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HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. NV-07-1243-McMoPa
DENH NHIET CHU,	Bk. No. S-05-24481-MKN
Debtor.	Adv. No. 06-01031
	(Ref. No. 07-10)
DENH NHIET CHU,	
Appellant,	
v.	**M E M O R A N D U M**[1]
MIGUEL LARA,	
Appellee.	

Argued and Submitted on February 22, 2008
at Sacramento, California

Filed - March 18, 2008

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Mike K. Nakagawa, Bankruptcy Judge, Presiding

Before: McMANUS,[2] MONTALI and PAPPAS, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

[2] Hon. Michael S. McManus, Chief Bankruptcy Judge for the Eastern District of California, sitting by designation.

The chapter 7 debtor and defendant, Denh Nhiet Chu, appeals from a judgment entered pursuant to section 523(a)(9)[3] in favor of the plaintiff, Miguel Lara.

We hold that the bankruptcy court's admission of evidence was not an abuse of discretion. The bankruptcy court also correctly applied both Nevada's driving under the influence ("DUI") law, Nev. Rev. Stat. § 484.379, and section 523(a)(9), when it concluded that Chu's liability to Lara was nondischargeable. We AFFIRM.

FACTS

At approximately 11:00 p.m. on August 18, 2005, Chu drove herself to a restaurant to meet with friends. After consuming two or three alcoholic drinks, Chu left the restaurant and drove off in her motor vehicle at approximately "3:00-ish" in the early morning of August 19. Fifteen to 30 minutes later, while traveling at approximately 100 miles an hour, Chu rear-ended a vehicle driven by Lara. The accident occurred in light traffic on a dry, straight, and level public road. The impact caused Chu's vehicle to flip over and completely destroyed Lara's vehicle. Chu admitted that she did not see Lara's vehicle before colliding with it.

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[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as enacted and promulgated prior to the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, because the case from which this appeal arises was filed before its effective date (generally October 17, 2005).

At the hospital, a blood test was administered to Chu. Thereafter, Chu was notified by the Department of Motor Vehicles that her driver's license had been suspended for 90 days because the blood test had indicated that her blood alcohol concentration after the accident was 0.08 or greater.

On October 13, 2005, Chu filed a voluntary chapter 7 petition. To prevent Chu from discharging her liability for his personal injuries resulting from the collision, Lara filed a timely complaint under section 523(a)(6). Chu denied that her conduct warranted this relief.

Shortly before trial, both parties filed pretrial statements. Lara's pretrial statement indicated that he would call himself, Chu, and the custodian of records for the City of Henderson Police Department as witnesses. Chu's pretrial statement identified herself and all witnesses identified by Lara.

Lara then moved to amend his complaint to allege that his claim was also nondischargeable under section 523(a)(9). Chu objected to this amendment. At a hearing on the motion, both parties informed the bankruptcy court that granting the motion would not require them to amend their pretrial statements.

On October 30, 2006, the bankruptcy court granted the motion to amend the complaint. Then, despite having informed the bankruptcy court that no amendment to his pretrial statement would be necessary, Lara filed a "Supplement to Trial Statement," listing two additional trial witnesses: Kimberly Brockman, a chemist from Quest Diagnostics, to testify as to blood test results; and police officer John Gregg of the Henderson Police

Department, who responded to and investigated the accident.

Chu objected to these additional witnesses. The bankruptcy court, after considering the objection and the supplement at the beginning of the trial, sustained the objection. However, it permitted Brockman to testify for the limited purpose of establishing the time at which a blood sample was drawn from Chu after the accident.

In addition to Brockman, Lara, and Chu, Cynthia J. Miles, the records custodian for the Henderson Police Department, testified in connection with the plaintiff's case-in-chief. Officer Gregg, who was subpoenaed by Lara, failed to appear. Lara requested a continuance of trial in order to obtain his testimony, but his request was denied.

Based on Miles' testimony, Exhibits 2 and 3 were admitted without objection. Exhibit 2 is a copy of the subpoena issued to the Henderson Police Department Record Services Section. Exhibit 3 is a certificate of the custodian of records issued in response to the subpoena.

Exhibits 4 through 12 were preliminarily admitted pursuant to FED. R. EVID. 104(a), subject to a later ruling on Chu's evidentiary objections. These exhibits were: a Traffic Accident Report dated August 19, 2005 (Exhibit 4); a DUI Summary dated August 19, 2005 (Exhibit 5); a Toxicology Request dated August 19, 2005 (Exhibit 6); a Blood Draw Declaration dated August 19, 2005 (Exhibit 7); a Forensic Laboratory Report of Examination dated September 10, 2005 (Exhibit 8); an Evidence Custody Declaration Under Penalty of Perjury dated August 23, 2005 (Exhibit 9); a Toxicology Report dated August 23, 2005 (Exhibit

10); a Supplemental Report dated September 28, 2005, a further Supplemental Report dated March 22, 2006, an undated Incident Report (collectively, Exhibit 11); and an Evidentiary Testing/Implied Consent form dated August 19, 2005 (Exhibit 12).

Chu objected to the admission of Exhibits 4, 5, and 6 on hearsay, authenticity, and best evidence grounds. The bankruptcy court overruled the objections to Exhibit 4. As to Exhibits 5 and 6, the bankruptcy court overruled the authenticity and best evidence objections, but reserved a ruling on the hearsay objection.

With respect to Exhibits 7 through 12, Chu objected only on the ground that they contained hearsay. Lara countered that exceptions to the hearsay rule set out in Nev. Rev. Stat. §§ 50.310, 50.315, 50.320, and 50.325 made these exhibits admissible.

At trial, the bankruptcy court conditionally admitted these exhibits, reserving a ruling on whether a proper foundation had been established under an exception to the hearsay rule. The parties were ordered to file post-trial briefs addressing this issue as well as the applicability of Nevada's evidence rules.

After considering the post-trial briefs, the bankruptcy court ruled that all of the objected-to exhibits, Exhibits 4 through 12, were admissible under FED. R. EVID. 803(6) as the police department's business records. However, the exhibits were admitted into evidence only to the extent they evidenced the activities of the Henderson Police Department. The bankruptcy court also concluded that none of these exhibits were admissible to establish Chu's blood alcohol concentration because Brockman

had not been permitted to testify about the results of the blood alcohol analysis.

Additionally, the bankruptcy court concluded that Exhibits 6 through 10 were admissible as public records under FED. R. EVID. 803(8)(A), but only to the extent that they evidenced the activities of the Henderson Police Department.

Based on FED. R. EVID. 803(8)(C), the bankruptcy court also overruled the objection that Exhibits 4, 5, 11, and 12 contained multiple hearsay. These exhibits were admissible because they contained the observations and factual findings of Officer Gregg. But, once again, references in these exhibits to the blood test results were inadmissible to establish Chu's blood alcohol concentration.

With these evidentiary rulings, the bankruptcy court concluded that, while Lara's claim was not made nondischargeable by section 523(a)(6), it was nondischargeable under section 523(a)(9). The bankruptcy court concluded that Lara had proven, by a preponderance of the evidence, that Chu's operation of the motor vehicle was unlawful under Nevada's DUI law, Nev. Rev. Stat. § 484.379, because Chu was intoxicated at the time of the accident. Accordingly, the bankruptcy court issued a judgment in favor of Lara in the amount of his medical bills, $80,218.04, with interest at the federal judgment rate. Additionally, the bankruptcy court ordered Chu to pay Lara's costs.

Chu timely appealed the bankruptcy court's judgment.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C.

§§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158.

STANDARD OF REVIEW

A bankruptcy court's evidentiary rulings are reviewed for an abuse of discretion and should not be reversed unless the error was prejudicial. Latman v. Burdette, 366 F.3d 774, 786 (9th Cir. 2004). A bankruptcy court abuses its discretion if it bases its ruling upon an erroneous view of the law or a clearly erroneous assessment of the evidence. Caldwell v. Farris (In re Rainbow Magazine, Inc.), 136 B.R. 545, 550 (9th Cir. BAP 1992). Findings of fact are reviewed for clear error and questions of law are reviewed de novo. Valley v. Locke (In re Kelley), 300 B.R. 11, 16 (9th Cir. BAP 2003).

DISCUSSION

Chu argues that the determination that Lara's debt is nondischargeable under section 523(a)(9) was erroneous because: (1) the bankruptcy court erred in admitting Lara's exhibits under the Federal Rules of Evidence because he had urged their admission only under inapplicable Nevada evidence rules; (2) the bankruptcy court erred when admitting all of the objected-to exhibits under FED. R. EVID. 803(6) because they are not business records; (3) the bankruptcy court erred in admitting the hearsay statements contained in Exhibits 6 through 10 pursuant to FED. R. EVID. 803(8)(A); (4) the bankruptcy court erred in admitting the hearsay statements contained in Exhibits 4, 5, 11, and 12 pursuant to FED. R. EVID. 803(8)(C); (5) the bankruptcy court's

admission of Exhibits 4, 7, 8, 9, and 11 was erroneous because it violated the Confrontation Clause of the Sixth Amendment of the United States Constitution; and (6) considering only the properly admissible evidence, the bankruptcy court's judgment was erroneous because it misinterpreted Nevada's DUI law.[4]

A. The Federal Rules of Evidence Were Applicable

Chu argues that the bankruptcy court erred by admitting Lara's exhibits because he incorrectly argued that the applicable evidentiary rules were Nevada's evidence rules, not the Federal Rules of Evidence.

It is true that Lara sought to admit Exhibits 4 through 12, over Chu's hearsay objection, by invoking Nevada's evidence rules, Nev. Rev. Stat. §§ 50.310, 50.315, 50.320, and 50.325. The bankruptcy court concluded, however, that the Federal Rules of Evidence, not Nevada's evidence rules, were applicable.

Its conclusion was correct. Rule 9017 provides that the Federal Rules of Evidence apply in bankruptcy cases. See also FED. R. EVID. 1101(a), (b) (providing that bankruptcy judges must apply the Federal Rules of Evidence in "proceedings and cases

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[4] Chu also argues that the bankruptcy court erred when it declined to find that the lack of a criminal charge against her for driving under the influence was admissible under FED. R. EVID. 803(7) to prove that she was not driving under the influence. However, this argument was not identified by Chu as an issue on appeal. The appellate issues identified by Chu were limited to whether the bankruptcy court improperly admitted Exhibits 4 through 12, and whether it improperly applied state substantive law in its decision. Thus, we decline to address an issue not properly identified for appeal. See Woods v. Pine Mountain, Ltd. (In re Pine Mountain, Ltd.), 80 B.R. 171, 173 (9th Cir. BAP 1987).

under title 11. . . .”). Hence, the Federal Rules of Evidence are applicable in adversary proceedings even when the proceeding implicates state substantive law. See Boone v. Barnes (In re Barnes), 266 B.R. 397, 403 (8th Cir. BAP 2001).

Section 523(a)(9) requires that the bankruptcy court apply state substantive law to determine whether the debtor’s conduct was unlawful, such that the debt for death or personal injury caused by the debtor is nondischargeable. Id. at 403-04. See also Whitson v. Middleton (In re Middleton), 898 F.2d 950, 952 (4th Cir. 1990). This does not require, however, that the bankruptcy court also apply Nevada’s rules of evidence.

In Barnes, which also concerned an adversary proceeding under section 523(a)(9), the Eighth Circuit Bankruptcy Appellate Panel noted that the parties had erroneously analyzed the evidentiary questions on appeal by applying state law. But, as a rule, “even when the bankruptcy court applies state law to resolve substantive issues, it must apply the Federal Rules of Evidence to resolve evidentiary questions.” Barnes, 266 B.R. at 403. Thus, notwithstanding the parties’ erroneous reliance on state evidence rules, the Panel analyzed the evidentiary questions on appeal under the Federal Rules of Evidence, and concluded that the bankruptcy court correctly applied FED. R. EVID. 702. Id. at 404-05.

Similarly, we cannot conclude that the bankruptcy court abused its discretion when it applied the Federal Rules of Evidence even though Lara had urged it to admit evidence under Nevada’s evidence rules.

B. The Admission of Exhibits 4 Through 12

Chu argues that the bankruptcy court erred when it admitted into evidence, pursuant to FED. R. EVID. 803(6), Exhibits 4 through 12 as the business records of the Henderson Police Department. Chu further argues that even if Exhibits 4 through 12 were properly admitted as business records, they contain hearsay not made admissible by FED. R. EVID. 803(8)(A) and 803(8)(C).

While this Panel addresses, and largely rejects, each of these arguments, as noted below, even if all these exhibits should have been excluded from evidence, Chu's own testimony supports the bankruptcy court's judgment. Hence, the erroneous admission of any of these exhibits was not a prejudicial abuse of discretion; at most it was harmless error. Rule 9005, incorporating FED. R. CIV. P. 61.

1. Admissibility Under FED. R. EVID. 803(6)

The bankruptcy court admitted Exhibits 4 through 12 under the business records exception to the hearsay rule, FED. R. EVID. 803(6). 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." Assuming there is an objection, hearsay is made inadmissible by FED. R. EVID. 802. See FED. R. EVID. 801(c), 802.

However, there are many exceptions to the hearsay rule. One of these exceptions is FED. R. EVID. 803(6),[5] which provides that

[5] FED. R. EVID. 803(6) provides: "A memorandum, report, (continued...)

a record made in the course of a regularly conducted business activity is admissible even though it contains hearsay and whether or not the person preparing the record is available to testify.

To admit such a record of a regularly conducted business activity, the custodian or other qualified witness must demonstrate that it was: (1) the regular practice of that business to make the record; (2) kept in the regular course of that business; (3) made by a person with knowledge; and (4) made at or near the time of the event recorded. See Am. Express Travel Related Servs. Co. v. Vinhnee (In re Vinhnee), 336 B.R. 437, 444 (9th Cir. BAP 2005).

Business records are admissible despite the fact that they contain hearsay statements:

> Records prepared and kept in the ordinary course of business are presumed reliable for two general sorts of reasons. [Citation omitted.] First, businesses depend on such records to conduct their own affairs; accordingly, the employees who generate them have a strong motive to be accurate and none to be deceitful. Second, routine and habitual patterns of creation lend reliability to business records.

United States v. Blackburn, 992 F.2d 666 (7th Cir. 1993).

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[5](...continued)
record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, 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 certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

At trial, Miles, the custodian of records for the Henderson Police Department, testified that Exhibits 4 through 12 were documents maintained in the ordinary course of business at the Henderson Police Department. Further, the certificate of the custodian of records, which was admitted at trial without objection as Exhibit 3, states:

> [T]he original of those records [produced] . . . was made at or near the time of the acts, events and condition, and opinions recited therein by or from information transmitted by a person with knowledge of the course of the regularly conducted activity of the Deponent or the office or institution in which the Deponent is employed.

Based on Miles' testimony and the certificate of the custodian of records, the bankruptcy court concluded that Exhibits 4 through 12 were admissible as business records under FED. R. EVID. 803(6).

Exhibits 4, 5, 11, and 12 are records of the Henderson Police Department. Exhibits 6 through 10, however, are records of a third party, Quest Diagnostics.

a. The Admissibility of Exhibits 4, 5, 11, and 12 Under FED. R. EVID. 803(6)

The foundation for the admission into evidence of Exhibits 4, 5, 11, and 12 as the business records of the police department was established by Miles' testimony and also by the certificate of the custodian of records (Exhibit 3) under FED. R. EVID. 902(11).[6]

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[6] FED. R. EVID. 902(11) permits self-authentication of documents as business records under FED. R. EVID. 803(6) if the documents are accompanied by a written declaration of its custodian or other qualified person, certifying that the

(continued...)

Chu argues, however, that Exhibits 4, 5, and 11 should not have been admitted because it is unclear who prepared those documents.

The bankruptcy court correctly concluded that Exhibits 4, 5, and 11 were the business records of the Henderson Police Department. Regardless of the particular person at the police department who prepared these documents, the foundational showing that they were prepared by members of the department was made.

Further, Exhibit 4 shows that "R. Adams" completed Exhibit 4. According to Officer Gregg's affidavits contained within Exhibit 11, "R. Adams" is police officer Robert Adams, who responded to the scene of the accident after Officer Gregg arrived.

Exhibit 5 shows that Officer Gregg completed the DUI Summary, and Exhibit 11 shows that Officer Gregg prepared the two Supplemental Reports and accompanying affidavits and Incident Report.

It was not error to admit Exhibits 4, 5, and 11 as the business records of the Henderson Police Department.

Chu additionally argues that Exhibits 4, 5, and 11 were made in anticipation of litigation and thus cannot be admitted as business records of the Henderson Police Department.

Documents prepared in anticipation of litigation rather than for the routine and systematic conduct of business operations are said to lack the business motivation to be accurate. Certain Underwriters at Lloyds, London v. Sinkovich, 232 F.3d 200, 205

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[6](...continued)
documents meet the requirements of FED. R. EVID. 803(6).

(4th Cir. 2000). Thus, documents prepared in anticipation of litigation are not entitled to the presumption of trustworthiness implicit to the applicability of FED. R. EVID. 803(6).

The bankruptcy court found, based on Miles' testimony, that these exhibits were generated as a matter of routine practice and kept in the course of regularly conducted business activity of the police department. Additionally, the bankruptcy court noted that the police department is a public entity whose duties include making and keeping accurate records. The mere possibility that a document may be admitted into evidence does not mean that it was prepared in anticipation of litigation or for the purpose of litigation.

The bankruptcy court found no reason to believe Exhibits 4, 5, and 11 lacked trustworthiness. This finding is supported by the record.

Chu finally argues that Exhibit 11 was not admissible as a business record because the first Supplemental Report therein was created one month after the accident, and the second Supplemental Report therein was created seven months after the accident.

FED. R. EVID. 803(6) requires that a business record be made at or near the time of the event or activity recorded. FED. R. EVID. 803(6). The accident occurred on August 19, 2005. However, the investigation of it continued for several months. The Supplemental Reports were made at or near the time of the investigation. It is the proximity of these reports to the investigatory activity, not the accident, that is germane.

We conclude that it was not an abuse of discretion to admit into evidence, pursuant to FED. R. EVID. 803(6), Exhibits 4, 5,

11, and 12 as the business records of the Henderson Police Department.

b. The Admissibility of Exhibits 6 through 10 Under FED. R. EVID. 803(6)

The admission of Exhibits 6 through 10 as the business records of the Henderson Police Department is more problematic given that they were prepared, with one exception, by another entity, Quest Diagnostics. The bankruptcy court admitted Exhibits 6 through 10 based on the testimony of the records custodian of the police department, not of Quest Diagnostics.

Exhibit 6 is a Toxicology Request by Officer Gregg on a form provided by Quest Diagnostics. Exhibit 7 is a Blood Draw Declaration signed by a Quest Diagnostics laboratory assistant. Exhibit 8 is a Forensic Laboratory Report of Examination created by Brockman of Quest Diagnostics. Exhibit 9 is an Evidence Custody Declaration signed by a Quest Diagnostics courier. Exhibit 10 is a Toxicology Report prepared by Quest Diagnostics.

The admission of Exhibit 6 under FED. R. EVID. 803(6) was appropriate. Although it was on Quest Diagnostics' stationery, Exhibit 6 was completed entirely by Officer Gregg, an employee of the Henderson Police Department. Therefore, it was not an abuse of discretion for the bankruptcy court to admit Exhibit 6 as a business record of the Henderson Police Department.

However, Exhibits 7 through 10 are not business records of the Henderson Police Department because none of those documents were created by Henderson Police Department employees. They are business records of Quest Diagnostics, and neither its custodian of records nor other qualifying witness appeared to make the

foundational showing required under FED. R. EVID. 803(6).

Still, the documents might be considered the business records of the police department under the reasoning articulated in United States v. Childs, 5 F.3d 1328 (9th Cir. 1993), and given broad applicability in MRT Constr. Inc. v. Hardrives, Inc., 158 F.3d 478 (9th Cir. 1998).

In Childs, the Ninth Circuit held that documents kept in the regular course of business but not made by the business can still qualify as business records of the business if there is testimony that the documents in question were kept in the regular course of business and the business relied on the documents in the course of its business. Childs, 5 F.3d at 1334. The Childs court stressed that reliance was the key because the reason for the business records exception is that business records are trustworthy; actual reliance by the business is indicative of trustworthiness. Id. at 1334.

Similarly, in MRT, the Ninth Circuit held "that records a business receives from others are admissible under [FED. R. EVID.] 803(6) when those records are kept in the regular course of that business, relied upon by that business, and where that business has a substantial interest in the accuracy of the records." MRT, 158 F.3d at 483.

The problem with applying Childs and MRT here is that the necessary foundation is lacking. It was perfectly acceptable for Miles to testify regarding the Quest Diagnostics documents maintained by the police department in its files. FED. R. EVID. 803(6) permits a custodian of records for the business or "other qualified witness" to lay the necessary foundation. See United

States v. Ray, 930 F.2d 1368, 1370 (9th Cir. 1991) ("The phrase 'other qualified witness' is broadly interpreted to require only that the witness understand the record-keeping system.")

But, Miles testified only that the documents were kept in the regular course of business at the police department. Miles did not testify that the police department relied on the Quest Diagnostics documents. Thus, the proper foundation was not laid.

The bankruptcy court recognized that Exhibits 7, 8, 9, and 10 were prepared or completed by employees of Quest Diagnostics, rather than members of the Henderson Police Department but concluded they were nonetheless the business records of the police department:

> The Henderson Police Department clearly has a substantial interest in the accuracy of those records, relied upon them in performing its duties, and kept them in the ordinary course of business. Thus, those exhibits still qualify as business records even though they were prepared or completed by Quest Diagnostics.

Although it seems likely, even obvious, that the police department would rely on Quest Diagnostics' records to establish Chu's blood alcohol concentration, the police department's records custodian, or some other qualified witness, had to make that foundational showing. This testimony was not given.

Despite the lack of this foundation, we cannot conclude that the admission of Exhibits 7 through 10 was prejudicial error. This is so because the bankruptcy court considered these exhibits only to the extent they evidenced the activities of the Henderson Police Department. Further, the bankruptcy court did not rely upon these exhibits when it concluded that Chu had violated Nevada's DUI statute, Nev. Rev. Stat. § 484.379(1). As discussed

below, the bankruptcy court's judgment was based on the testimony of Chu and Lara and the police records, Exhibits 4, 5, and 11, which were properly admitted under FED. R. EVID. 803(6).

Therefore, considering the limited use the bankruptcy court made of Exhibits 7 through 10, no prejudice resulted from their admission into evidence.

2. Multiple Hearsay in Exhibits 4 Through 11[7]

Chu next argues that even if Exhibits 4 through 11 were business records of the police department, they were still inadmissible because they contain multiple hearsay statements by persons other than the person preparing each exhibit. Chu fails, however, to identify the links in this chain of multiple hearsay.

To the extent these records contain, in addition to the statements of the person(s) preparing them, the out-of-court statements of Chu, her statements are not hearsay. Statements by a party opponent are admissions. Under the Federal Rules of Evidence, such statements are not considered hearsay. See FED. R. EVID. 801(d)(2)(A).

As to the statements of other persons who did not prepare the exhibits, the bankruptcy court was aware of the potential multiple hearsay issue because it considered the exhibits only to the extent they recorded the activities, observations, and factual findings of the police. The bankruptcy court concluded

[7] On appeal, Chu does not argue that Exhibit 12 was inadmissible for any other reason than the inapplicability of FED. R. EVID. 803(6). Thus, it is unnecessary to consider whether this exhibit should have been excluded because it included multiple hearsay.

that Exhibits 6 through 10 were admissible under FED. R. EVID. 803(8)(A) because they memorialized the activities of the Henderson Police Department, and Exhibits 4, 5, 11, and 12 were admissible under FED. R. EVID. 803(8)(C) because they contained the observations of the police.

Further, to the extent these exhibits, particularly Exhibits 7 through 10, contained inadmissible statements, the court's ultimate judgment was not based on those statements.

a. The Admissibility of Exhibits 6 Through 10 Under FED. R. EVID. 803(8)(A)

Chu argues that Exhibits 6 through 10 (the documents on Quest Diagnostics' stationery or forms) were not properly admitted under FED. R. EVID. 803(8)(A), but discusses only their admissibility under FED. R. EVID. 803(6). Nonetheless, we will address whether Exhibits 7 through 10 were properly admitted as public records pursuant to FED. R. EVID. 803(8)(A).

Having already concluded that Exhibit 6, the Toxicology Request by Officer Gregg, was a business record of the Henderson Police Department because it was created by Officer Gregg, not employees of Quest Diagnostics, and was contained in the records in custody of the Henderson Police Department, we need not revisit this exhibit's admissibility under FED. R. EVID. 803(8)(A).

FED. R. EVID. 803(8)(A) applies only to records, reports, statements, or data compilations of a public entity recording the activities of that public entity. Admitting the records of a nonpublic entity, like Quest Diagnostics, because they record the activities of a public entity, like a police department, is not

permitted by FED. R. EVID. 803(8)(A). The public records exception is limited to the records of public entities. See United States v. Loera, 923 F.2d 725, 730 (9th Cir. 1991.)

Quest Diagnostics employees, not Henderson Police Department employees, created Exhibits 7 through 10. Quest Diagnostics employees are not public officials and they have no authority, duty, or obligation to record the activities of the Henderson Police Department.

Thus, we conclude that the bankruptcy court incorrectly admitted Exhibits 7 through 10 into evidence pursuant to FED. R. EVID. 803(8)(A). But, this error was not prejudicial because the bankruptcy court's judgment was based on the testimony of Chu and Lara and police records, Exhibits 4, 5, and 11, which were properly admitted under FED. R. EVID. 803(6).

b. Admissibility of Exhibits 4, 5, and 11 Under FED. R. EVID. 803(8)(C)

In addition to concluding that Exhibits 4, 5, and 11 were admissible as business records, the bankruptcy court also admitted Exhibits 4, 5, and 11 into evidence pursuant to FED. R. EVID. 803(8)(C) as public records. The bankruptcy court, however, concluded that these exhibits were admissible only to the extent they contained the observations and factual findings of Officer Gregg.

Under FED. R. EVID. 803(8)(C), a public record may be admitted into evidence so long as "both source and recorder act in regular course, and everyone in the chain of transmission does likewise." See 4 FEDERAL EVIDENCE § 8:82 (3d ed.). Here, the bankruptcy court concluded that Exhibit 4 (the Traffic Accident

Report), Exhibit 5 (the DUI Summary), and Exhibit 11 (the Supplemental Reports and Incident Report) were admissible as public records.

We agree with this conclusion. Police reports, if based on an officer's observation and knowledge, may be admitted under the public records exception to the hearsay rule. See Colvin v. United States, 479 F.2d 998, 1003 (9th Cir. 1973).

According to Miles' testimony, Exhibits 4, 5, and 11 were created by employees of the Henderson Police Department in the regular course of their duties as employees of the police department.

Thus, the out-of-court statements by public officers in these documents were excepted from the hearsay rule pursuant to FED. R. EVID. 803(8)(C), provided this hearsay represents the observations of a public official, unless the sources of information or other circumstances suggest a lack of trustworthiness.

The court dealt with the multiple hearsay issues, such as the statements by non-police department personnel regarding Chu's blood alcohol concentration, by limiting its use of the records only to the extent they evidenced the activities of the Henderson Police Department.

Chu also argues that Exhibits 4 and 5 contain inadmissible hearsay because they give the name of a witness, Steve Drake, but it is unknown what information in those documents, if any, was received from Drake and what information was from Officer Gregg's observations at the accident scene. This apparent ambiguity arises because neither Officer Gregg nor Drake testified.

The official and business records exceptions to the hearsay rule do not apply to statements in a police report made by persons without a business duty to make such statements. See e.g., Colvin, 479 F.2d at 1003.

Exhibits 4 and 5, however, contain information that a police officer at the scene of a traffic accident would likely observe and deduce. Therefore, given the nature of the information in the reports, and despite the lack of testimony from either Officer Gregg or Drake, the bankruptcy court's admission of Exhibits 4 and 5 as business and public records was not an abuse of discretion.

C. The Applicability of the Confrontation Clause

Chu maintains that the admission of Exhibits 4, 7, 8, 9, and 11 violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. That is, these documents contain out-of-court statements by Officer Gregg but he did not testify at trial, depriving her of the opportunity to cross-examine an important witness.

The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Commonly referred to as the "Confrontation Clause" of the Sixth Amendment, it applies only to criminal cases. See 23 C.J.S. Criminal Law § 1517 (2008) (cases collected).

An adversary proceeding brought under section 523(a)(9) is a civil, not a criminal, proceeding. While the United States

Supreme Court has applied the Confrontation Clause in some civil cases, such instances are limited to civil cases that are quasi-criminal in nature. See, e.g., Jenkins v. McKeithen, 395 U.S. 411 (1969) (state labor-management commission created an executive trial agency designed to make specific findings of guilt rather than to merely investigate and recommend; thus, it could not deny the right to confront and cross-examine witnesses because that is a fundamental aspect of procedural due process); Willner v. Comm. on Character & Fitness, 373 U.S. 96 (1963) (procedural due process requires confrontation and cross-examination of those whose word deprives a person of his livelihood, such as the admission to practice law).

Chu makes no compelling argument that the Confrontation Clause should operate in an adversary proceeding under section 523(a)(9). It is not tantamount to a criminal proceeding and the nondischargeable money judgment against Chu is not a criminal penalty.

Additionally, a debtor has no constitutional or "fundamental" right to a discharge in bankruptcy. See Grogan v. Garner, 498 U.S. 279, 286-87 (1991) ("The statutory provisions governing nondischargeability reflect a congressional decision to exclude from the general policy of discharge certain categories of debts. . . . Congress evidently concluded that the creditors' interest in recovering full payment of debts in these categories outweighed the debtors' interest in a complete fresh start.")

Chu nonetheless maintains that the Confrontation Clause should apply because her case is a "hybrid situation." According to Chu, if a criminal statute is used to determine whether a

civil debt is dischargeable, the Confrontation Clause should apply.

In support, Chu cites Reed v. Thalacker, 198 F.3d 1058 (8th Cir. 1999). However, Reed was a criminal case. At issue in Reed was whether the defendant's rights under the Confrontation Clause had been violated when the trial court admitted into evidence a victim's out-of-court statements. We fail to see the relevance of Reed to Chu's "hybrid situation" argument.

The bankruptcy court did not judge Chu to be guilty of a crime when it found that Lara's claim was nondischargeable. While it is true that application of section 523(a)(9) required the bankruptcy court to determine whether Chu had violated Nev. Rev. Stat. § 484.379(1), its determination could have no possible preclusive effect in a future criminal action. The bankruptcy court made factual findings based on the preponderance of the evidence standard. In any future criminal action, the state would have to prove beyond a reasonable doubt that Chu had been operating her vehicle while intoxicated.

The bankruptcy court did not violate the Confrontation Clause by admitting into evidence Exhibits 4, 7, 8, 9, and 11.

D. The Bankruptcy Court Correctly Concluded that Section 523(a)(9) Made Lara's Claim Nondischargeable

Chu argues that the bankruptcy court erroneously concluded that Lara's debt is nondischargeable pursuant to section 523(a)(9). Chu's argument is two-fold. First, she argues that the court misinterpreted Nevada's DUI statute, Nev. Rev. Stat. § 484.379(1). Second, she argues that there was insufficient evidence to support a judgment under section 523(a)(9).

1. The Requirements of Nev. Rev. Stat. § 484.379(1)

A debt is made nondischargeable by section 523(a)(9) if it is a debt "for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance."

A plaintiff, then, must establish three elements under section 523(a)(9): (1) a debt for death or personal injury; (2) caused by the debtor's operation of a motor vehicle; and (3) such operation of the motor vehicle must have been unlawful due to the debtor's intoxication. See, e.g., Mich. Assigned Claims Facility v. Felski (In re Felski), 277 B.R. 732, 735 (Bankr. E.D. Mich. 2002); United Servs. Auto. Ass'n v. Pair (In re Pair), 264 B.R. 680, 684 (Bankr. Idaho 2001). The first two elements are unquestionably present.

To determine whether the operation was "unlawful" under section 523(a)(9), the bankruptcy court must apply state substantive law. Middleton, 898 F.2d at 952. Nevada's DUI law, Nev. Rev. Stat. § 484.379(1), provides:

> It is unlawful for any person who:
>
> (a) Is under the influence of intoxicating liquor;
> (b) Has a concentration of alcohol of 0.08 or more in his blood or breath; or
> (c) Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have a concentration of alcohol of 0.08 or more in his blood or breath,
>
> to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access.

Nev. Rev. Stat. § 484.379(1) is in the disjunctive. Proof of any of the three alternatives articulated in Nev. Rev. Stat.

§ 484.379(1) is sufficient for a misdemeanor conviction. See Dossey v. State, 964 P.2d 782 (1998) (concluding that the three subsections to Nev. Rev. Stat. § 484.379(1) were intended by the legislature "to define alternative means of committing a single offense"); Anderson v. State, 118 P.3d 184 (2005) (holding that Nev. Rev. Stat. § 484.379(1) contained three statutory theories for DUI criminal liability).

At trial, Chu argued that Nev. Rev. Stat. § 484.379(1)(a) required proof of the driver's inability to operate the vehicle safely; it is not enough to show only that the driver was intoxicated. The bankruptcy court rejected that argument. On appeal, Chu renews this argument, citing two Nevada Supreme Court cases in support of it, Cotter v. State, 738 P.2d 506 (1987) and Bostic v. State, 760 P.2d 1241 (1988).

Cotter is a 1987 Nevada Supreme Court case dealing with Nevada's felony DUI law, Nev. Rev. Stat. § 484.3795, which applies when an intoxicated driver causes death or substantial bodily harm.

Under Nev. Rev. Stat. § 484.3795, there are six alternative bases for conviction of an intoxicated driver causing death or substantial bodily harm to another. See Nev. Rev. Stat. § 484.3795(1)(a)-(e). However, only one of those alternatives, Nev. Rev. Stat. § 484.3795(1)(e), contains a requirement that the driver be under the influence "to a degree which renders him incapable of safely driving or exercising actual physical control of the vehicle." See Nev. Rev. Stat. § 484.3795(1)(e) (providing that a person is guilty of a felony for driving under the influence if he "inhales, ingests, applies, or otherwise uses any

chemical, poison or organic solvent, or any compound or combination of any of these, to a degree which renders him incapable of safely driving or exercising actual physical control of a vehicle." (emphasis added).)

Notwithstanding the fact that the incapable-of-safely-driving language is confined to one of the six alternative subsections of Nev. Rev. Stat. § 484.3795(1), the Cotter court concluded that the plain reading and logical application of this statute required that this language qualify each of the six subsections. In other words, conviction of felony DUI required proof of the driver's inability to operate the vehicle safely. Otherwise, the court noted:

> [The statute] would make felons of drivers on lawfully prescribed medications irrespective of whether the medication had any causal relationship to the event leading to the death or injury of another. It is apparent that such a result would be unfair and contrary to the intent of the Legislature in enacting the statute.

Cotter, 738 P.2d at 305-06. See also Bostic, 760 P.2d at 1242-43; Etcheverry v. State, 821 P.2d 350, 351 n.1 (1991) (reading Nev. Rev. Stat. § 484.3795 for felony DUI involving intoxication by liquor to include requirement of inability to drive safely).

The difficulty for Chu is that Nev. Rev. Stat. § 484.3795 is not the only possibly applicable Nevada DUI law. Nevada's misdemeanor DUI statute, Nev. Rev. Stat. § 484.379, is also applicable.

Nev. Rev. Stat. § 484.379 is structured much differently than its felony DUI counterpart. Nev. Rev. Stat. § 484.379 parses the theories of DUI liability into two separate categories: intoxication by liquor (Nev. Rev. Stat.

§ 484.379(1)), and intoxication by a controlled substance alone or in combination with liquor (Nev. Rev. Stat. § 484.379(2)). The provision in Nev. Rev. Stat. § 484.3795(1)(e) requiring proof that the driver was both intoxicated and incapable of safely driving is confined to Nev. Rev. Stat. § 484.379(2)(c), dealing with intoxication due to controlled substances. This language is not included in Nev. Rev. Stat. § 484.379(1), dealing with intoxication by liquor and the statute relevant in this case.

In fact, the Nevada Supreme Court has already spoken on the issue of whether Nev. Rev. Stat. § 484.379(1) requires evidence of an intoxicated driver's inability to drive safely. In State v. Eighth Jud. Dist. Ct. of Nev., 994 P.2d 692 (2000), the Nevada Supreme Court considered whether a defendant's convictions for violation of Nevada's misdemeanor DUI statute, Nev. Rev. Stat. § 484.379(1), and for violation of a traffic law were redundant. Id. at 697. The court concluded that the convictions were not redundant because the "gravamen" of Nevada's DUI statute was different from that of the local traffic code:

> The gravamen of a DUI charge pursuant to [Nev. Rev. Stat. §] 484.379(1) is that the defendant was driving and/or in actual physical control of a vehicle under the influence of intoxicating liquor. A conviction for DUI under this statute does not require proof that the driver did any act or neglected any duty imposed by law while driving under the influence. . . . In other words, the defendant's ability to drive safely while intoxicated is not relevant to a charge under [Nev. Rev. Stat. §] 484.379(1).

Id. at 699 (emphasis added). Whether the defendant was operating a vehicle safely was germane to the charge involving the violation of a traffic law. Id. at 699 ("the gravamen of a 'rules of the road' charge under [the state traffic laws] or a

municipal ordinance is that the defendant was operating a vehicle in a particular manner that is prohibited by the relevant statute.”).

Hence, the Nevada Supreme Court has rejected the proposition that Nevada’s misdemeanor DUI law requires proof of a driver’s inability to operate the vehicle safely. State, 994 P.2d at 699. Therefore, we reject the same argument by Chu. The bankruptcy court’s interpretation of Nev. Rev. Stat. § 484.379(1) was correct.

2. The Sufficiency of the Evidence

We now turn to Chu’s final argument that the evidence was insufficient to support the bankruptcy court’s determination that the requirements of Nev. Rev. Stat. § 484.379(1) had been satisfied.

To conclude that Lara’s claim was nondischargeable under section 523(a)(9), the bankruptcy court had to determine that Lara sustained a personal injury caused by Chu’s unlawful operation of a motor vehicle while intoxicated. To determine unlawfulness, the bankruptcy court properly looked to Nev. Rev. Stat. § 484.379(1).

Nev. Rev. Stat. § 484.379(1) is in the disjunctive. Proof of any of the three alternatives articulated in Nev. Rev. Stat. § 484.379(1) establishes that a person has operated a vehicle on a public road unlawfully. It was unlawful for Chu to drive (1) under the influence of intoxicating liquor (Nev. Rev. Stat. § 484.379(1)(a)); (2) with a concentration of alcohol of 0.08 or more in her blood or breath (Nev. Rev. Stat. § 484.379(1)(b)); or

(3) with a concentration of alcohol of 0.08 or more in her blood or breath as measured within 2 hours after driving (Nev. Rev. Stat. § 484.379(1)(c)).

Lara had the burden of proving one of these three alternatives by a preponderance of the evidence. Grogan, 498 U.S. at 291.

The bankruptcy court concluded that Chu had operated her vehicle on a public road while under the influence of intoxicating liquor, the first alternative, Nev. Rev. Stat. § 484.379(1)(a). Unlike the other two alternatives, this alternative did not require a blood or breath test to establish intoxication. Instead, the bankruptcy court could conclude that Chu was intoxicated based on circumstantial evidence.

Indeed, there was ample circumstantial evidence to support this conclusion:

- Chu testified that she arrived at the restaurant at 11:00 p.m. but did not leave until 3:00 a.m.;
- Chu testified that she had at least two, possibly three, alcoholic drinks at the restaurant;
- After the accident, a police officer observed that Chu's clothes were soiled, she staggered when she walked, her eyes were bloodshot and watery, and her speech was slurred and slow;
- Chu admitted to the police that she had been drinking alcohol;
- The police officer "detected a strong odor of an alcoholic beverage emitting from [Chu's] breath and person;"
- The accident occurred despite the fact that there was

light traffic, the roadway was dry, straight, and level, and there was nothing obstructing either Chu's or Lara's vision;

- Chu admitted never seeing Lara's vehicle before colliding with it;
- Chu rear-ended Lara's vehicle;
- Chu's vehicle flipped over upon impact;
- Given the damage to both vehicles and the fact that the impact caused Chu's vehicle to roll over, coming to rest on its roof 331 feet from the point of impact, it was estimated that Chu was traveling at more than 100 miles per hour when the cars collided; and
- Chu testified that the Department of Motor Vehicles sent her two letters, the second of which stated that her driver's license was suspended for 90 days because her blood alcohol concentration was 0.08 or greater.

At trial, Chu testified that she did not believe that the two to three drinks of alcohol she admitted consuming rendered her unsafe to drive. The bankruptcy court, however, did not find her testimony credible, either as to the amount of alcohol she had consumed or as to her certainty that she was not impaired. The court concluded that Chu's recollection was not accurate because she admitted never seeing Lara's vehicle before the collision. Further, Chu's testimony that she left the restaurant at around 3:00 a.m. and that the accident occurred 15 to 30 minutes later, could not have been accurate. The Traffic Accident Report placed the accident at 4:22 a.m. Consequently, "the Court has little faith in [Chu]'s ability to accurately or objectively recall the circumstances and timing of the events

leading up to the accident."

The bankruptcy court ultimately determined, based on the records of the Henderson Police Department and Chu's testimony, that there was strong circumstantial evidence of Chu's intoxication at the time of the accident. This interpretation of the record was not clearly erroneous and it amply supports the conclusion that Chu had unlawfully operated a vehicle on a public road while intoxicated. Where Nev. Rev. Stat. § 484.379(1)(a) provides that unlawful intoxication may be found without a specific blood alcohol concentration, Chu's intoxication could be determined from this circumstantial evidence alone.

We conclude by noting that, had the bankruptcy court excluded Exhibits 4 through 12 as requested by Chu, the result would be no different because Chu's trial testimony alone supports the judgment.

Chu admitted that she voluntarily drove her vehicle on a public road after consuming alcoholic beverages at the restaurant. Chu also admitted that she rear-ended Lara's vehicle minutes after leaving the restaurant. Finally, Chu testified that her driver's license had been suspended because her blood alcohol concentration after the accident was .08 or greater.

Thus, even if all of the contested exhibits had been excluded, Chu's admissions at trial were sufficient to establish her violation of Nev. Rev. Stat. § 484.379(1)(b) and (c), as well as nondischargeability under section 523(a)(9).

CONCLUSION

The bankruptcy court's evidentiary rulings either were

correct or, to the extent incorrect, were not a prejudicial abuse of discretion because Chu's own testimony supported the judgment. We also conclude that the bankruptcy court correctly determined that Lara's claim was nondischargeable pursuant to section 523(a)(9).

We AFFIRM.