

IN THE CIRCUIT COURT FOR FREDERICK COUNTY, MARYLAND

LHR, INC.

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Appellant

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v.

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Case No. 10-C-10-000662

ROBERT AYREE

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Appellee

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\* \* \* \* \*

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on a Petition for Judicial Review filed by LHR, Inc., (hereinafter "Appellant") regarding a directed verdict in favor of Robert Ayree, (hereinafter "Appellee), ordered by the District Court of Maryland for Frederick County, Maryland on 29 January 2010. Based upon a complete review of the record, pleadings, arguments and applicable law, the decision of the District Court must be affirmed.

STATEMENT OF FACTS  
AND PROCEDURAL HISTORY

Appellant purchased a credit card account from INFIBANK Sandy Springs Bank, (hereinafter, "Sandy Springs") on 3 June 2008, in the amount of \$20,754.85. At the time of purchase, Sandy Springs transmitted electronic data of the purchased debt to LHR, Inc., (hereinafter, "LHR") including an itemized statement of the account. On 19 September 2009 Appellant sued Appellee for the amount outstanding on the account plus interest and attorney's fees for a total amount of \$26,375.72. Appellee remained unrepresented until the date of trial on 29 January 2010 when Attorney Bowman entered

his appearance as Counsel for Appellee. At trial, Mr. Mauro, attorney for Appellant, moved to enter into evidence as Plaintiff's Exhibit One a certificate under Rule 5-902(b) used to authenticate the itemized statements of Sandy Springs regarding the credit card account, as well as Appellee's purported card membership agreement with Sandy Springs. Mr. Bowman objected to the admissibility of the records that were submitted by Appellant under provisions of Rule 5-902(b) of the Maryland Rules, which govern self-authentication of documents. (T. at 4.) Specifically, Mr. Bowman objected to the certification in that it was not attached to the documents it purported to certify, and secondly, that the documents LHR was attempting to certify were not in fact the business records of LHR. (T. at 5.)

Lastly, Mr. Mauro attempted to introduce into evidence as Plaintiff's Exhibit Two an affidavit reflecting that LHR purchased this debt from Sandy Springs. (T. at 10-11.) Mr. Bowman objected to this evidence on the grounds that it contained hearsay. (T. at 11.) The presiding Judge, O. John Cejka, Jr., sustained both of Mr. Bowman's objections after taking two short recesses to consult the applicable Maryland Rules. (T. at 10, 12.) This record appeal follows.

### **STANDARD OF REVIEW**

The standard of review for a record appeal to the Circuit Court is stated in Maryland Rule 7-113(f), which states in pertinent part,

**Scope of Review.** The circuit court will review the case on both the law and the evidence. It will not set aside the judgment of the District Court on the evidence *unless clearly erroneous*, and will give due regard to the opportunity of the District Court to judge the credibility of the witnesses. (Emphasis added.)

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<sup>11</sup> In this Memorandum, "T. \_\_" refers to the transcript of the District Court hearing on 29 January 2010.

Expanding upon the definition of “clearly erroneous” the Maryland Court of Appeals states that a lower court’s decision is clearly erroneous if and only if there is no evidence in the record to support its decision. *L.W. Wolfe Enters. v. Md. Nat’l Golf, L.P.*, 165 Md. App. 339, 343, 885 A.2d 826, 828 (2005) (quoting *Yivo Inst. For Jewish Research v. Zaleski*, 386 Md. 654, 663, 874 A.2d 411, 416 (2004)). An appellate court does not sit as a second trial court on a record appeal, but instead is limited to reviewing evidence already in the record. *Goss v. C.A.N. Wildlife trust, Inc.*, 157 Md. App. 447, 456, 852 A.2d 996, 1001 (Md. Ct. Spec. App. 2004).

Proving that a lower court’s decision was clearly erroneous is an extremely heavy burden. A clearly erroneous decision is one that is not founded upon sound legal principles and/or one that does not have substantial evidence in the record to support it. *Thomas v. Capital Med. Management Assocs., LLC*, 189 Md. App. 439, 453, 985 A.2d 51, 61 (Md. Ct. Spec. App. 2009); *see also Ross v. Hoffman*, 280 Md. 172, 186, 372 A.2d 582, 591 (1977). If there is material and competent evidence in the record to support the trial court’s decision, the reviewing court may not overturn that decision. *L.W. Wolfe Enters. v. Md. Nat’l Golf, L.P.*, 165 Md. App. at 343, 885 A.2d at 828 (quoting *Yivo Inst. For Jewish Research v. Zaleski*, 386 Md. at 663, 874 A.2d at 416).

### **DISCUSSION**

There are three main issues presented by Appellant for review by this Court. First, was there sufficient support for Appellant’s attempt to authenticate the records made by another entity? Second, were Appellant’s documents inadmissible under the Maryland Rules? Lastly, was Appellant’s affidavit admissible? Additionally, Appellant raises new objections in his brief that he failed to raise at trial, and consequently is barred

from raising them on appeal. Because the lower court's decision is supported by substantial evidence of record, the decision of the District Court must be affirmed.

**I. THERE WAS NOT SUFFICIENT SUPPORT FOR APPELLANT'S ATTEMPT TO AUTHENTICATE THE RECORDS MADE BY ANOTHER ENTITY.**

The records Appellant purported to authenticate were not in fact the business records of LHR, but rather the business records of another entity, namely Sandy Springs. Therefore, the records do not fall under the hearsay exception of business records. A party may only authenticate records as business records under Maryland Rule 5-902(b) when they are considered business records within the scope of Maryland Rule 5-803(b)(6). Rule 5-803(b)(6) states in pertinent part, "(B) it was made by a person with knowledge or from information transmitted by a person with knowledge. (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record or data compilation." LHR did not create the itemized statement of account that it purported to certify via its own Custodian of Records, Mr. Skipper. Because LHR did not make the records, Mr. Skipper was not certified to authenticate them. The missing piece of the puzzle is an affidavit by a record custodian of Sandy Springs authenticating the documents. The Rules clearly state that to be a business record of an entity it must be made by that entity, not inherited piecemeal from a separate business.

Appellant looks to *Killen v. Houser*, 251 Md. 70, 246 A.2d 580 (Md. 1968), to support its argument that records of one business can in fact become the business records of another company. However, Appellant is mistaken in the applicability of this case to the facts currently before this court. The facts in *Killen* are distinguishable from this case

in that *Killen* involves the purchase of an entire, intact business, which included every one of the business's existing records. *Id.* at 76, 246 A.2d at 583. *Killen* acquired the entire business as one entity and its records were part of that acquisition. *Id.* at 76, 246 A.2d at 583. In contrast, the present Appellant did not acquire the entire business of Sandy Springs. Appellant merely purchased a fragment of the transactions that Sandy Springs participates in and as such the records remain the business records of Sandy Springs. The records were created by Sandy Springs in the course of its ordinary business; they were neither created by LHR nor made in the course of LHR's ordinary business. There is no bill of sale or assignment produced by Appellant to show that these records should now qualify as business records of LHR. Therefore, because the records are not Appellant's business records, Appellant is not authorized to certify them under the hearsay exception of Maryland Rule 5-902(b).

## **II. APPELLANT'S DOCUMENTS WERE INADMISSIBLE UNDER THE MARYLAND RULES.**

Courts and Judicial Proceedings Article, § 10-101 defines written records as, "(b) *Admissibility* - A writing or record made in the regular course of business as a memorandum or record of an act, transaction, occurrence, or event is admissible to prove the act, transaction, occurrence, or event. (c) *Time making records* - The practice of the business must be to make such written records of its acts at the time they are done or within a reasonable time afterwards." Clearly, the "business records" purported to be certified by Appellant are not "business records" as defined by §10-101, in that the Article requires the records to be a record of the business, made by the business, of the acts of the business. The records Appellant sought to certify were not made by LHR, and are not the acts of LHR. It was not within Appellant's ordinary course of business to

create a "Pre-Qualified Acceptance Certificate," monthly account statements or "Card member Agreements." As a custodian of records for only LHR and not Sandy Springs, Mr. Skipper is not qualified to authenticate these records. Mr. Skipper has no knowledge of the record keeping practices of Sandy Springs, and as such he may not authenticate the business records of Sandy Springs.

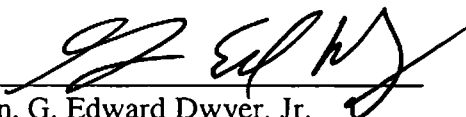
**III. THE DISTRICT COURT CORRECTLY FOUND APPELLANT'S AFFIDAVIT TO BE INADMISSIBLE.**

The affidavit offered by Appellant to prove that Appellant purchased Appellee's credit card account from Sandy Springs was correctly found to be inadmissible by the District Court. In the absence of a person present to testify, *the affidavit offered by Appellant at the merit trial is considered second level hearsay and therefore any objection to it being admitted into evidence must be sustained. The affidavit is hearsay regardless of whether it was or was not made in anticipation of litigation, absent an authenticating witness.*

**CONCLUSION**

For the reasons set forth herein and based upon a complete review of (i) the entire record, (ii) the memoranda filed by the parties, (iii) the oral arguments, and (iv) the applicable law, it is decided this 22<sup>nd</sup> day of July, 2010, by the Circuit Court for Frederick County, Maryland, that the ruling of the District Court is **AFFIRMED**.

**FILED**  
2010 JUL 26 A 10:11  
SANDRA K. DALTON  
CLERK \_\_\_\_\_  
BY \_\_\_\_\_

  
Hon. G. Edward Dwyer, Jr.  
JUDGE  
Circuit Court for Frederick County