plaintiff asserted its viewpoint was endorsed by *U.S. v. Adefehiniti*, 510 F.3d 319 (D.C. Cir. 2007) and relied on by the Arizona Supreme Court in *State v. Parker, id.*

Plaintiff maintained it relied on the Chase records and traced the credit card account from Chase to EAF and from EAF to Midland Funding. Thus, although there was no witness who stated the Chase Bank records were created at or near the time of the event, and no one testified as to familiarity with the procedures Chase Bank used to create the records, Chase Bank's records were incorporated into Plaintiff's records and relied on in Plaintiff's day to day operations. On one hand, Mr. Patton expressed familiarity with the MCM records and with Midland's reliance on records it received from EAF; while on the other hand, there was a gap in the chain of evidence between the Bill of Sale from Chase—with its unidentified exhibit—and the records MCM received. Plaintiff argued Mr. Patton was a qualified witness because he was employed by MCM—the debt servicer for Midland Funding—and Midland Funding was in the business of purchasing credit card debt. Defense counsel asserted Plaintiff failed to prove Defendants' credit card account was transferred in the Chase to EAF to Midland Funding transaction chain.

The term "qualified witness" may be broadly interpreted, *U.S. v. Lauersen*, 348 F.3d 329, 342 (2nd Cir. 2003). While Mr. Patton's testimony did not clearly meet all of the requirements of Rule 803(6) since Mr. Patton could not testify about the documents included in the Bill of Sale from Chase Bank to EAF, the trial court determined any omission went to the weight as opposed

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to the admissibility of the evidence. See *Parker*, at ¶ 41. Although this Court might have ruled differently, Defendants did not demonstrate the trial court's ruling was an abuse of discretion. This Court cannot substitute its own judgment for that of the trial court.

The Bill of Sale From EAF To Midland Funding.

Mr. Patton also tried to provide testimony supporting the Bill of Sale from EAF to Midland Funding. Here, too, there are problems in finding Mr. Patton was a qualified witness. Although he discussed the Bill of Sale from EAF to Midland Funding, that Bill of Sale did not specify which credit card accounts were transferred to Midland in the Sales Agreement. The Sales Agreement was a redacted copy. It did not reference Exhibit 1 from the Sales Agreement between Chase and EAF. Mr. Patton was not an EAF employee and he admitted he had no independent knowledge of the transfer. He stated he did not know whether the Bill of Sale was made at the time of the event or occurrence it purported to memorialize and he did not know if the transferred documents were maintained in the ordinary course of EAF's regularly conducted business activities. However, he did indicate the records accompanying this sale were incorporated in MCM's business and were relied on in MCM's regular course of business.

Merger Documents

Mr. Patton testified Hilco and EAF merged. Plaintiff provided a copy of the merger documents and Mr. Patton stated MCM relied on the merger documents in the ordinary course of MCM's business. The trial court did not err in admitting this document.

Admissibility of Exhibit III

The trial court determined Plaintiff's Exhibit III was admissible and based its ruling on Defense counsel's failure to show the exhibit was unreliable. The trial court commented Defense counsel's objections went to the weight as opposed to the admissibility of the field data sheet. As stated, rulings on the admissibility of hearsay are reviewed for an abuse of discretion. *State v. Parker*, 231 Ariz. 391, 296 P.3d 54, ¶ 8 (Ariz. 2013). Defendants have not shown the trial court abused its discretion in making this ruling.

Admissibility of Exhibit IV—The Credit Card Statements

Defendants challenged the admissibility of the Chase Bank credit card statements. These records are generally admissible—particularly in light of our Supreme Court's recent decision in *State v. Parker* where the Arizona Supreme Court discussed the exceptions to the hearsay rule for business records. In *Parker*, the bank's fraud investigator testified about the bank's business practices. The Arizona Supreme Court referenced *Adefehinti*, and discussed cases that allowed the business records of one entity to be used as the business record of another if the second entity relies on those record and keeps them in the ordinary course of business. However, in order to incorporate these records, a witness must testify:

. . . “that the records are integrated into a company's records and relied upon in its day-to-day operations,” and noting that relevant financial statements were

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completed at bank's request and were of a type that the bank regularly used to make decisions whether to extend credit.

Adefehinti at 510 F.3d at 326. In *Parker, id.*, the Supreme Court held:

If documents prepared for litigation are mere reproductions of regularly kept database records, however, such documents may qualify as business records. *See U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co.*, 576 F.3d 1040, 1043–44 (9th Cir. 2009) (discussing federal rule 803(6)); *see also* Jack B. Weinstein and Margaret A. Berger, *Federal Evidence* § 901.08[2], at 901–84 (Joseph M. McLaughlin ed., 2d ed., rev. 2012) (“[P]rintouts prepared specifically for litigation from databases that were compiled in the ordinary course of business are admissible as business records to the same extent as if the printouts were, themselves, prepared in the ordinary course of business.”). This is the case with the records at issue here.

Parker, at ¶ 30. Persuasively, the Texas Court of Appeals commented on the use of Citibank credit card statements and held they demonstrated a sufficient indication of trustworthiness. The Texas court held:

Here, like General Motors, Citibank must keep careful records of its customer's credit card debt, otherwise its “business would greatly suffer or even fail.” *See Harris*, 846 S.W.2d at 963. Also, failure to keep accurate records could result in criminal or civil penalties. *See Tex. Fin. Code Ann. § 392.304(a)(8)* (Vernon 2006) (prohibiting misrepresentation of amount of consumer debt); *Tex. Fin. Code Ann. § 392.402* (Vernon 2006) (providing criminal penalties for violation of Chapter 392 of Texas Finance Code); *see also* Fair Debt Collection Practices Act, 15 U.S.C.S. § 1692e(2)(a) (LexisNexis 2005) (prohibiting misrepresentation of amount of debt); 15 U.S.C.S § 1692l (LexisNexis 2005) (providing for administrative enforcement of Fair Debt Collection Practices Act). These circumstances provide an indication of trustworthiness of the Citibank documents. *See Harris*, 846 S.W.2d at 963; *see also Air Land Forwarders, Inc.*, 172 F.3d 1338 at 1343–44.

Simien v. Unifund CCR Partners, 321 S.W.3d 235, 244 (Tex. App. 2010). The same rationale applied to Chase credit card statements. The trial court did not err in finding the copies of the Chase credit card statements admissible.

Postponed Rulings About Objectionable Evidence

Defendant also challenged the trial court's practice of refraining from immediately ruling on an objection until after all the evidence was presented at trial. Although Defendant challenged this as a questionable practice, Defendant provided no legal authority for this contention. Because this Court lacks specific authority showing the trial court ruled incorrectly, this Court must affirm the trial court's evidentiary rulings and find the trial court did not abuse its discretion in making a delayed ruling on Defendants' objections to the admissibility of the proffered documents.

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B. Did The Trial Court Err By Finding Plaintiff Met Its Burden Of Proof.

In a contract case, the Plaintiff has the burden of proof, *Yeazell v. Copins*, 98 Ariz. 109, 116-17, 402 P.2d 541, 546 (1965), and must prove its case by a preponderance of the evidence. The phrase “preponderance of the evidence” was defined in *Matter of Appeal in Maricopa County Juvenile Action No. J-84984*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983) (citations omitted) where the Arizona Supreme Court stated:

The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the [trier of fact] to find that the existence of the contested fact is more probable than its nonexistence.” Indeed, this court stated long ago that by a preponderance of the evidence “the ultimate test is, does the evidence convince the trier of fact that one theory of the case is more probable than the other.” The United States Supreme Court on several occasions has agreed with this statement of the preponderance of the evidence test. Thus, we disagree with the court of appeals’ definition of the preponderance of the evidence standard, and hold that that standard requires simply that the trier of fact find the existence of the contested fact to be more probable than not.

In this case, the only evidence presented was the evidence Plaintiff provided. This evidence led the trier of fact to find the existence of an allegedly contested fact—Defendants owed money to Plaintiff’s predecessor in interest—to be more likely than not. The trial court did not err in finding Plaintiff met its burden where (1) none of Plaintiff’s evidence was controverted; and (2) Plaintiff provided proof of the underlying debt as well as of Plaintiff’s acquisition of this debt.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Highland Justice Court did not err.

IT IS THEREFORE ORDERED affirming the judgment of the Highland Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Highland Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris

THE HON. MYRA HARRIS
Judicial Officer of the Superior Court

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