THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Joseph M. Strickland, Master-In-Equity

Appellate Case No.: 2023-001054

Wells Fargo Bank, National Association, not in its individual or banking capacity, but solely as Trustee on behalf of Green Tree Mortgage Trust 2005-HE1… ..... Respondent,

vs.

James E. Turner, a/k/a James Turner, Sr. ..... Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Plaintiff [hereinafter used interchangeably with "Respondent"] commenced this foreclosure action by the filing of a Summons and Complaint on July 31, 2018. Plaintiff's complaint alleges four causes of action. *R. p. 35*. The First Cause of Action seeks to quiet title on the two parcels of land that are the subject of this foreclosure action. The Second Cause of Action seeks to foreclose on a parcel of land on which a mortgage was originated by Emergent Mortgage Corporation. Of importance, Emergent Mortgage Corporation subsequently became HomeGold, Inc.[1] Although Emergent Mortgage Corporation ["Emergent"] had become HomeGold, Inc. ["HomeGold"], Plaintiff named Emergent as a defendant. Plaintiff did not name HomeGold as a Defendant.

Plaintiff named numerous other defendants, including the typical unknown defendants, in a foreclosure action. On October 15, 2018, Attorney Kelley Y. Woody was appointed for Cynthia Turner and the other unknown persons in this lawsuit.

[1]Defendant Turner requests the Court to take judicial notice of the public records located in the Office of the Secretary of State which shows that Emergent Mortgage Corporation subsequently became HomeGold, Inc. on May 9, 2000. A copy of the record from the Office of the Secretary of State for South Carolina is attached to this Memorandum as Enclosure 4.

Appellant James E. Turner, Sr. filed a pro se answer in the matter on August 24, 2018, and other defendants also filed answers in this case. Procedurally, this foreclosure was contested by Appellant. *R. p.61.*

The parties conducted discovery, and on June 10, 2021, the Plaintiff filed a Motion for Summary Judgment. In response to the Motion for Summary Judgment, Defendant James Turner filed over 400 pages of discovery documents in response. The trial court denied the Plaintiff's Motion for Summary Judgment, and the matter proceeded to trial before the Honorable Joseph M. Strickland, Master in Equity for the County of Richland on May 11, 2023.

Judge Strickland entered an Order of Foreclosure and Sale on June 15, 2023. *See, Master in Equity's Order and Judgment of Foreclosure and Sale*, dated June 15, 2023 [hereinafter referred to as the "Foreclosure Order"]. *R. p. 1*.

The Proposed Order of Foreclosure and Sale, as submitted by the Plaintiff, sought to sell the Appellant's property during the first week of August 2023. However, it was discovered, at the close of business on June 29, 2023, that the Property was included in the Master's Sale Roster for Monday, July 03, 2023, and it is scheduled to be sold on July 03, 2023, even though it had never been advertised in the newspaper for judicial sale as required by law. On June 30, 2023, Appellant filed an emergency *ex parte* Petition for *Writ of Supersedeas* in this Court, seeking an order to stop the sale of his home and business. This Court graciously granted the Appellant's Petition for *Writ of Supersedeas* which stopped the pending sale. Thereafter, on June 30, 2023, this Court temporarily granted the Petition for Supersedes, pending receipt of (1) a return to the petition and (2) this Court's receipt and review of a signed undertaking pursuant to *S.C. Code Ann. § 18-9-1970*. Subsequently, the Court received both items, and on July 19, 2023, this Court issued an order holding the appeal in abeyance until Respondent' pending motion to "set bond and for

justification of sureties" with the master-in-equity could be resolved.

The matter then returned to Judge Strickland for two separate hearings. First, on August 14, 2023, the matter came before Judge Strickland on Respondent's Motion to Set Bond and Justification of Sureties. After this hearing, Judge Strickland issued an order on August 21, 2023 setting a supersedeas bond for $250,000, which was required to be posted within ten days of the order. *See, Master's Order Setting Supersedeas Bond* [hereinafter referred to as "Supersedeas Bond Order No. 1"]. Supersedeas Bond Order No. 1 stated, in part, the following: "Should Defendant fail to submit the required bond within that time, a further hearing will be held, to be scheduled by Plaintiff's counsel." *Id*. Defendant was unable to acquire and file the required $250,000.00 Supersedeas Bond. However, Plaintiff's counsel did not schedule a hearing before the Master-in-Equity. Instead, on August 24, 2023, Defendant filed a Motion for Reconsideration of Supersedeas Bond No. 1, which brought the matter before Judge Strickland, post-appeal, for the second time for hearing. *See, Defendant's Motion for Reconsideration of Appeal Bond, filed on October 12, 2023.* As a result of this second post-appeal hearing, Judge Strickland issued an order on October 17, 2023, reducing the supersedeas bond to $150,000.00, which required the said bond to be submitted on or before November 13, 2023.[2] *Order Amending Appeal* Bond [hereinafter referred to as "Supersedeas Bond No. 2"].

On November 13, 2023, Defendant filed an undertaking in the amount of $150,000.00 with the Clerk of Court for Richland County. *See, Undertaking of Ernest E. Yarborough*. Respondent never filed a Motion challenging the $150,000.00 Undertaking. Defendant's counsel sent an informal, non-specific email to Judge Strickland requesting that that property be placed back on the Master's Sale's List. Appellant's counsel challenged such request with his own email

[2]At the end of the hearing on October 12, 2023, Judge Strickland granted Defendant counsel's request to require only one surety. However, the Supersedeas Bond No. 2 used the work "sureties'—which is obvious an error.

to Judge Strickland, and counsel reasonably thought that the matter ended with Appellant's counsel understanding that Respondent was going to bring the matter before Judge Strickland in order to challenge the $150,000.00 undertaking that was filed by the Appellant as a result of Supersedeas Bond Order No. 2. However, no such motion was filed. Strangely, the matter suddenly appeared, without notice to Appellant's counsel, on Judge Strickland's Master Sale List for sale January 4, 2023.

On November 7, 2023, the Court ordered Appellant to file his Initial Brief on December 7, 2023, and because of Appellant's Motion for Extension of Time, this Court extended the time to December 18, 2023, for Appellant to file and serve his Initial Brief.

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity. [This Court's] review of a case heard by a master who enters a final judgment is to determine facts in accordance with [its] own view of the preponderance of the evidence." *E. Sav. Bank, FSB v. Sanders*, 373 S.C. 349, 354, 644 S.E.2d 802, 805 (2007) (quoting *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997)). "However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses." *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). "[B]ecause the predominate issues involved in this appeal are equitable, [the appellate Court review[s] the evidence to determine the facts in accordance with [its] view of the preponderance of the evidence." *Heritage Fed. Sav. &Loan v. Eagle Lake &Golf Condos*., 318 S.C. 535, 539, 458 S.E.2d 561, 564 (Ct. App. 1995). However, "the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." *Id*. at 387-88, 544 S.E.2d at 623. *See, also, U.S. Bank Trust Nat. Ass'n v. Bell*, 385 S.C. 364, 373 (S.C. Ct. App.

2009).

"Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt. Once the debt and default have been established, the mortgagor has the burden of establishing a defense to foreclosure such as lack of consideration, payment, or accord and satisfaction. *See, Bandy v. Bandy*, 187 S.C. at 413(holding the burden was on defendant in mortgage foreclosure suit to establish her defense that mortgage and note secured thereby were without valuable consideration by preponderance of evidence).

FACTS

This foreclosure action was highly contested. *R. p. 61.* The key facts to support the arguments are as follows:

1. On or about November 6, 1996, Defendant James E. Turner [hereinafter Defendant J. "Turner"] took out a $121,500.00 mortgage on a parcel of land that that is in the County of Richland, consisting of 2 acres [hereinafter referred to as "Mortgage 1"] *R. p. 40, admitted.*
2. Mortgage 1 was given to Emergent Mortgage Corporation, who was the original lender. *Id.*
3. Appellant James Turner testified that he paid the mortgage and at least Mortgage 1 was paid and satisfied in full. *R. pp. 79-125*.
4. On or about October 05, 2007, Emergent Mortgage Corporation satisfied Mortgage 1 by filing a Lost Mortgage Satisfaction in the Office of the Register of Deeds for Richland County in Deed Book 1364, page 1234. *R. p. 44*.

5. Emergent Mortgage Corporation ["Emergent"] merged with and became HomeGold, Inc. Printout from Office of Secretary State of South Carolina.[3]
6. HomeGold, Inc. endured a 36-month investigation that ended with many of its leaders being indicted and convicted many securities and other crimes. *R. p. 470.*[4]
7. Plaintiff alleges to have received an assignment of Mortgage 1 from Carolina Investors, Inc., a company that was included in the HomeGold Investigation.
8. Carolina Investors and HomeGold officers were indicted and convicted:[5]
    - Larry Owen, former Carolina Investors President, pleaded guilty on July 22, 2004, to 22 counts of securities fraud. On March 30, 2005, Owen was sentenced to eight years in prison.
    - Earle Morris, former Carolina Investors Chairman, was convicted on November 18, 2004, on 22 counts of securities fraud and was sentenced to 44 months in prison. He is currently out on bond pending an appeal.
    - Anne Owen, former Carolina Investors Vice-President, pleaded guilty on July 18, 2005, to eight counts of securities fraud and was sentenced to 10 years suspended to 90 days in jail time. Owen was also sentenced to 5 years' probation, the first 18 months of which are to be served as home detention.
    - Karen Miller, former Chief Financial Officer of HomeGold, Inc., pleaded guilty on Tuesday, September 13, 2005, to one count of conspiracy. Miller's

[e]Defendant J. Turner requests the Court to take judicial notice of this fact.
[4] Defendant J. Turner requests the Court to take judicial notice of this fact.
[5] See, footnote 3 above.

sentencing is being deferred while she cooperates with the state grand jury investigation.

- Ronald Sheppard, Former Chief Executive Officer of HomeGold Inc., was indicted on Wednesday, November 16, 2005, by the State Grand Jury on 10 criminal counts to include securities fraud, conspiracy, bank fraud, insurance fraud, forgery, perjury, breach of trust and obtaining goods under false pretenses. Sheppard's trial is scheduled for January 15, 2007, in Lexington.
- Jack Sterling, former Chairman of the Board of Directors of HomeGold, Inc., was indicted on Wednesday, April 12, 2006, by the State Grand Jury, on three criminal counts to include two counts of securities fraud and conspiracy. If convicted on all counts, Sterling could face 25 years in prison and $105,000 in fines.

9. Effective August 31, 2015, Ditech Mortgage Corporation merged with Green Tree Servicing, LLC [“Greentree”], and Greentree was the surviving entity and Ditech Mortgage Corporation ceased to exist as a legal entity. *R. p. 470.*
10. To support its request to foreclose on Mortgage 2, Plaintiff relies upon an alleged assignment from Ditech that was signed on April 16, 2018, after Ditech no longer existed as a legal entity. *Id*.
11. Other than Defendant James E. Turner, Sr., the only witness testimony that Respondent offered at trial was from Charles Kevorkian [“Kevorkian”].

12. Kevorkian is employed with Shellpoint mortgage Services as a litigation foreclosure case manager. *R. pp. 129-243*.
13. He started working for Shellpoint in December of 2019. *R . p . 1 3 0* .
14. Kevorkian testified that he has a small portfolio of loans that are in default that he manages. However, he never testified that he manages Appellant's loan. *Id.*. His job is to review files, documents, prepare for contested trial, uncontested trials, as well as depositions. *Id.*
15. Respondent admitted 25 Exhibits in an attempt to prove its case. *R. p. 319.* Defendant's counsel did not object to the admissibility of most of the documents. However, he strenuously objected to Kevorkian admitted testimony concerning the information contained in the said documents. The Court allowed defense counsel to state a standing objection to Kevorkian's testimony. *R. p. 63.*
16. Defense counsel's objections to Kevorkian's testimony were grounded in the legal holdings of *Deep Keel, LLC v. Atlantic Private Equity Group,* 413 S.C. 58, 773. S.E.2d 60, 614 (S.C. Ct. App. 2015). In stating his consistent and standing objections to Kevorkian's testimony, defenses counsel relied upon *Deep Keel* by name. *Id.*
17. No loan history data was admitted. Exhibits 24 and 25 (contained the alleged loan historical data and it was marked for identification, but it was not admitted). Said documents were later submitted to the Clerk for Filing by the Appellant, but such documents were not admitted as exhibits during the trial. Therefore, these two documents did not constitute the payment history of the mortgages at issue.

18. Plaintiff admitted the Lost Mortgage Satisfaction, dated October 5, 2007, by Emergent swearing that the $121,500.00 Mortgage had been satisfied in full. *R. p. 260.* This document was given under oath by an Emergent Official. Respondent did not produce a witness to refute this document or to prove that it was signed in effort. Turner referred to this document to support his position that the mortgage was paid in full. Turner's testimony did not challenge this satisfaction. Over Defendant's objection, Kevorkian simply stated that payments were made after this document was signed by Emergent *R. p. 169.*

19. The official records from Delaware Secretary of State established that Ditech Mortgage Corporation and Green Tree Servicing LLC merged on August 31, 2015, and Green Tree survived the merger and Ditech ceased to exit of the merger date. *R. p. 284.* However, despite Ditech's non-existence as of **August 31, 2015**, Respondent contented at trial that Ditech issued Plaintiff rights to the $55,000.00 by assignment dated **April 16, 2018**. Plaintiff's Exhibit 22 [hereinafter referred to as the "Ditech Assignment']. Plaintiff's Exhibits 22. This is the only documentary evidence that Kevorkian used to testify, over objection, that Plaintiff was the holder of the note involving the $55,250.00 mortgage. *R. p. 176.*

20. Respondent admitted, over Defendant's objection, an affidavit of verified statement of account for both loans, signed by Steven Reeves, a Litigation Specialist with Shellpoint. *See, Exhibits Plaintiff's Exhibits 19 and 24.* Kevorkian did not testify that he had personal knowledge of the information contained in the verified statements. *R. pp. 10-171.*

If necessary, additional relevant facts are included in the discussion of each argument as

allowed by the appellate rules of this Court. *See, Rule 208(b)(1)(E)*, SCACR (requiring citation to authority in the argument section of an appellant's brief).

ARGUMENTS

A. THE MASTER-IN-EQUITY ERRED IN ALLOWING THE RESPONDENT'S LITIGATION SUPPORT EMPLOYEE TO TESTIFY CONCERNING THE INFORMATION CONTAINED IN THE LOAN DOCUMENTS, ADMITTED OR NOT ADMITTED.

The admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal. *Recco Tape Label Co. v. Barfield*, 312 S.C. 214, 439 S.E.2d 838 (1994). In the context of a contested foreclosure, like other contested cases, the admissibility of documents and testimony was clearly established by 2015 as a result of this Court's holding in *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, supra, which held as follows:

> A party offering evidence must meet "[t]he requirement of authentication ... as a condition precedent to admissibility." Rule 901(a), SCRE. The authentication requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Id. "[T]he burden to authenticate ... is not high" and requires only that the proponent "offer[ ] a satisfactory foundation from which the jury could reasonably find that the evidence is authentic." United States v. Hassan,742 F.3d 104, 133 (4th Cir.2014) (decided under Fed. R. Evid. 901(a)); see also29A Am. Jur. 2d Evidence § 1045 (2008) ("The authentication requirement does not demand that the proponent of ... evidence conclusively demonstrate [its] genuineness. ").

Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 773 S.E.2d at 610 [sometimes referred to as "Deep Keel"]. *Deep Keel* provided additional instructions as follows:

> However, establishing that a witness is qualified to testify about a business record does not automatically lead to admission of that record. The qualified witness must then lay the foundation to meet the requirements of Rule 803(6) and section 19–5–510. *See State v. Davis,*371 S.C. 170, 178–79, 638 S.E.2d 57, 62 (2006) (stating the proponent of evidence has the burden of establishing that a record falls within a hearsay exception). There are numerous elements to the foundation for a business record to which Bynum did not testify in this case. *See Ex parte Dep't of Health*

> *Envtl. Control*,350 S.C. at 249–50, 565 S.E.2d at 297 (listing the elements of the business records exception).

Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 773 S.E.2d at 61. In other words, Deep Keel recognizes that loan documents can be properly admitted "to show the existence of an agreement to loan money, the terms of repayment, and the existence of a security interest in the real estate. Because the loan documents [are] not offered to prove the truth of any statement, they [are] not hearsay and the master [can] correctly admit[] them." *Deep Keel, LLC v. Atlantic Private Equity Group, LLC,* 773 S.E.2d at 613 (S.C. Ct. App. 2015). However, *Deep Keel* held as follows:

> . . .Rule 803(6) does not apply to admit live testimony offered to prove the contents of a record containing hearsay when that record is not offered in evidence. See Thompson v. State, 705 So.2d 1046, 1048 (Fla.Dist.Ct.App.1998) ("While the business-records exception to the hearsay rule allows the admission of '[a] memorandum, report, record, or data compilation,' it does not authorize hearsay testimony concerning the contents of business records which have not been admitted into evidence." (citation omitted))."

Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 773 S.E.2d at 614-15.

In the case now before this Court, Judge Strickland erred by allowing Mr. Kevorkian, a litigation support specialist, to provide live testimony concerning the payment history for the two loans because the business records supporting such conclusions were not admitted into evidence, and such live testimony squarely violated the holdings in *Deep Keel*.

First, before reviewing the live testimony, it is important to identify the records upon which the impermissible testimony was based. The alleged compilation of the loans' history is contained in two documents, identified in the trial transcript as Plaintiff's Exhibits 25 and 26 [collectively referred to as the Loan History Documents]. Exhibits 25 and 26 were not admitted into evidence because Respondent's counsel "laid the exhibits on the floor" and forgot to admit them during his case-in-chief. *R. pp. 181-182.* [Defense counsel stated, in part

the following: ". . .[C]andidly, I forgot to admit them. . ."]. *R. p. 182*. Respondent counsel discovered fatal error during the cross-examination of Kevorkian. Defense then objected to the Loan History Documents' admission. *R. pp. 182-183.* [thereafter, the matter was not revisited by the Court and the Loan History Documents was later filed with the Clerk of Court as Exbibits that were not admitted. *See, the Exhibit list contained in the Transcript. R. pp. i-ii.*

To that end, Respondent counsel's "candid error" now puts him squarely in the "judicial scope" as created by *Deep Keel*. In *Deep Keel*, a similar foreclose case, the witness was allowed to testify concerning the payment history of the loan, but the loan history documents were not admitted. In *Deep Keel*, this Court sustained the admission of the records other business records but denied the live testimony for the following reasons:

> Deep Keel argues Bynum was a 'qualified witness under Rule 803(6) and section 19–5–510 and thus should have been permitted to testify to the calculations he made from the information contained in the records. Deep Keel relies on Twelfth RMA Partners, L.P. v. National Safe Corp.,335 S.C. 635, 518 S.E.2d 44 (Ct.App.1999), in which this court held a witness is qualified to testify about a business record, despite the fact he or she did not personally participate in the creation of the record and was not the custodian 'at or near the time" the record was made. 335 S.C. at 642, 518 S.E.2d at 48. We held a person is a 'qualified witness' under the rule if the testimony conveys information from a person 'with knowledge' at the time the records were created. *Id.*
>
> In this case, Bynum appears to be a 'qualified witness' under Twelfth RMA because he studied the manner in which Community First and CresCom Bank maintained the records before he purchased the note. Thus, his testimony conveyed information from a person with knowledge at the time the records were created. 335 S.C. at 642, 518 S.E.2d at 48 [this holding simply allowed the records to come in].

Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 773 S.E.2d at 615. In rejecting Bynum's testimony as hearsay, this Court also stated the following:

> We first consider whether Bynum's testimony concerning the amount due on the note was hearsay. At the hearing, Bynum testified he reviewed "all the documents related to the amounts due and the payments that were made on the loan at the time [Deep Keel] purchased it." He further testified these documents contained "a

> calculation ... regarding what the balances are today." He was then asked to testify to the current principal balance due on the note. Atlantic objected on the basis that Bynum's testimony regarding the principal balance "is based upon his review of bank records," which were hearsay. The master allowed Bynum to testify that the remaining balance of the original principal was $1,532,238.
>
> Bynum then explained how that figure was calculated. He testified that by the time Deep Keel acquired the loan, which was originally for $2,000,000, the principal had been reduced due to payments made by Atlantic, rent received from tenants, and proceeds from the sale of one of the properties securing the loan. He explained the current balance was calculated from "loan agreements" and "accounting records" that "show what payments were made, when they were made, [and] how much interest accrued." He then testified that with the addition of interest on the principal and several other costs, the total amount remaining due was $1,655,027. We find Bynum's testimony was hearsay. **Bynum had no personal knowledge of any transactions with Atlantic before he purchased the note. His testimony demonstrates his knowledge was based exclusively on documents that show payments and interest charges**. By testifying to a conclusion based only on statements he read in documents, Bynum necessarily testified to the truth of those statements. His testimony, therefore, was offered to prove the truth of the statements and was hearsay.

Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 773 S.E.2d at 613-14 [emphasis added]. Consequently, this Court further explained "[b]ecause the business records exception applies only to the admission of business records themselves; the exception does not apply to Bynum's hearsay testimony." *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, 773 S.E.2d at 614.

The facts of this case are factually analogous to the facts in *Deep Keel*. Kevorkian started working for Shellpoint in December of 2019. *R. p.129, Line 9.* He is employed with Shellpoint as a litigation foreclosure case manager. *R. p. 76, Line 2*. The foreclosure Complaint in this case was filed on July 31, 2018. Like Bynum in Deep Keel, the information Kevorkian knows about his case was derived solely from reviewing the files once he started working for Shellpoint over seventeen months after he started working for Shellpoint. *R. p. 129.*

p. 75. Kevorkian, like Bynum, has absolutely no personal knowledge concerning the matters in the business records, and fatal to the Respondent's foreclosure cause, Kevorkian testified

concerning the data contained in Plaintiff's Exhibits 25 and 26—the Loan History Documents—which were not admitted into evidence.

Kevorkian testimony also relied upon Plaintiff's Exhibits 19 and 24, which are the Affidavits of Verified Statements of Account prepared by Reese, another litigation foreclosure case manager. *R. p. 171; R. p. 177.* This testimony is also inadmissible hearsay because the figures contained in the affidavits are based upon the data contained in the unadmitted Loan History Documents. No testimony was admitted showing that Reese or Kevorkian had personal knowledge of the information contained in the business record or that they obtained there information from a business-connected person with personal knowledge. Therefore, for the same reasons as stated in Deep Keel, Kevorkian's testimony is hearsay, and the information contained in the affidavits as prepared by Reese is not admissible to prove the matter asserted—the information contained in the affidavits is inadmissible hearsay.

In summary, the entity employing Kevorkian did not receive the documents until 2018. Respondent failed to present testimony for a person with knowledge, whether conveyed or otherwise, of the transactions before 2019. Moreover, the unique history of these loans being associated with a group of individuals who went to prison for fleecing investors strongly weighs against this Court finding that the evidence was admissible based upon the discretion of the trial judge. The inescapable conclusion is that Kevorkian's testimony was hearsay.

B. ADMISSION OF THE HEARSAY TESTIMONY WAS PREJUDICIAL.

A finding that Kevorkian's testimony was erroneously admitted as hearsay does not end the analysis by this Court. This Court "must next determine whether [Turner] was prejudiced by the admission of the evidence". *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, 773 S.E.2d at 615.

In *Deep Keel,* this Court concluded that the testimony prejudiced the Atlantic Private Eqity Group. The Court stated that "[w]ithout Bynum's hearsay testimony concerning the unpaid balance, Deep Keel could not prove the amount remaining due on the debt, and the master had no basis for calculating the amount of the deficiency. We find the error prejudiced Atlantic." *Id.* Just like the testimony in Deep Keel, without Kevorkian's hearsay testimony concerning the unpaid balance, the Respondent can not prove the amount remaining on the debt, and the master had no basis for even calculating whether Turner was in default. As a matter of law, the Respondent's case fails because of a lack of proof. Unlike the situation in Deep Keel, there is no requirement that the Court remand the matter, this Court should dismiss the foreclosure action in this case for lack of sufficient proof. *See, Ives et al. v. Rutland et al,* 135 S.C. 173, 180 (S.C. 1926)["In action of foreclosure payment is affirmative defense"]. Without any proof of non-payment, Turner's affirmative defense prevails]. Therefore, this Court should reverse the master and dismiss the foreclosure case.

C. RESPONDENT'S CASE SHOULD BE DISMISSED BECAUSE IT FAILED TO ESTABLISH A PRIMA FACIE CASE OF FORECLOSURE.

The action before the master was highly contested. "Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt*".* *U.S. Bank Trust Nat. Ass'n v. Bell*, 385 S.C. at 374-75. Once the debt and default have been established, the mortgagor has the burden of establishing a defense against foreclosure such as lack of consideration, payment, or accord and satisfaction. *See, Bandy v. Bandy*, 187 S.C. 410 at 413 (holding the burden was on defendant in mortgage foreclosure suit to establish her defense that mortgage and note secured thereby were without valuable consideration by preponderance of evidence). *Id.* "A complete failure of proof concerning an essential element of

the non-moving party's case necessarily renders all other facts immaterial." *Gauld v. O'Shaugnessy Realty*, 380 S.C. 548, 559 (S.C. Ct. App. 2008).

Other than Turner, the only witness called by the Respondent to establish its prima facie case of foreclosure was Kevorkian. If this Court finds that Kevorkian testimony was inadmissible, such finding will create a situation where the Plaintiff's case would suffer from a lack of proof, a fatal procedural situation for its cause. Appellant asserts that Respondent cause must be dismiss because it failed to prove its case with the defective testimony provided by Kevorkian. With Kevorkian's testimony excluded, Respondent fails to establish a prima facie case for foreclosure. During the trial, Respondent/Plaintiff offered or attempted to admit 25 exhibits in support of its case-in-chief. For the most part, Defendant did not object to the admissibility of the loan documents because of the dispositive holding in Deep Keel concerning the low standard for authentication. The crux of Defendant's assertion at trial, and now before this Court, is that Respondent's key, and witness other than Defendant, was not a qualified witness to testify concerning the content of the loan documents. Before Judge Strickland, defense counsel , strenuously asserted the holdings of *Deep Keel* in his failed attempt to block the testimony of Charles Kevorkian, Respondent's star witness, from testifying concerning the contents of the loan documents. Such finding would give Turner's "payment defense" testimony more strength and leave it as the prevailing evidence in the case.

Consequently, Appellant contends that this Court should dismiss the Respondent's foreclosure complaint because Respondent's proof failed at trial to establish a *prima facie* case.

D. THE COURT ERRED IS SETTING ASIDE THE LOST MORTGAGE SATISFACTION BECAUSE RESPONDENT FAILED TO PROVE THAT LOST MORTGAGE SATISFACTION WAS SIGNED IN ERROR BY EMERGENT MORTGAGE CORPORATION.

On or about November 6. 1996, Turner borrowed $121,500.00 from Emergent Mortgage Corporation, and he executed customary note and mortgage [hereinafter referred to as "Mortgage 1*"*]. *See, R. pp. 40, paragraphs 22-24; see also, R. pp. 271-274.* For over 10 years, Turner paid Mortgage 1 until it was paid in full. *R. pp. 769-129.* Thereafter, on October 5, 2007, Emergent Mortgage Corporation, through its officer Carl Jackson, as witnessed by David Robinson, satisfied Mortgage 1 as paid in full by the filing of a sworn Lost Mortgage Satisfaction. *See, R. p. 260*. In the Lost Mortgage Satisfaction, Mr. Jackson stated under oath, in part, the following: (1) That Emergent was the bone fide owner and holder of Mortgage 1; (2) That as of the date of satisfaction, Mortgage 1 had not been assigned, hypothecated or otherwise disposed of; (3) That Mortgage 1 had been lost or destroyed and after diligent search cannot be found; (4) That the debt associated with Mortgage 1 "is paid in full and the lien" had been satisfied. *Id*. The Lost Mortgage Satisfaction was duly filed in the public real estate records of Richland County, State of South on October 7, 2007, at Mortgage Book 1364, page 1234. *See, R. pp. 42-43 [Complaint, paragraphs 35 to 38]; R. p. 26 [Plaintiff's Exhibit 5]*.

Despite this devastating evidence of satisfaction of the debt, the Respondent Plaintiff did not call a single witness associated with Lost Mortgage Satisfaction. No one formerly connected to Emergent Corporation or to Carolina Investors, Inc. was called to testify that the mortgage was satisfied in error. *Transcript, pp. 75-126.* Moreover, Plaintiff waited 11 years after the mortgage was satisfied to raise an issue associated with Lost Mortgage Satisfaction. *R. p. 202.* It is well settled in this state:

> [T]he debt must be presumed to be satisfied from the lapse of time. If this presumption prevails, the mortgage is as completely discharged as if the debt had been satisfied by actual payment. Where the statute of limitations applies, it is presumption *juris et de jure.* It cannot be rebutted. A debtor may admit that the debt

> has not been paid, and in the same breath insist upon the protection and bar of the statute. But **a presumption of satisfaction arising from the lapse of time may be rebutted.**

Lever v. Lighting Galleries, Inc., 374 S.C. 30, 34 (S.C. 2007). By failing to call a single witness to rebut the presumption of satisfaction arising from the lapse of time, Plaintiff failed to establish a *prima facie* case for foreclosure of Mortgage No. 1. Therefore, this Court should find that the presumption prevails and that the mortgage is completely discharged as if the debt had been satisfied by actual payment. Turner testified that he paid the debt, and the documentary evidence supported his position. However, given the presumption of satisfaction arising from the lapse of time and Plaintiff's absolute failure to rebut said presumption, this Court should conclude that the trial judge erred in settling aside the Lost Mortgage Satisfaction, and that the debt is considered paid in full by payments by Turner or by the presumption of satisfaction.

Appellant counsel acknowledges that "[e]quitable principles may be applied to cancel a mortgage satisfaction." Specifically, "`when the legal rights of the parties have been changed by mistake, equity restores them to their former condition, when it can be done without interfering with any new rights acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to other parties.'" Thus, a mortgage that has been mistakenly satisfied may be reinstated only where there is no third party who, without notice of the mistake, subsequently and in good faith acquires an interest in the property. *First Palmetto Savings Bank v. Patel*, 344 S.C. 179, 183-84 (S.C. Ct. App. 2001). In this case, Plaintiff failed to prove that the legal rights of a third party have changed because failed to tender any qualified witness who could establish this fact by sworn testimony. Additionally, third parties are involved in this case, to wit: the Internal Revenue Service, Emergent Mortgage Corporation, Turner, and Carolina Investors, Inc. Emergent and Carolina investors were never brought before the Court. For over 16 years,

Turner, as a third party, relied upon mortgage satisfaction. Such mortgage satisfaction cannot be set aside without interfering with the rights of third parties. Thus, equitable principles cannot be used to cancel the satisfaction when Plaintiff's hands are dirty—dirty by waiting so many years to complain.

E. AS TO MORTGAGE 2, PLAINTIFF FAILED TO ESTABLISH THAT IT WAS THE RIGHTFUL HOLDER OR OWNER OF THE RIGHTS TO MORTAGE 2. THEREFORE, PLAINTIFF FAILED TO ESTABLISH A PRIMA FACIE CASE ENTITLING IT TO FORECLOSE ON MORTGAGE OR FAILED TO ESTABLISH THAT IT HAD STANDING TO PURSUE THE FORECLOSURE.

Plaintiff's Fourth Cause of Action seeks to foreclose on Mortgage 2. *R. pp. 43-52*. Mortgage 2 involves a loan that Appellant acquired from Green Tree Servicing Corporation for the sum of $55,250.00 on or about February 12, 1997. *R. pp. 43-44*; *see also R pp. 302, 307.* Less than a month before the Summons and Complaint were filed, Plaintiff filed an Affidavit of Lost Assignment claiming enforcement rights to the note and mortgage associated with Mortgage 2 [hereinafter referred to as the "Ditech Assignment"]. *R. p. 287*. Not a single witness associated with Ditech was called to testify concerning the circumstances which caused the Ditech Assignment to be signed by Ditech officials.

Respondent is required to show that it has standing to bring the foreclosure action as the owner or holder of the note and mortgage or rights thereto. *See, Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). There are fatal flaws to the Ditech Assignment which prevent it from proving standing. For example, the official records from Delaware Secretary of State established that Ditech Mortgage Corporation merged with Green Tree Servicing, LLC, effective on August 31, 2015. Thereafter, Ditech Mortgage Corporation

ceased to exist as a viable business entity. *See, R. p. 284*. In essence, Ditech disappeared from the business landscape almost three years before the Respondent claimed that it signed the Ditech Assignment. Moreover, not a single witness has testified that Plaintiff ever possessed the original note or mortgage connected to Mortgage 2. The trial record is completely devoid of any evidence from a live witness to prove that Respondent had standing to pursue the foreclosure.

A review of this additional other facts also raises substantial doubt concerning the believability of the Ditech Assignment—no Ditech Assignment equals no standing in this case. For example, Kevorkian testified that the last payment made on Mortgage 2 was in 2009. *R. p. 202*, which means that it took 9 years for someone to discover that it did not have the original mortgage in its possession. Further, the Court should recognize that the Plaintiff is a trust that was formed in 2015, the year designated in its title. Not a single person associated with the trust or associated with the signing of the Ditech Assignment was called by Respondent to testify concerning the circumstances which gave rise to the creation of the Ditech Assignment. Importantly, Kevorkian had no personal knowledge concerning the creation of the Ditech Assignment, because he did not come on aboard until 2019, after the assignment was created nor did he received knowledge from anyone associated with the creation of the Ditech Assignment.[6] Even if the Ditech Assignment is considered to be a business record, Kevorkian, for the reasons previously discussed, was not qualified to testify about the content of the business record because of his lack of personal knowledge. In other words, Kevorkian did not convey any information that

[6] In *Deep*, this Court stated that a qualified witness can testify despite the fact he or she did not personally participate in the creation of the record and was not the custodian "at or near the time" the record was made. *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, 773 S.E.2d at 615. However, to be qualified as a witness, the testifying person must convey information from a person "with knowledge" at the time the records were created. *Id.*

he received information from a person, with knowledge connected with the preparation of the Ditech Assignment. To that end, Plaintiff failed to prove that it had standing from a valid assignment.

CONCLUSION

For the reasons stated within, this Court should reverse the judgment of the circuit court.

At Orangeburg, SC

Dated: May 12, 2025

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Joseph M. Strickland, Master-In-Equity

Appellate Case No.: 2023-001054

Wells Fargo Bank, National Association, not in its individual or banking capacity, but solely as Trustee on behalf of Green Tree Mortgage Trust 2005-HE1… ..... Respondent,

vs.

James E. Turner, a/k/a James Turner, Sr. ..... Appellant.

PROOF OF SERVICE

I, Glenn Walters, Sr., certify that I have served or caused to be served the foregoing FINAL BRIEF OF APPELLANT in this case on May 12, 2025, by mailing it to opposing counsel(s) by depositing a copy in the United States mail, with proper postage and return address clearly visible, addressed as follows:

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