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SC Court of Appeals

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.

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Appellant James E. Turner, through counsel, respectfully petitions this Court for rehearing pursuant to *Rule 221, SCACR*, and includes within this petition his suggestion for rehearing en banc pursuant to *Rule 219, SCACR*.

This Court filed its unpublished opinion on July 1, 2026, affirming the Master-in-Equity's order of foreclosure and sale. Appellant respectfully submits that rehearing is necessary because the panel overlooked or misapprehended controlling record facts and controlling law concerning:

(1) the limits of the business-records exception under *Rule 803(6), SCRE*, and *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*., 413 S.C. 58, 72, 773 S.E.2d 607, 614 (Ct. App. 2015); (2) the distinction between admitting a business record and permitting a litigation-support witness to testify to the truth of its contents; (3) the effect of a late redirect admission of loan histories after live hearsay testimony had already been given; (4) Appellant's preservation of the Mortgage 2 holder/standing issue; and (5) the burden required to cancel or set aside a sworn recorded mortgage satisfaction.

Appellant further suggests rehearing en banc because the opinion creates a conflict with Deep Keel and substantially affects foreclosure litigation throughout South Carolina. The opinion effectively allows a loan servicer's litigation employee to prove debt, default, payment history, balance, and assignment authority through conclusory "business records" testimony, even where the underlying records span decades, multiple predecessor entities, and disputed corporate assignments.

I. Points Overlooked or Misapprehended

A. The panel overlooked that Appellant's objection was not merely authentication of documents, but to Kevorkian's live testimony concerning the truth of the contents of the loan records.

The opinion frames the issue as whether Wells Fargo's witness was "qualified" and whether the loan documents were ultimately admissible under *Rule 803(6), SCRE*. Respectfully, that framing misses the central Deep Keel issue preserved below and argued on appeal.

Appellant did not merely argue that the loan documents could not be authenticated. Appellant argued that Charles Kevorkian, a litigation foreclosure case manager for Shellpoint, could not testify to the truth of the contents of records he did not create, did not personally maintain during most of the life of the loans, and did not receive from a person with knowledge at the time the records were created. Kevorkian began working for Shellpoint in December 2019. R. p. 130. The loans at issue were originated in 1996 and 1997. R. pp. 40, 43-44, 271-274, 302, 307. The complaint was filed July 31, 2018, before Kevorkian began working for Shellpoint. R. p. 35; R. p. 130. Defense counsel made a standing objection to Kevorkian's testimony concerning the contents of the documents and specifically relied on *Deep Keel*. R. p. 63. The record therefore preserved the precise issue *Deep Keel* decided: a witness may authenticate records in proper circumstances, but *Rule 803(6*) does not permit live hearsay testimony offered to prove the truth of the contents of business records.

Deep Keel controls. In that case, this Court held that loan documents could be admitted to establish the loan agreement, repayment terms, and security interest, but the witness's testimony about the balance due was hearsay because his knowledge came solely from documents showing payments and charges. *Deep Keel, LLC v. Atl. Priv. Equity Grp., LLC*, 413 S.C. 58, 69-72, 773 S.E.2d 607, 613-14 (Ct. App. 2015). The Court explained that "*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." *Id.* at 72, 773 S.E.2d at 614. The opinion's analysis collapses two different questions: whether documents may be admitted and whether Kevorkian could testify to the truth of their contents. *Deep Keel* treats those issues separately. This Court should grant rehearing and correct that misapprehension.

B. The panel misapprehended the Rule 803(6) foundation because the record did not establish that Kevorkian conveyed information from a person with knowledge at the time the records were created.

The opinion states that Kevorkian was qualified because he was Shellpoint's authorized representative, was familiar with Shellpoint's, Green Tree's, and Ditech's procedures and documents, and conveyed information from a person "with knowledge" at the time the records were created. Respectfully, the record does not support that conclusion. A qualified witness under *Rule 803(6), SCRE*, and *S.C. Code Ann. § 19-5-510* must do more than recite that records were kept in the ordinary course. The witness must identify the record, explain the mode of preparation, and establish that the sources of information, method, and time of preparation justify admission. *Ex parte Dep't of Health & Env't Control*, 350 S.C. 243, 249-50, 565 S.E.2d 293, 297 (2002). The proponent bears the burden of establishing that the records fall within the hearsay exception. *State v. Davis*, 371 S.C. 170, 178-79, 638 S.E.2d 57, 62 (2006). *Deep Keel* recognizes that a witness may be qualified even without personally creating the records, but the witness must still convey information from a person "with knowledge" at the time the records were created. *Deep Keel,* 413 S.C. at 73, 773 S.E.2d at 615; *Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.,* 335 S.C. 635, 642, 518 S.E.2d 44, 48 (Ct. App. 1999).

The record here does not show that Kevorkian conveyed information from anyone with knowledge of the records when the loans were originated, serviced, transferred, boarded, merged, assigned, accelerated, or declared in default. The record shows instead that Kevorkian was a litigation foreclosure case manager whose job was to review files and prepare for contested trials, uncontested trials, and depositions. R. pp. 129-130. He was the only witness Wells Fargo called, other than Turner. R. pp. 129-243. He was not employed by the original lender, Emergent, Carolina Investors, HomeGold, Green Tree, or Ditech during the creation of the historical records central to this foreclosure. R. pp. 129-130.

This case involves more than a routine loan record. It involves two loans originated in 1996 and 1997, a disputed 2007 sworn lost mortgage satisfaction, a disputed 2018 assignment, and predecessor entities whose records allegedly passed through multiple corporate hands. R. pp. 40, 43-44, 260, 271-274, 284, 287, 302, 307, 470. A conclusory foundation by a 2019 Shellpoint litigation employee did not satisfy *Rule 803(6), § 19-5-510, DHEC, Davis, or Deep Keel.*

C. The panel overlooked that late redirect admission did not cure prior hearsay testimony and did not eliminate prejudice.

The opinion states that although Turner argued the loan payment histories were not admitted, the Master permitted their admission on redirect and Turner "opened the door" by demanding that the witness show the payment history. Respectfully, this overlooks the timing and function of the objection. During cross-examination, Wells Fargo's counsel acknowledged the problem, stating in substance that he had "forgot[ten] to admit" the loan history exhibits. R. pp. 181-182. Defense objected to admission at that point. R. pp. 182-183. By then, Kevorkian had already testified to the loan information, alleged default, balances, payment history, and amounts due based on records that had not yet been admitted. R. pp. 129-183. The later redirect admission of Exhibits 25 and 26 could not retroactively transform prior hearsay testimony into competent evidence. *Deep Keel's* prejudice analysis turns on whether, without the hearsay testimony concerning the unpaid balance, the plaintiff could prove the amount remaining due and give the Master a basis to calculate the debt. *Deep Keel*, 413 S.C. at 73-74, 773 S.E.2d at 615.

The opinion also misapprehends the "opened the door" doctrine. Appellant did not introduce new matter to prove Wells Fargo's case. Appellant challenged the absence of competent evidence supporting Kevorkian's testimony. A defendant does not waive a hearsay objection, business-records objection, or foundation objection by demanding that a witness identify the documents supposedly supporting his testimony. *Rule 611(d), SCRE,* governs the scope of redirect; it does not excuse Rule 803(6), Rule 602, Rule 802, or § 19-5-510. The point is not merely whether redirect was allowed. The point is that Wells Fargo used Kevorkian's testimony as substantive proof of the contents of records before those records were properly admitted and without a sufficient Rule 803(6) foundation. That was the precise error condemned in Deep Keel.

D. The panel overlooked that the prima facie foreclosure issue was independent of the hearsay ruling.

The opinion declined to address Appellant's prejudice and prima facie case arguments because it held Kevorkian's testimony was admissible. Respectfully, even if this Court adheres to part of its evidentiary ruling, the prima facie issue remains independently preserved and dispositive.

A foreclosure plaintiff has the burden of establishing the debt and the mortgagor's default. *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 374-75, 684 S.E.2d 199, 205 (Ct. App. 2009). Only after the debt and default are established does the burden shift to the mortgagor to prove defenses such as payment or accord and satisfaction. *Bandy v. Bandy*, 187 S.C. 410, 413, 197 S.E. 396, 397 (1938). A complete failure of proof on an essential element is fatal. *Gauld v. O'Shaugnessy Realty Co*., 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008).

In this case, the foreclosure action was highly contested. R. p. 61. Wells Fargo relied on Kevorkian as its only substantive witness other than Turner. R. pp. 129-243. Appellant challenged whether Wells Fargo proved the debt, default, amount due, and holder/owner status through competent evidence. R. pp. 63, 129-183, 169, 176, 181-183, 202, 260, 284, 287. Thus, the prima facie issue was not merely duplicative of the hearsay issue; it was a separate challenge to Wells Fargo's proof. The opinion should be reheard because it disposed of issues two and three under *Futch* without addressing the independent failure-of-proof arguments.

E. The panel misapprehended the preservation of the Mortgage 2 assignment/standing issue.

The opinion holds that Turner did not preserve the argument that Wells Fargo lacked standing to foreclose Mortgage 2 based on the Ditech assignment. Respectfully, the record and briefing show otherwise. Appellant's brief squarely argued that, as to Mortgage 2, Wells Fargo failed to establish that it was the rightful holder or owner of the rights to Mortgage 2 and therefore failed to establish a prima facie foreclosure case or standing. Appellant cited the complaint allegations for Mortgage 2, the note and mortgage, the lost assignment, the Ditech assignment, and the Delaware Secretary of State materials. R. pp. 43-44, 284, 287, 302, 307, 470. Appellant further argued that no Ditech witness testified concerning the circumstances causing the Ditech assignment to be signed and that Kevorkian had no personal knowledge concerning creation of the Ditech assignment. R. pp. 176, 287. At trial, Wells Fargo used Plaintiff's Exhibit 22, the Ditech assignment, as the documentary basis to claim the right to enforce the $55,250 Mortgage 2 obligation. R. p. 176. The official Delaware records showed Ditech Mortgage Corporation merged with Green Tree Servicing, LLC effective August 31, 2015, and Green Tree was the surviving entity, and Ditech Mortgage Corporation ceased to exist. R. p. 284. Yet Wells Fargo relied on an April 16, 2018, assignment from Ditech. R. p. 287. This was not a new issue raised for the first time on appeal. It was part of the same preserved objection to Wells Fargo's proof of holder/owner status, its right to enforce, and Kevorkian's lack of personal knowledge. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). The issue was raised to the Master through the evidentiary challenge and the challenge to Wells Fargo's proof, and it was argued on appeal as a separate issue concerning Mortgage 2. Rehearing is necessary because the preservation ruling overlooks the record and prevents review of a dispositive Mortgage 2 defect.

F. The panel overlooked that Wells Fargo bore the burden to set aside the sworn recorded Lost Mortgage Satisfaction.

The opinion holds that Emergent lacked authority to satisfy Mortgage 1 in 2007 because Emergent assigned its Mortgage 1 interest to Carolina Investors in 1996. The opinion relies on *Williams & Co. v. Paysinger,* 15 S.C. 171, 173 (1881). Respectfully, this analysis overlooks the burden and the evidence.

Wells Fargo sought affirmative equitable relief to set aside a recorded mortgage satisfaction. Plaintiff admitted the Lost Mortgage Satisfaction, dated October 5, 2007, in which Emergent swore that the $121,500 Mortgage 1 had been satisfied in full. R. p. 260. The satisfaction was executed by an Emergent official, stated that Emergent was the bona fide owner and holder of Mortgage 1, stated that Mortgage 1 had not been assigned, hypothecated, or otherwise disposed of, stated that the mortgage had been lost or destroyed after diligent search, and stated that the debt secured by the mortgage was "paid in full" and the lien satisfied. R. p. 260. Turner testified that he paid Mortgage 1 and relied on the satisfaction. R. pp. 79-125, 260. No witness from Emergent, Carolina Investors, HomeGold, or any entity connected to the 2007 satisfaction testified that the satisfaction was signed by mistake, fraud, accident, clerical error, or lack of authority. R. pp. 75-126, 129-243. Kevorkian simply testified, over objection, that payments were made after the satisfaction. R. p. 169. That testimony did not prove the sworn recorded satisfaction was invalid, nor did it prove Wells Fargo was entitled to equitable cancellation. South Carolina law recognizes that equitable principles may allow cancellation of a mortgage satisfaction, but only where equity can restore the parties without interfering with rights acquired on the faith of the altered legal condition and without doing injustice. *First Palmetto Sav. Bank, F.S.B. v. Patel,* 344 S.C. 179, 183-84, 543 S.E.2d 241, 243 (Ct. App. 2001). Here, the recorded satisfaction existed for more than a decade before Wells Fargo challenged it. R. p. 260. Turner relied on the recorded satisfaction. R. pp. 79-125, 260. Third parties were implicated, including Emergent, Carolina Investors, the IRS, and record-title parties. R. pp. 35-52, 260, 470. The opinion's reliance on *Williams & Co.* does not resolve the burden issue. *William*s may address the effect of an unauthorized satisfaction as against one who acquired an interest before the discharge. But Wells Fargo still bore the burden to prove why a sworn recorded satisfaction should be cancelled in equity. The opinion effectively shifted that burden to Turner, despite the satisfaction itself being record evidence that Mortgage 1 was paid in full.

G. The panel overlooked the presumption and evidentiary force of satisfaction arising from lapse of time and recorded discharge.

Appellant argued that the debt should be treated as satisfied based on the recorded satisfaction, Turner's testimony, and the lapse of time. R. pp. 79-125, 202, 260. South Carolina recognizes that satisfaction may be presumed from lapse of time, and if the presumption prevails, the mortgage is discharged as completely as if actually paid. *Lever v. Lighting Galleries, Inc.,* 374 S.C. 30, 34, 647 S.E.2d 214, 216 (2007). The opinion does not address Lever, the lapse of time, or the absence of a witness competent to rebut the recorded satisfaction. Instead, it concludes that the 1996 assignment alone defeated the 2007 satisfaction. That conclusion fails to grapple with the sworn language of the satisfaction itself, which stated that Emergent was the bona fide owner and holder and that Mortgage 1 had not been assigned, hypothecated, or otherwise disposed of. R. p. 260. The Court should grant rehearing to address whether Wells

Fargo met its burden to overcome both the recorded satisfaction and the equitable considerations protecting reliance on recorded land records.

II. Suggestion for Rehearing En Banc

Appellant respectfully suggests rehearing *en banc* under *Rule 219*, SCACR. Rehearing en banc is warranted for two reasons. First, *en banc* review is necessary to maintain uniformity with *Deep Keel*. The opinion allows a foreclosure plaintiff to prove loan balances, default, payment history, and amount due through live testimony from a litigation-support employee where the witness's knowledge is based on review of records. *Deep Keel* held that such testimony is hearsay when offered to prove the truth of the contents of records. *Deep Keel*, 413 S.C. at 71-72, 773 S.E.2d at 613-14. The opinion's reasoning risks converting the business-records exception into a live-testimony exception for loan servicers.

Second, the proceeding involves a question of exceptional importance. Mortgage foreclosure cases routinely involve transferred loans, successor servicers, lost assignments, merged entities, payment histories, and verified statements of account. If this opinion stands, foreclosure plaintiffs may satisfy their prima facie burden through conclusory testimony from a litigation employee who did not create the records, did not maintain the records during most of the loan history, and does not identify the person with knowledge at the time the records were created. The issue is not limited to this litigant. It affects the reliability of foreclosure proof, the integrity of recorded satisfactions, and the evidentiary showing necessary before a South Carolina homeowner's property may be sold.

III. Relief Requested

For the reasons stated above, Appellant respectfully requests that this Court:

1. grant panel rehearing under Rule 221, SCACR;
2. withdraw or modify the July 1, 2026 opinion;
3. hold that Kevorkian's testimony concerning the contents of the loan records, payment histories, default, and amounts due was inadmissible hearsay under Deep Keel;
4. hold that the late admission of Exhibits 25 and 26 on redirect did not retroactively cure the prior hearsay testimony or Wells Fargo's failure of proof;
5. address Appellant's preserved prima facie foreclosure and Mortgage 2 holder/standing arguments;
6. hold that Wells Fargo failed to carry its burden to set aside the recorded Lost Mortgage Satisfaction; and
7. reverse the order of foreclosure and sale, or alternatively remand for further proceedings consistent with this Court's corrected ruling.

Appellant further respectfully suggests rehearing en banc because the opinion conflicts with *Deep Keel* and involves questions of exceptional importance in South Carolina foreclosure litigation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Glenn Walters, Sr., hereby certify that I have served the foregoing **Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc** upon counsel for Respondent by regular mail, on July 07, 2026, addressed as follows:

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