Opinion issued June 30, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00150-CV

OLD REPUBLIC INSURANCE COMPANY, Appellant

V.

MARLANA EDWARDS, Appellee

On Appeal from the County Court at Law No. 3
Harris County, Texas
Trial Court Case No. 896330

MEMORANDUM OPINION

This is an appeal from a take-nothing judgment following a bench trial. We affirm.

BACKGROUND

On June 18, 2007, Plaintiff Old Republic Insurance Company sued Defendant Marlana Edwards for breach of contract, alleging that she failed to make payments on an installment contract for home improvements she entered with Nationwide Building Systems, a non-party ("the Agreement"). Old Republic's Petition states that it is "the owner and holder of this note and is entitled to receive all money due under its terms." It sought $15,310.08 in principal, $3,015.35 in interest, and at least $5,497.63 in attorney's fees.

Edwards filed an answer and a verified denial. She asserted numerous affirmative defenses, including failure of consideration, fraud, and failure of conditions precedent. Pursuant to Rule 93 of the Texas Rules of Civil Procedure, she also verified the following denials: "a. Defendant did not enter the alleged agreement with the alleged Plaintiff—the signature on the attached contract is not the defendant's; b. the agreement is not as alleged; c. Plaintiff does not have legal capacity to sue; [and] d. The assignment is not as alleged."

A. The Agreement and its Assignments

The May 15, 2005 Agreement attached to Old Republic's petition reflects it is for the installation of solar screens, a storm door, and paint. Its terms provide for 144 payments of $225.59 (principal amount of $15,365.00 and 14.49% interest), monthly "beginning approximately 30 days from the completion date." The

Agreement is signed by "Catherine Murray," (elsewhere identified as "President" of Nationwide) as the Seller and "Marlana Edwards" as the Buyer.

The Agreement has an assignment section, dated the same date as the Agreement, stating: "This Contract is assigned to Assignee . . . First Mutual Bank." Another page of the Agreement has a section entitled "Assignment by Seller" containing the terms of the assignment to First Mutual. There, Nationwide makes several warranties to First Mutual Bank, including that the statements in the Contract "are true and correct," that the "Contract is valid and enforceable in accordance with its terms," that the "names and signatures on this Contract are not forged, fictitious or assumed, and are true and correct," and that the goods covered "have been delivered to the Buyer in good condition and have been accepted by Buyer." The assignment provision expressly transferred to First Mutual "its rights, title and interest in this Contract" and gives it "full power, either in its own name or in Seller's name, to take all legal or other actions which Seller could have taken under the Contract."

Attached to Old Republic's petition is also a March 1, 2006 "Assignment of Texas Home Improvement Retail Installment Contract" assigning from First Mutual "[a]ll right, title and interest . . . to Old Republic Insurance Company without warranty, except that the note is valid and enforceable against the borrower." An employee of Old Republic Insured Credit Services—an entity

related to the plaintiff Old Republic—testified at trial that this assignment resulted from an insurance claim by First Mutual. Old Republic insures loans held by financial institutions, such as Edwards's debt to First Mutual. When First Mutual notified Old Republic that Edwards had defaulted on her loan, Old Republic paid First Mutual's claim, took assignment of the Agreement, and sued Edwards.

B. Trial Court Proceedings

Old Republic moved for both a traditional summary judgment on its breach-of-contract claim, and no-evidence summary judgment on Edwards's affirmative defenses. Edwards responded with evidence in the form of an affidavit stating that it "is not my signature on the contract attached to the petition" and that she does "not recall a contractual agreement" or "receiving anything of value from OLD REPUBLIC INSURANCE COMPANY and/or their alleged assignors." The record does not contain a ruling on those motions.

1. The Business Record Affidavit

On September 8, 2008, Old Republic filed a "Notice of Filing of Business Records Affidavit." This was filed, however, in a different case because, although it was styled correctly, it was titled with the wrong cause number. Attached was a "Business Records Affidavit" of an Old Republic employee:

> I am the custodian of the records of Old Republic Insurance Company. Old Republic Insurance Company is the owner and holder of the account of Marlana Edwards by assignment from the original creditor. Attached hereto are twenty-three (23) pages of records kept

> on this account by Old Republic Insurance Company in the regular course of business, and it was the regular course of business of Old Republic Insurance Company for an employee or representative of Old Republic Insurance Company, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The twenty-three (23) pages of records attached hereto are the original or exact duplicates of the original.

Attached to this affidavit were several documents, including a copy of the Agreement that is the subject of this suit. Old Republic did not dispute at trial that Edwards's counsel was never provided copies of many of the attached records during discovery.

2. The trial

On October 15, 2009, the case was tried to the bench. The defendant was not present at trial. In making an opening statement, Old Republic's counsel explained that it intended to prove its case with the business records affidavit and the attached documents. Edwards's counsel pointed out that the defendant disputed that the work was done, that she signed the contract, that she owned the house, and he argued that Old Republic could not make its case as there was no one at trial to testify as to these matters or to authenticate the records Old Republic sought to rely upon.

The court then asked whether Old Republic had subpoenaed Edwards, and Old Republic's counsel represented that it had. The lawyers' versions of what

happened in that regard, however, were conflicting. Edwards's counsel stated that, while he was out of town the Friday afternoon before trial, someone from his office called to tell him that there were persons "here looking for you but we told them you weren't here. They said well, that's okay. We can just throw it on the floor. And it was thrown on the floor.' To my knowledge there was no check submitted or — so they tried to subpoena her through me."[1] Old Republic's counsel responded "I don't know — there was a check submitted. It was signed. I don't have the actual signature because I had to come back to — or fly down here to Houston before I could get the signature. I can look at my records and tell you who signed for it at Mr. Walker's office. But as far as the signed affidavit from the process server, I do not have that." In light of this, the court concluded that Old Republic "can't prove that she was subpoenaed," taking that issue "off the table."

The only witness to provide testimony at trial was Chad Unel, the assistant vice president for loss mitigation and field underwriting for Old Republic Insured Credit Service. He testified that Old Republic is a property and casualty company that insures loans originated by financial institutions. In this case, Old Republic provided insurance to First Mutual, paid First Mutual's claim when Edwards defaulted, and took assignment of Edwards's note. When shown a copy of the

[1] This reference to a check refers to the fees that must accompany a subpoena. This is significant because the Texas Rules of Civil Procedure provide that enforcement of a subpoena cannot be sought absent "proof by affidavit that . . . all fees due the witness by law were paid or tendered." TEX. R. CIV. P. 176.8.

Agreement, he identified it as a retail installment contract "received after claim was made by First Mutual Bank."

Following objection and discussion about Unel not actually working for Old Republic but rather a related company, Old Republic's attorney asked that the court take judicial notice of its business records affidavit rather than require it to prove up documents. Edwards's counsel objected on several grounds, arguing that the contract and documents attached to the affidavit were not business records under the hearsay exception Rule 803(6) of the Texas Rules of Evidence, so the business record self-authentication Rule 902(10) allowing certain documents to be both proven up and authenticated by a business records affidavit does not apply. Edwards's counsel also protested that the Old Republic affidavit was not executed by anyone purporting to have personal knowledge of how First Mutual's records were kept.

At that point, the court offered Old Republic the opportunity to put on any evidence it had to authenticate and prove up as business records the documents it sought to introduce. Unel then testified that Marlana Edwards's signature was on the Agreement, and further testified that Old Republic "took ownership of these records when First Mutual Bank provided us their old originals." He averred that Old Republic has been in possession of the records since the assignment from First

Mutual, and that it is the "nature of [its] business, to keep records in [its] file from the moment of assignment on."

When asked about a credit application Old Republic next sought to introduce, Unel testified that it was also "part of the records that [it] received from First Mutual Bank" and that it was "kept in the normal course of business by Old Republic Insurance Company following an assignment." Following this testimony, the court sustained the defendant's objection to introduction of both exhibits—the Agreement and the credit application—and the trial concluded.

3. The Court's Judgment and Old Republic's Motion for New Trial

After the court rendered judgment that Old Republic take nothing on its claim, Old Republic filed its first motion for new trial, attaching a return of subpoena reflecting that a subpoena for Edwards was signed for by someone in the defendant's counsel's office. Old Republic thus argued that Edwards's attorney had at least constructive notice of the subpoena. Because Old Republic was harmed by the inability to illicit testimony from Edwards, it argued, the trial court should grant a new trial "under the principles of fairness." Old Republic also complained in its motion for new trial again that the court "erred by refusing to allow Old Republic to testify about Defendant's records held by Old Republic because the records are kept in the regular course of business, contain original documents, and Old Republic filed a proper business record affidavit." Old

Republic subsequently filed Plaintiff's First Supplemental Motion for New Trial to bring to the court attention a new case decided by this Court on December 10, 2009. *See Simien v. Unifund CCR Partners*, No. 01-08-00593-CV (Tex. App.—Houston [1st Dist.] December 10, 2009) (withdrawn on rehearing).[2] Old Republic's motion for new trial was not expressly ruled upon, rendering it overruled by operation of law.

4. This Appeal

Old Republic brings four issues on appeal, arguing that the trial court (1) "erred by refusing to admit the primary business records of Old Republic pursuant to the business records exception to the hearsay rule," (2) "erred in denying Old Republic's motion for summary judgment when Old Republic established its right to judgment as a matter of law," (3) "erred in finding that the subpoena directed to Edwards through her attorney of record was insufficient when Edwards had notice of the subpoena," and (4) "erred by denying Old Republic's motion for new trial." Edwards did not file an appellee's brief in response. We affirm the trial court's judgment.

EXCLUSION OF EVIDENCE

In its first issue, Old Republic asserts that the trial court erred by refusing to admit its business records under Texas Rules of Evidence 803(6) and 902(10). It

[2] A new *Simien* opinion was later issued. *See Simien v. Unifund CCR Partners*, 321 S.W.3d 235 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (op. on reh'g).

argues that it filed its business records affidavit "more than one year before the trial," and "[e]ven with ample time to review the business records, Edwards never objected to the records prior to trial and waived her right to object to the admission of the records." Old Republic reasons that Rule 902(10)'s requirement that business records be filed fourteen days prior to trial, "impl[ies] that the non-filing party has a duty to object to the affidavit prior to the commencement of trial or else the objection is waived." "Without such an implication," it contends, "the filing party could never know whether the custodian of records would need to appear live at trial."

Old Republic next argues that it established—both with its business records affidavit and through Unel's testimony—the admissibility of its records as an assignee of First Mutual by showing: (1) the documents are incorporated and kept in the regular course of the testifying witness's business, (2) that the business typically relies upon the accuracy of the contents of the documents, and (3) the circumstances otherwise indicate the trustworthiness of the documents. *See Simien*, 321 S.W.3d at 240-41.

A. Standard of Review

Evidentiary rulings are committed to the trial court's sound discretion. *Bay Area Healthcare Grp., Ltd. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007). We review a trial court's decision to admit or exclude evidence for an abuse of that

discretion. *In re J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005). A trial court abuses its discretion when it acts without reference to any guiding rules and principles. *Garcia v. Martinez*, 988 S.W.2d 219, 222 (Tex. 1999). We must uphold the trial court's evidentiary ruling if there is any legitimate basis for the ruling. *Owens–Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998); *Oyster Creek Fin. Corp. v. Richwood Invs. II, Inc.*, 176 S.W.3d 307, 317 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

"To obtain reversal of a judgment based on error in the admission or exclusion of evidence, an appellant must show that the trial court's ruling was erroneous and that the error was calculated to cause, and probably did cause, 'rendition of an improper judgment.'" *Benavides v. Cushman, Inc.*, 189 S.W.3d 875, 879 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (quoting TEX. R. APP. P. 44.1(a)(1); *Malone*, 972 S.W.2d at 43). In conducting this harm analysis, we review the entire record. *Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000); *Benavides*, 189 S.W.3d at 879.

Evidentiary rulings do not usually cause reversible error unless an appellant can demonstrate that the judgment turns on the particular evidence that was admitted or excluded. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753–54 (Tex. 1995); *Benavides*, 189 S.W.3d at 879. An error in the exclusion of evidence

requires reversal if it is both controlling on a material issue and not cumulative. *Mentis v. Barnard*, 870 S.W.2d 14, 16 (Tex. 1994).

B. Business Records

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." TEX. R. EVID. 801(d). The proponent of hearsay has the burden of showing that the testimony fits within an exception to the general rule prohibiting the admission of hearsay evidence. *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 908 n.5 (Tex. 2004).

Rule 803(6) of the Texas Rules of Evidence provides the following exception to the hearsay rule for business records:

> A . . . record . . . made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

TEX. R. EVID. 803(6); *see In re E.A.K.*, 192 S.W.3d 133, 141 (Tex.App.—Houston [14th Dist.] 2006, pet. denied). The business records "shall be admissible in evidence in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of Rule 803(6) or (7)." TEX. R. EVID. 902(10)(a).

Rule 902(10) provides a form for the affidavit and states it "shall be sufficient if it follows this form though this form shall not be exclusive, and an affidavit which substantially complies with the provisions of this rule shall suffice." TEX. R. EVID. 902(10)(b). The form language provided is as follows:

> My name is _____, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:
>
> I am the custodian of the records of _____. Attached hereto are _____ pages of records from _____. These said _____ pages of records are kept by _____ in the regular course of business, and it was the regular course of business of _____ for an employee or representative of _____, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

Id.

C. Admissibility of Business Records of a Third-Party

"A document authored or created by a third party may be admissible as business records of a different business if: (a) the document is incorporated and kept in the course of the testifying witness's business; (b) that business typically relies upon the accuracy of the contents of the document; and (c) the circumstances otherwise indicate the trustworthiness of the document." *Simien*, 321 S.W.3d at 240–41 (citing *Bell v. State*, 176 S.W.3d 90, 92 (Tex. App.—Houston [1st Dist.] 2004, no pet.)).

D. Analysis

Old Republic primarily relies upon its business record affidavit to argue that it satisfied its burden to authenticate the contract and application it sought to use at trial. Old Republic's argument assumes that the Agreement and credit application are hearsay but admissible as business records, and no appellee's brief was filed arguing otherwise. Thus, for purposes of our business records analysis, we assume, without deciding, that these documents constitute hearsay, a point that Edwards's attorney strongly disputed at trial.

Old Republic contends that "the trial court has no discretion to deny the admittance of business records if the requirements of Texas Rules of Evidence 803(6) and 902(10) are met." It asserts it "filed a business record affidavit that complied with Texas Rule of Evidence 902(10)." Then, citing no authority in support, Old Republic insists that because Edwards did not object to that affidavit or the attached records before trial, Edwards waived any objection and the trial court was without discretion to refuse to admit the documents.

Old Republic's argument relies on the faulty premise that it complied with Rule 902(10). Rule 902(10) requires that the business records affidavit and attached records be "filed with the clerk of the court *for inclusion with the papers in the cause in which the record or records are sought to be used as evidence* at least fourteen days prior to the day upon which trial of said cause commences."

TEX. R. EVID. 902(10) (emphasis added). Here, Old Republic filed the business record affidavit in the incorrect case, and the affidavit and attached documents were not made a part of the record in the underlying case until *after* the final judgment was signed. Given this fact, and given that Old Republic did not dispute Edwards's counsel's representation to the court that Edwards had not otherwise been provided several of the attached documents in discovery, we cannot conclude that the trial court abused its discretion by refusing to allow Old Republic to introduce the business records affidavit and attached records.

We thus turn to whether Old Republic has demonstrated that the trial court abused its discretion by holding that the Unel's testimony at trial was insufficient to prove up the evidence the trial court excluded. A "custodian or other qualified witness," TEX. R. EVID. 803, may overcome a hearsay objection with testimony satisfying certain criteria: (1) the records were made and kept in the course of a regularly conducted business activity; (2) it was the regular practice of the business activity to make the records; (3) the records were made at or near the time of the event that they record; and (4) the records were made by a person with knowledge who was acting in the regular course of business. *In re E.A.K.*, 192 S.W.3d at 141. A document may be authenticated by "evidence sufficient to support a finding that the matter in question is what its proponent claims," including "[t]estimony by a

witness with knowledge . . . that a matter is what it is claimed to be." TEX. R. EVID. 901(a), (b)(1).

Texas courts uniformly recognize that business records of an original creditor can become the business records of a predecessor company, but disagree about what evidence is required to prove up those business records. For example, the El Paso Court of Appeals—in a case relied upon by Edwards's attorney during trial to argue that Old Republic's witness Unel did not have sufficient knowledge of First Mutual's practices—requires a sponsoring witness have personal knowledge of the way records were created and kept by the original creditor to be admissible:

> Although Rule 803(6) does not require the predicate witness to be the record's creator or have personal knowledge of the content of the record; however, the witness must have personal knowledge of the manner in which the records were prepared. Documents received from another entity are not admissible under Rule 803(6) if the witness is not qualified to testify about the entity's record keeping.

Riddle v. Unifund Partners, 298 S.W.3d 780, 783 (Tex. App.—El Paso 2009, no pet.) (citations omitted).

Subsequent to the trial in the underlying case here, this Court considered a similar issue in the context of the assignment of a credit card account, applying a different analysis and expressly declining to follow the approaches of El Paso and Dallas to the extent they conflict with our Court's approach. *See Simien*, 321

S.W.3d at 245.[3] *Simien* involved an attempt to collect on unpaid credit card debt by Unifund, assignee of the original credit card issuer, Citibank. *Id.* at 239. The defendant in that case did not dispute the authenticity or enforceability of the credit card agreement; nor did she dispute that she had breached the credit card agreement. *Id.* Rather, she contested the amount owed and the appropriate interest rate. *Id.*

Over the defendant's objection, the trial court admitted a business record affidavit, signed by one of Unifund's employees, attaching, among other things (1) a Unifund credit card statement, (2) the assignment from Citibank to Unifund, (3) three Citibank statements, and (4) the Citibank Card Agreement. *Id.* We analyzed whether the trial court's admission of these documents was within its discretion with reference to the test this Court had articulated earlier in *Bell v. State*, which held an assignee could introduce documents authored or created by a predecessor company if "(a) the document is incorporated and kept in the course of the testifying witness's business; (b) that business typically relies upon the accuracy of the contents of the document; and (c) the circumstances otherwise indicate the trustworthiness of the document." *Id.* at 240–41 (citing *Bell*, 176 S.W.3d at 92.).

---

[3] Old Republic does not challenge the test set forth in *Simien*; its argument is that it satisfied the requirements established in that case.

In *Simien*, we concluded that the trial court acted within its discretion admitting the business records affidavit. *Id*. at 245. The affidavit in *Simien* stated:

> The affiant is the designated agent of Unifund [and] is authorized to make this affidavit on Plaintiff's behalf.
>
> . . . .
>
> The affiant is the designated agent of Unifund CCR partners (Plaintiff) in the above entitled and numbered cause, and that in such capacity is authorized to make this affidavit on Plaintiff's behalf.
>
> That the affiant has reviewed the file in this matter and upon review of the file has personal knowledge of the facts set forth in this affidavit and is not disqualified from making this affidavit or giving testimony herein.
>
> That affiant is a designated agent and has personal knowledge of the books and records of the Plaintiff concerning this claim against Defendant, MICHELLE D. SIMIEN.
>
> The attached documents are kept by Plaintiff in the regular course of its business as permanent records of the company and it was the regular course of business for an employee with personal knowledge of the act, event, or condition recorded to make the memorandum or record, or to transmit the information thereof to be completed in such attached memorandum or record; and memorandum or record was made at or near the time of the act, event, or condition recorded or indicated in said record, or reasonably soon thereafter.
>
> The Defendant entered into an agreement allowing Defendant to receive cash advances and/or purchase goods and services at different places which honored the credit cards as issued.
>
> That the attached account [identified by number] is the original, true and correct account or an exact duplicate thereof of Defendant, MICHELLE D. SIMIEN, which has been maintained in files under my supervision and control.

Id. at 241. Applying the first *Bell* factor, we concluded this affidavit established that Unifund "integrated" Citibank's records into its own records based on the

statements that (1) the records were "kept by [Unifund] in the regular course of its business as permanent records of the company," (2) the records were "maintained in files under [the affiant's] supervision and control," and (3) the affiant "reviewed the file, is the designated agent for the file, and . . . has personal knowledge of the books and records concerning Simien." *Id.* at 242.

Noting that the second *Bell* factor—"reliance on accuracy of documents"—can be "shown in a number of different ways," we found Unifund satisfied this requirement with the affidavit's averments that the affiant reviewed the file, is the designated agent for the file, has personal knowledge of the books and records of Simien concerning this claim, has maintained the files under his control, and that Simien's account remains unpaid in the amount stated in the affidavit. *Id.* at 242–43.

Finally, we concluded, in accordance with the third *Bell* factor, that "the circumstances indicate[d] the trustworthiness of the third-party document[s]." *Id.* at 243. We noted, "Citibank must keep careful records of its customer's credit card debt, otherwise its 'business would greatly suffer or even fail.'" *Id.* at 244 (quoting *Harris v. State*, 846 S.W.2d 960, 963 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd)). We further pointed to Citibank's incentive to keep trustworthy records, as "failure to keep accurate records could result in criminal or civil penalties." *Id.* at 244. Identifying the "primary concern in admitting records such

as these [to be] their reliability," we considered it significant that the defendant did "not attack the reliability of the records." *Id*. at 245.

We are faced with a different posture in this case than *Simien*, a case in which the issue was whether the trial court abused its discretion in admitting certain business records. The issue here is whether the trial court abused its discretion by excluding two exhibits—the Agreement and a credit application—proffered under the business records exception to the hearsay rule. We conclude, given the totality of the unique circumstances the trial court was presented with, Old Republic has not established that the trial court abused its considerable discretion in excluding these documents.

A trial court abuses its discretion when it acts unreasonably or arbitrarily, or without reference to any guiding principles. *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991); *Waldrep v. Tex. Emp't Ins. Ass'n*, 21 S.W.3d 692, 703 (Tex. App.—Austin 2000, pet. denied). "We will not reverse a ruling on the exclusion of evidence simply because we disagree with the decision." *Codner v. Arellano*, 40 S.W.3d 666, 674 (Tex. App.—Austin 2001, no pet.) (citing *Buller*, 806 S.W.2d at 226). Rather we will only reverse if the court acts without any guiding principles and there is no legitimate basis for the ruling. *Malone*, 972 S.W.2d at 43.

Unel testified that (1) he is an assistant vice-president for loss mitigation and field underwriting for Old Republic Insured Credit Services, a related entity to Old Republic, (2) Old Republic insures loans for financial institutions such as First Mutual's loan to Edwards, (3) Old Republic received First Mutual's original documents and ownership of those documents from First Mutual when Old Republic paid First Mutual's claim on Edwards's default, (4) Marlana Edwards's signature is on the Agreement, (5) Old Republic has been in possession of the documents since assigned by First Mutual, (6) Old Republic's practice is to keep records from the time of assignment, (7) Unel reviewed the file and the records, (8) Old Republic also received the credit application from First Mutual and kept in the normal course of business, and (9) Marlana Edwards's name is on the credit application.

Unel further testified to Old Republic's practice of accepting and keeping account documents after paying claims on those accounts. He also testified that Old Republic paid First Mutual's claim in exchange for the documents. *Cockrell*, 817 S.W.2d at 113 (verification of accuracy of information for purposes of demonstrating assignees reliance demonstrated by evidence that records were kept in the ordinary course of assignee's business as mortgage insurer and formed basis of payment on claim).

Unel is not the custodian of these records. He works for a different company (related through a mutual parent company) and he did not testify to having personal knowledge of the way Old Republic uses and maintains its records. Nonetheless, that personal knowledge is arguably implicit in the testimony that it is the regular practice of Old Republic to keep assigned files from the time of assignment. TEX. R. EVID. 803(6) (business records can be proven up by "custodian or *other qualified witness*" (emphasis added)); *Cf. Cockrell v. Republic Mortg. Ins. Co.*, 817 S.W.2d 106, 111 (Tex. App.—Dallas 1991, no pet.) ("An affiant's position may show how the affiant learned or knew of the facts to which they testify."). Given this, the first two *Bell* factors—(1) incorporated and kept in the course of business and (2) reliance on accuracy of documents—were satisfied by Unel's testimony.

The trial court here could have, however, determined that Old Republic did not establish that the circumstances indicated the trustworthiness of the documents as required by the third *Bell* factor. In its brief, Old Republic argues that—based on our analysis in *Simien* and the Dallas Court of Appeals' analysis in *Cockrell*—trustworthiness here was established by (1) testimony that the records were kept in the course of Old Republic's business and formed the basis of its insurance claim payment to First Mutual, and (2) that Old Republic's business could suffer

monetarily and face civil and criminal liability if it did not verify the accuracy of claims.[4]

Simien did hold the evidence similar to that cited by Old Republic here to be some evidence to support the trustworthiness of the documents in those cases. But the question here is whether that evidence conclusively establishes trustworthiness in the face of other indicators casting doubt on the trustworthiness of the documents. We hold that it does not.

In *Simien*, we admonished that the "primary concern in admitting records such as these is their reliability." 321 S.W.3d at 245; *see also Curran v. Unis*, 711 S.W.2d 290, 295 (Tex. App.—Dallas 1986, no pet.) ("[T]he primary emphasis of rule 803(6) is on the reliability and trustworthiness of the records sought to be introduced."). In finding evidence similar to that cited by Old Republic to be some evidence of circumstances indicating trustworthiness of the documents at issue in that case, we expressly noted that Simien did not attack the reliability of the records. *Simien*, 321 S.W.3d at 245. Likewise, in *Cockrell*, the other case upon which Old Republic relies, we pointed out that the defendant did not "effectively allege any evidence or affirmative defenses to defeat" the plaintiffs' right to payment and we noted that "[n]othing in the record or the circumstances

[4] *E.g.*, *Simien*, 321 S.W.3d at 244 (recognizing "Citibank must keep careful records of its customer's credit card debt, otherwise its 'business would greatly suffer or even fail'" (quoting *Harris v. State*, 846 S.W.2d 960, 963 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd)).

concerning the generation of these records indicates a lack of trustworthiness." 817 S.W.2d at 113.

The transaction and situation here is fundamentally different than presented in *Simien* and *Cockrell*. In *Simien* and *Cockrell*, the plaintiffs had assumed ownership of contracts that prior account-makers had entered into with the defendant. *Simien* involved a credit card debt that Simien never disputed that she entered or breached. There was no allegation or evidence that the original contract or payment information was incorrect—leaving the relevant issue as the assignee's practices and recordkeeping. The same is true of *Cockrell*, a case in which the defendant did not present any allegations or evidence that the underlying documents were not valid or binding or that the payment records were incorrect—again leaving the relevant issue as the assignee's practices and recordkeeping.

Here, unlike the situation in *Simien* and *Cockrell*, the documents Old Republic sought to introduce were not the product of a loan that Edwards allegedly entered into with Old Republic's predecessor. Instead, the documents were allegedly generated in connection with a real estate improvement contract between Edwards and Nationwide Building Systems, another nonparty. Nationwide assigned that contract to First Mutual, who in turn assigned it to Old Republic.

Edwards filed a verified denial claiming that the signature on the Agreement was not hers, and that the agreement with Nationwide forming the basis of Old

Republic's suit was "not as alleged." In other words, unlike the defendants in *Simien* and *Cockrell*, Edwards had—in a sworn statement—directly challenged the original making of the business record at issue.

As for the credit application, Edwards's attorney pointed out to the court at trial that it was not produced to Edwards during discovery and that it recites that it is for different work than was alleged to have been completed in the Agreement. Old Republic's attorney did not dispute either of these assertions. Old Republic has not demonstrated that the trial court abused its discretion by refusing to admit the Agreement and credit application into evidence.[5] TEX R. CIV. P. 803 (heresay objection to business records overcome by testimony complying with rule "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness"); *cf. In re A.T.*, No. 2-04-355-CV, 2006 WL 563565, at *4 (Tex. App.—Fort Worth March 9, 2006, pet. denied) (despite substantial compliance with business record affidavit form in rule 902(10)(b), examination of actual attached records of drug testing reflected they offered too little detail to be

[5] We note that admissibility is rarely an issue in debt-collection cases such as this because usually the documents to be admitted fall within the rules providing for self-authentication of documents and for the admission of business records. *See e.g.*, TEX. R. EVID. 803(6) (business records exception to hearsay rule), 902(8) (notarized documents are self-authenticating); 902(10) (business records accompanied by affidavit and properly filed are self-authenticating and excepted from the hearsay rule); TEX. R. CIV. P. 93(7) (unless contract execution is challenged by verified denial, it is "received in evidence as fully proved").

deemed trustworthy under Rule 803(6), and trial court abused its discretion in admitting into evidence).

We overrule Old Republic's first issue.

DENIAL OF MOTION FOR SUMMARY JUDGMENT

In Old Republic's second issue, it argues that the "trial court erred in denying Old Republic's motion for summary judgment when Old Republic established its right to judgment as a matter of law." "Where a motion for summary judgment is denied by the trial judge, and the case is tried on the merits, the order denying the motion for summary judgment is not reviewable on appeal." *Orozco v. Orozco*, 917 S.W.2d 71, 72 (Tex. App.—San Antonio 1996, writ denied) (citing *Ackermann v. Vordenbaum*, 403 S.W.2d 362, 365 (Tex. 1966)). The denial of Old Republic's motion for summary judgment prior to the underlying trial on the merits presents nothing for our review. We accordingly overrule Old Republic's second issue.

SUBPOENA

In Old Republic's third issue, it argues that "the trial court erred in finding that the subpoena directed to Edwards through her attorney of record was insufficient when Edwards had notice of the subpoena." Specifically, Old Republic contends that Edwards or her attorney had at least constructive notice of the subpoena. It contends Edwards's failure to attend trial caused it "harm" and

that the "trial court's exclusion of Old Republic's business records and failure to compel the attendance of Edwards resulted in a death penalty sanction to Old Republic as no evidence could be offered." Accordingly, Old Republic argues, "the trial court's actions were . . . an abuse of discretion, and its judgment should be reversed."

A. Applicable law

A party may be compelled to attend trial through a subpoena. TEX. R. CIV. P. 176.2, 181. The Texas Rules of Civil Procedure prescribe both the method of service and how service in proven:

> **176.5. Service**
>
> (a) *Manner of Service*. A subpoena may be served at any place within the State of Texas by any sheriff or constable of the State of Texas, or any person who is not a party and is 18 years of age or older. A subpoena must be served by delivering a copy to the witness and tendering to that person any fees required by law. If the witness is a party and is represented by an attorney of record in the proceeding, the subpoena may be served on the witness's attorney of record.
>
> (b) *Proof of Service*. Proof of service must be made by filing either:
>
> (1) the witness's signed written memorandum attached to the subpoena showing that the witness accepted the subpoena; or
>
> (2) a statement by the person who made the service stating the date, time, and manner of service, and the name of the person served.

TEX. R. CIV. P. 176.5. Methods of enforcing subpoenas are also specifically prescribed by the rules:

176.8. Enforcement of Subpoena

> (a) *Contempt*. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued or a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both.
>
> (b) *Proof of Payment of Fees Required for Fine or Attachment*. A fine may not be imposed, nor a person served with a subpoena attached, for failure to comply with a subpoena without proof by affidavit of the party requesting the subpoena or the party's attorney of record that all fees due the witness by law were paid or tendered.

TEX. R. CIV. P. 176.8.

B. Discussion

The record reflects that four days before trial, on a Friday afternoon, Old Republic attempted to serve Edwards through her attorney's office. Edwards's attorney was not there to accept the subpoena, but the affidavit attached to Old Republic's motion for new trial indicates that it was received by someone in his office. Edwards's counsel stated at trial that to "his knowledge, there was no check submitted." Old Republic's counsel stated that (1) he did not know the name of the person who signed for the subpoena, (2) "there was a check submitted," and (3) "as far as the signed affidavit from the process server, I do not have that." The court's conclusion at that point that "you can't prove that she was subpoenaed" was correct and in accordance with the plain language of Rule 176.5(b).

Although Old Republic complains generally that the court abused its discretion, it did not actually request any particular relief from the trial court related to the subpoena until its motion for new trial. At trial, it did not ask for enforcement of the subpoena, nor did it request a continuation of the trial to secure Edwards's appearance. In its motion for new trial, it did for the first time attach "a statement by the person who made the service stating the date, time, and manner of service, and the name of the person served" in compliance with Rule 176(b)(2), but never filed, even with its motion for new trial, "proof by affidavit of the party requesting the subpoena or the party's attorney of record that all fees due the witness by law were paid or tendered"—a prerequisite to a request for enforcement of a subpoena under Rule 176.8(b). Old Republic has not demonstrated any abuse of discretion related to the trial court's determination that it failed to establish that Edwards was properly subpoenaed.

MOTION FOR NEW TRIAL

In its fourth issue, Old Republic argues that the trial court abused its discretion by failing to grant its motion for new trial, which argued the court "committed reversible error by failing to admit Old Republic's business records pertaining to Edwards into evidence." Old Republic's argument has been fully addressed with our discussion and disposition of Old Republic's first issue. For the same reasons, we overrule Old Republic's fourth issue.

CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Sharp and Brown.

Justice Brown, concurring.

Justice Sharp, concurring without opinion.