

SIXTH DISTRICT COURT OF APPEALS
STATE OF FLORIDA

App Case No.: 6D23-1482
LT. Case No.: 2020-CA-007792-O

CHARLES RUFFENACH,
Appellant,

v.

DEUTSCHE BANK NATIONAL
TRUST COMPANY, AS TRUSTEE
FOR AMERIQUEST MORTGAGE
SECURITIES INC., ASSET- BACKED
PASS-THROUGH CERTIFICATES
SERIES 2005-R8, RAYMOND
LOZANO, ALILI RIHKRAND, ET AL.,
Appellees.

Appeal from the Circuit Court of the
Ninth Judicial Circuit, in and for
Orange County, Florida
Honorable Vincent Falcone, presiding

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RECEIVED, 03/24/2023 09:45:21 PM, Clerk, Six District Court of Appeal

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PREFACE

This appeal derives from (and requests reversal of):

- A Final Judgment of Foreclosure, dated 8/23/22 (R3848-3853)
- Rulings made at trial on 8/12/22

Appellee, DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR AMERIQUEST MORTGAGE SECURITIES INC., ASSET- BACKED PASS-THROUGH CERTIFICATES SERIES 2005-R8 , will be referred to as “the Trustee,” “Appellee” or “Plaintiff.”

Appellant, CHARLES RUFFENACH, will be referred to as “Mr. Ruffenach,” “the Owner” or “Appellant.”

Citation to the record will be signified by (R[page number], [paragraph/line number]), or (R[page number]). The entire record is in one volume so the brief will not cite to volume number.

For the purposes of Appellant’s Reply Brief, the Initial Brief will be cited as (IB [page number]) to indicate item and page.

For the purposes of Appellant’s Reply Brief, the Answer Brief will be cited as (AB [page number]) to indicate item and page.

STATEMENT OF CASE AND FACTUAL SUMMARY

This is a foreclosure case. A law firm known as “McCabe” filed a foreclosure complaint on August 1, 2020 naming the plaintiff as Deutsche Bank National Trust Company, as Trustee for Ameriquest Mortgage Securities Inc., Asset- Backed Pass-through Certificates Series 2005-R8 (“the Trustee”). (R21-63) Therein, the complaint identified Raymond Lozano as the borrower under the note and mortgage. Id. The complaint identified Mr. Ruffenach as the current owner of the property, and PHH Mortgage Corporation as the loan servicer. (R22 ¶¶7, 12) Mr. Ruffenach obtained title through a lien foreclosure in 2019. (R3999).

The Complaint did not allege that the borrower modified the note and mortgage. Instead, it alleged that the borrower defaulted under the original note and mortgage by failing to pay an installment due on May 1, 2008, leaving \$243,251.43 in principal due, plus interest, tax payments, insurance payments, other costs and corporate advances. (R22 ¶¶8-11).

Mr. Ruffenach answered. (R76-14). His affirmative defenses included a statute of repose defense under Fla. Stat. § 95.281,

where he argued that the statute barred the Trustee from seeking to collect “all obligations, including taxes, paid by the mortgagee, 5 years from the date of payment.” (R78) He also raised affirmative defenses of standing and capacity, which specifically challenged the Trustee’s alleged agency relationship with the person or people in possession of the note. (R77)

The case proceeded to trial. Darian Henderson was the Trustee’s first witness. He worked for McCabe. (R3896-97) Prior to the commencement of the foreclosure case below, he received the original note from the court file from a previous 2008 foreclosure case. (R3898) He testified that he did not review any fee agreement or representation agreement to connect his employer with PHH. (R3907 ln5-9). He also testified that he did not review any documents that confirmed whether PHH was the servicer or agent of the Trustee. (R3907 ln10-14; R3909 ln2-9). According to Mr. Henderson, he linked PHH and the Trustee to the note through a referral letter, which was not present at trial. (R3909-10) Through Mr. Henderson, the Trustee’s counsel sought to introduce a certificate of possession of the note that Mr. Henderson previously

signed. (R4128-4142, specifically R4133-4134)

Mr. Ruffenach's counsel raised a hearsay objection to the admission of portions of the certificate of possession of the note because it stated that the law firm was acting on behalf of PHH and that PHH is the Trustee's servicer (R3912-3913). Mr. Henderson stated that his knowledge of this alleged agency relationship came from a referral letter which was not in evidence. (R3909) The Court overruled this objection. (R3913)

The Trustee's next witness was Louise Plasse, a senior loan analyst for Ocwen Financial Corporation. (R3916-3917) She testified, over Mr. Ruffenach's hearsay and personal knowledge objections, that Ocwen "merged with PHH or bought PHH" (R3918). Ms. Plasse also testified—over Mr. Ruffenach's hearsay and lack of foundation objections—that PHH is the servicer for the loan. (R3919)

Ms. Plasse discussed—over Mr. Ruffenach's hearsay and lack of foundation objections—the boarding process for PHH, whereby it receives records from prior servicers (R3922-3927). She testified that red flags—such as errors or discrepancies—could occur in the boarding process where they would seek "a satisfactory answer"

from the prior servicer. (R3926) Further, she testified that “To the information that I’ve reviewed, there’s been no red flags” in boarding the loan. Id. Through this testimony, the Trustee’s counsel sought to introduce a loan history. (R3928; R4151-4255) A review of the loan history (aka “payment history”) reveals the following records:

- Records from “AMC Mortgage Services, Inc.” with entries dated from September 2005 to December 2006 (R4152-4153; R4158-4159)
- Records from “Citi Residential Lending, Inc.” with entries dated from January 2007 to December 2008 (R4154-4157; R4160-4162)
- Records from an unidentified source (R4163-4205) concerning:
 - interest rates from April 2008 to February 2010 (R4163-64; R4171)
 - Late charges from 2007 to 2008)
 - A record of payments and charges added to the loan from February 2008 to March 2010. (R4176-4202)

This includes a payment of \$1,373.69 dated March 22, 2010 (R4202)

- Other items
- A document from Ocwen Financial Solutions Pvt. Ltd. titled “Affidavit of Debt” summarizing claimed amounts due, interest rate changes, and corporate advances (R4206-R4221) The latest date on this document is July 22, 2013 (R4219). This document lists corporate fees and expenses from April to August 2013 and a “Prior Servicer Fees” of \$15,289,25 dated May 1, 2008. (R4208-4209). It also lists a collection of Attorney’s fees, unidentified “Capital Expense[s],”and other fees from 2008 to 2013.
- Records from Ocwen with entries dated from February 2013 to April 2019 (R4222-4231; R4236-4238)
- Records from PHH with entries dated April 15, 2019 (R4232-4235; R4247-4249¹)

¹In R4247-4249, there are 3 entries not dated 4/15/2019: one entry dated 4/30/2019 (R4249); one entry dated 1/1/2019; and

- Records from Ocwen recording entries dated April 11, 2019 (R4239-4245)
- Records from PHH with entries dated from April 2019 to July 2022. (R4250-4255)

Omitting the “Affidavit of Debt” summary document at R4206-R4221, the payment history records contain a nearly four-year gap as they did not contain entries for the loan from April 2010 to January 2013.

On voire dire, Ms. Plasse addressed the fact that there was a gap in the payment histories for 2011 to 2013. (R3929). She admitted: “I do see what you are saying, and I don’t see that information here.” She also admitted:

- that the note had an adjustable interest rate linked to the LIBOR rate, but that the payment histories do not contain the published LIBOR rate. Id.
- that the information in the payment histories entries on costs (payments for taxes, insurance, property expenses, etc.) are based on a bill or invoice. (R3932-33)

one entry dated 4/11/2019 (R4246).

- that the “Affidavit of Debt” document at R4206-R4221 is “based on payment history”(R3930-3931)
- that she could not identify which entity generated the records from an unidentified source in evidence at R4163-4205. (R3933-3934)
- that she had no personal knowledge as to how the records from an unidentified source at R4163-4205 were created “other than they printed it” (R3934), and that she had no personal knowledge as to whether the entries in that document were made at or near the time of the event, by or from a person with knowledge. (R3934-35)
- that she had no personal knowledge as to whether the entries in the documents from Citi Residential Lending, Inc. (at R4154-4157; R4160-4162) were made at or near the time of the event, by or from a person with knowledge. (R3934-35)
- That her knowledge of Ocwen’s boarding process is based upon things that she had read or been told by other people. (R3940)

- That, to her knowledge, Ocwen does not independently verify the accuracy of the entries from the prior servicers. (R3940)
- That, based upon her training, Ocwen’s boarding process is “mainly just designed to ensure that the information received from previous servicers is accurately transferred over to Ocwen’s systems.” (R3941)

The Trustee’s counsel also stipulated that Ms. Plasse did not have personal knowledge as to whether the records from Citi Residential Lending, Inc. and AMC Mortgage Services, Inc. were made at or near the time of the event, by or from a person with knowledge. (R3936-3937) Further, Ms. Plasse “has no personal knowledge as to the business records or boarding processes of any of [the] prior servicers other than Ocwen and PHH.” (R3939).

The *voire dire* touched on the written boarding procedures for PHH in evidence at R108-4127. (R3942-3944). Ms. Plasse admitted that these boarding procedures did not “require an independent verification of the data entries from the previous servicers” and that neither Ocwen or PHH would perform such an independent

verification in the boarding process. (R3944-45)

Because of Ms. Plasse's testimony on *voire dire*, Mr. Ruffenach objected to the admission of the payment history based upon hearsay and "lack of personal knowledge as to laying the business records exception as it relates to any servicers prior to Ocwen and PHH" and "lack of proof regarding necessary requirements for the boarding process." (R3945; R3946-47; 3951-3952) After the parties debated the requirements for admitting the payment histories (R3946-3952) the court overruled the objection and admitted the payment histories into evidence. (R3952-54) The court ruled that "[a]ny issues regarding the document will be addressed in terms of weight." (R3953-54)

On the Trustee's continued direct examination, Ms. Plasse discussed the "Affidavit of Debt" summary and that it contained "dates from 2009 up through 2013." (R3955-3956) On cross examination, Ms. Plasse admitted that this summary did not document any payments received by the servicer and that it was a "summarization of the amounts at the time that this was taken," i.e., September 30, 2013. (R3987 also R3989-90; R4206) Further,

the payment history suggested that Ocwen did not take over the servicing of the loan until February 2013 (R3989-90). Accordingly, Ms. Plasse agreed that there is “essentially a gap in the payment history between March 2010 to February 2013.” (R3990) This gap was important, because as explained later, the corporate records indicated that the loan was modified around March 2010, and Ms. Plasse agreed that the records would show “how payments should be applied” during that time “if the loan was modified.” (R3990)

At the Trustee’s initiation, Ms. Plasse also identified a loan modification agreement. (R3956) Ms. Plasse admitted that the borrower had signed the loan modification agreement, and that the loan modification was in her company’s business records associated with the loan. (R3959) In addressing the loan modification document, the Trustee’s counsel argued that “It is our contention the loan was not modified” (R3961) and Ms. Plasse testified that the loan was not modified “based on the date of this [loan modification], March 2010, if you go back into the payment history, from 2010, you would—if it was modified, you would see documentation to that effect, and there is nothing to that effect.”

(R3962)

On cross examination, Ms. Plasse admitted that Citi's business records contained a February 16, 2010 transaction (shortly before the purported March 2010 loan modification) that says "loan closing or pre-disturbed payment." (R3982-88 referencing R4191) Ms. Plasse admitted that a "loan closing" in the middle of a payment history could indicate a refinancing. (R3983) She did not want to admit that the notes for "loan closing" meant that the loan was being modified, and she agreed that she could not think of "any other way you would have a loan closing in the middle of a payment history" other than if there was a refinance. (R3982-83). When confronted with an entry on the payment history that says "W MODIFICATION" on an entry dated February 15, 2010, Ms. Plasse confirmed that she did not know whether that meant that the loan was modified. (R3984 referencing R4194)

Consistent with a loan modification, the loan history reflected a new principal amount of \$306,814.75 on an entry dated March 11, 2010 (R4196) even though the payment history records from 2008 (R4162) showed a principal balance of \$243,532.12. Ms.

Plasse thought that even though the principal balance changed, and that the records contained “W MODIFICATION” markings, she did not believe that the loan was modified simply because “the interest rate is 6.5... Loan mods usually are around 2 percent, 3 percent.”

When asked about the borrower’s payments in March 2010, Ms. Plasse admitted “I don’t know what the agreement was back then with the prior servicer.” (R3997)

Further, Ocwen has an original collateral files document. (R3991-3992 referencing R4105-4107). Ms. Plasse admitted that “if the loan was modified...[you would] have a copy of the modification in the collateral file.” (R3992) Ms. Plasse admitted that this collateral file document reflected that a loan modification was in the collateral file. (R3993)

The Trustee’s counsel sought to introduce judgment figures “generated from your loan servicing platform pulling information from the payment history maintained by PHH.” (R3963) The judgment figures are a “payoff quote” in evidence at R4144-4150 and include \$104,806.26 of “Escrow/Impound Overdraft” and

\$93,225.35 of a “Recoverable Balance.” (R4145) Ms. Plasse admitted that the judgment figures sought to collect amounts since May 1, 2008, and that the recoverable balance was “all the fees associated with the foreclosure and attorney’s fees.” (R3965).

Mr. Ruffenach’s counsel objected to the judgment figures based on hearsay, that it was a summary, and best evidence. (R3965-67). This included an objection that the judgment figures were seeking to prove interest rates under the adjustable interest rate “without proving what the LIBOR rates are.” (R3966). Mr. Ruffenach further objected to the collection of attorney’s fees through this document because “that needs to be established at an attorneys’ fee hearing” and “we need expert testimony” to establish attorney’s fees. (R3966-67) The court overruled the objections and admitted the document into evidence. (R3967)

On cross-examination, Ms. Plasse admitted that PHH had no documents in its possession “that would show any sort of agency relationship between McCabe and PHH or McCabe and the plaintiff” (R3993-94) It bears repeating that McCabe was the law firm that had possession of the blank-endorsed note at the commencement

of the foreclosure case. Ms. Plasse provided no testimony or documents supporting an agency relationship between PHH and the Trustee, PHH and McCabe, or the Trustee and McCabe.

On closing argument, Mr. Ruffenach's counsel re-argued issues concerning the business records exception to the hearsay rule and the boarding process, (R4013-R430). He also argued that the Trustee had failed to establish an agency relationship linking it to McCabe's possession or a servicer's possession of the Note. (R4002-4006) Without this link, the Trustee could not prove standing. Id.

Mr. Ruffenach's counsel also argued that the evidence showed that the loan was modified, but the Trustee failed to allege and prove a breach of the loan modification with damages thereunder. (R4006-4007). Additionally, the Trustee failed to present competent evidence concerning the amounts due, including those amounts for interest, taxes, insurance, attorney's fees and costs. (R4007-11) Moreover, the Trustee was seeking amounts precluded by the statute of repose Fla. Stat. § 95.281. (R4011-4013) Based on these arguments, the case should be dismissed, or the certain

amounts sought by the Trustee in its judgment were precluded.

In spite of these arguments, the court awarded the Trustee a foreclosure judgment “in the requested amount.” (R4037; R3848-3853). This included the \$93,225.35 “Recoverable Balance” (R3848) which Ms. Plasse said represented attorney’s fees and costs (R3965). It also included \$104,806 in taxes and insurance payments (R3848), which Ms Plasse said includes amounts since May 1, 2008.

Concerning the attorney’s fees and costs, the court heard no expert testimony concerning the reasonableness of these items. The court also did not have any time records for the attorney’s fees. No attorney provided testimony to substantiate the attorney’s fees.

This appeal followed. (R3881-3889)

SUMMARY OF ARGUMENT

The case below was a trial of errors. The Trustee's evidence fell woefully short of the threshold required for a foreclosure judgment. The Trustee's case fell short in six key ways:

- 1 Failure to follow the rules of evidence;
- 2 Failure to prove agency and standing;
- 3 Failure to plea and prove a breach of the modified loan;
- 4 Failure to provide substantial competent evidence of the amounts due;
- 5 Failure to limit the recovery within the bounds of Florida's five-year statute of repose Fla. Stat. § 95.281; and
- 6 Failure to provide the basic evidence required for recovering attorney's fees and costs, such as a fee expert, time records, and invoices.

The Trustee failed to meet basic evidentiary standards, in that it did not have the documents and testimony necessary to meet the business records exception to the hearsay rule: the Trustee's witness lacked knowledge as to whether the prior servicers' records were made at or near the time of the event, by or from a person

with knowledge.

In addition, the Trustee could not establish that previous servicer's records were trustworthy. That is, the Trustee failed to show that there was a contractual or business relationship with the previous servicers that incentivized accuracy, or that the predecessor servicer independently confirmed the accuracy of the creator's documents. Since Florida law requires this type of proof to admit a predecessor's records, the Trustee's evidence fell flat.

The Trustee's evidence also ran afoul of the evidentiary rules on summaries and best evidence. For example, the Trustee's second witness, Ms. Plasse, testified that entries in the servicer's corporate records for taxes, insurance, and other costs were generated from more original documents such as invoices, receipts, and other payment histories. The Trustee never delivered these original documents to Mr. Ruffenach as required by the rule of summaries, Fla. Stat. § 90.956. Nor did the trustee produce the best original documents at trial. As such, they were not admissible.

The Trustee's problems continued. It attempted to prove facts such as agency relationships, the LIBOR interest rate, and amounts

owing based upon documents that it never introduced into evidence. Since this cannot happen under Florida law, the Trustee's evidence on these points is legally useless.

This defect defeated the Trustee's proof of agency and standing. The proof at trial showed that the law firm McCabe held the possession of the note. Possession of the note confers standing to sue. However, the Trustee never presented the evidence required to link McCabe to the Trustee through an agency relationship—i.e., that McCabe was in possession of the note for the Trustee. Without this, the Trustee's proof only showed that non-party McCabe had standing to foreclose, and did not prove the Trustee's standing.

More problems. The evidence at trial showed that the note and mortgage was modified. Since the Trustee did not plea and prove that there was a breach of the modified loan, its case was without merit.

Finally, the Trustee's case was deficient because:

- Its failure to use competent substantial evidence require a dismissal;
- It sought to collect amounts barred by the five year

statute of repose Fla. Stat. § 95.281;

- It sought to collect attorney's fees without an expert witness;
- It sought to collect attorney's fees and costs without time records and invoices.

Based upon these numerous deficiencies, the Trustee's claim should be dismissed, or the recovery reduced.

STANDARD OF REVIEW

To the extent that this appeal challenges the sufficiency of the evidence, Fla. R. Civ. P. 1.530(e) permits such a challenge, regardless as to whether such an issue was specifically raised in the lower tribunal. *Burdeshaw v. Bank of New York Mellon*, 148 So. 3d 819, 822 (Fla. 1st DCA 2014)

This appeal challenges:

- (a) evidentiary rulings
- (b) proof of an agency relationship and standing
- (c) the court's refusal to dismiss the case after receiving evidence that the loan was modified;

- (d) the lack of competent evidence for the amounts due;
- (e) the statute of repose; and
- (f) awarding attorney's fees through a payment history and summary without conducting a fee hearing and without having a fee expert.

The standard of review for these issues are as follows.

A. Evidentiary Rulings

The trial court's admission of evidence under issue is subject to either a de novo review or abuse of discretion review. *Johnston v. State*, 863 So.2d 271, 278 (Fla.2003) ("A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion."); *Bradley v. State*, 214 So.3d 648, 655 (Fla. 2017) ("Where a trial court errs in interpreting the rules of evidence, the error is subject to de novo review.").

B. Proof of Agency Relationship and Standing

The legal requirements for proving agency relationship is reviewed de novo since it is an issue of law. Appellate courts "review findings regarding standing de novo." *Wells Fargo Bank, NA v. Morcom*, 125 So. 3d 320, 321 (Fla. 5th DCA 2013)

C. The Court’s Refusal to Dismiss the Case after Receiving Evidence That the Loan Was Modified.

The Courts in *Morales v. Fifth Third Bank*, 275 So. 3d 197, 199 (Fla. 4th DCA 2019) and *Rattigan v. Central Mortgage Company*, 199 So. 3d 966 (Fla. 4th DCA 2016) have reviewed this issue de novo.

D. The Lack of Competent Evidence for the Amounts Due

This concerns a finding of fact that is informed by the law of evidence. Findings of fact involve a “standard of review [that] determines whether there was competent substantial evidence to support the decision of the trial judge.” *Giron v. Ugly Mortgage, Inc.*, 935 So. 2d 580 (Fla. 3d DCA 2006). If the judgment is based upon inadmissible proof, the competent substantial evidence standard requires reversal. Under this test, “competent” evidence is that evidence “testified to by one in a position to know” *Sims v. Brown*, 574 So.2d 131, 134 (Fla. 1991) (emphasis added). This standard is not satisfied by unreliable evidence which “merely creates a suspicion or which gives equal support to inconsistent inferences.” *Florida Rate Conference v. Florida R. R. & Pub. Utilities Comm’n*, 108 So.2d 601, 607 (Fla. 1959). It also “must not consist of vague,

uncertain, or irrelevant matter not carrying the quality of proof” and “[s]urmise, conjecture or speculation have been held not to be substantial evidence.” *Id.* The standard requires that “standard, generalized statements... be disregarded.” *City of Hialeah Gardens v. Miami-Dade Charter Found., Inc.*, 857 So.2d 202, 204-05 (Fla. 3d DCA 2003). Further, “findings must be based on something more than mere probabilities, guesses, whims, or caprices.” *Dep’t of Highway Safety & Motor Vehicles v. Trimble*, 821 So.2d 1084, 1087 (Fla. 1st DCA 2002). Substantial competent evidence also must be based upon admissible evidence, because “[t]he term ‘competent substantial evidence’...refers to the existence of some evidence (quantity) as to each essential element and as to the legality and admissibility of that evidence. Competency of evidence refers to its admissibility under legal rules of evidence.” *Lonergan v. Estate of Budahazi*, 669 So.2d 1062, 1064 (Fla. 5th DCA 1996), *citing Dunn v. State*, 454 So.2d 641, 649 n.11 (Fla. 5th DCA 1984) (Coward concurring) (emphasis added). Accordingly, the substantial competent evidence test is informed by issue (A)–the admissibility of the evidence.

E. The Statute of Repose

Appellate courts have “de novo review of a trial court's application of the statute of repose.” *Garofalo v. Proskauer Rose LLP*, 253 So. 3d 2, 5 (Fla. 4th DCA 2018)

F. Awarding Attorney’s Fees through a Payment History and Summary Without Conducting a Fee Hearing and Without Having a Fee Expert.

The need to have a fee expert to award attorney’s fees is an issue of law. *See Law Offices of Granoff & Kessler, P.A. v. Glass*, 305 So. 3d 345, 347 (Fla. 3d DCA 2020). Accordingly, de novo review applies. The legal standard for proving attorney’s fees is also an issue of law, to which de novo review applies.

ARGUMENT

A. Evidentiary Rulings

1. Business Records Exception to the Hearsay Rule. Fla. Stat. 90.803(6).

The trial court improperly admitted records under the business records exception to the hearsay rule where the witness could not lay a foundation with personal knowledge for that exception to apply. For purported business records not generated

by her employer, she also did not establish the additional requirements of accuracy and trustworthiness.

A. *The foundation for the exception must be made through personal knowledge. Fla. Stat. 90.604.*

The business records exception to the hearsay rule contains foundational elements that must be established through witness testimony “based on personal knowledge.” *Holt v. Calchas, LLC*, 155 So. 3d 499, 505 (Fla. 4th DCA. 2015); *Jackson v. Household Finance Corp. III*, 298 So. 3d 531, 536 (Fla. 2020) (“A qualified witness, therefore, is anyone with personal knowledge of the organization's regular business practices relating to creating and retaining the record(s) at issue.”); also *Bank of New York v. Calloway*, 157 So. 3d 1064, 1073 (Fla. 4th DCA 2015) (“It is well-settled that a record custodian who has been called to testify under oath need not be the actual person who prepared the document, but he or she must demonstrate *knowledge* of each requirement for establishing the business record foundation.” emphasis added); *CitiMortgage, Inc. v. Hoskinson*, 200 So.3d 191, 192 (Fla. 5th DCA 2016) (“Any qualified witness who has the *necessary knowledge* to testify as to how a

document was made may lay the foundation to bring the document within the business records exception.” emphasis added); *Deutsche Bank Trust Company Americas v. Merced*, 238 So.3d 438, 441 (Fla. 5th DCA 2018) (The witness’s “testimony demonstrated sufficient *personal knowledge* of PNC's business relationship with Deutsche Bank and PNC's record-keeping system to lay the foundation for Deutsche Bank's business records.” emphasis added).

Fla. Stat. § 90.604 imposes a personal knowledge requirement for testimony laying the business records foundation. Fla. Stat. § 90.604 states “Except as otherwise provided in s. 90.702, a witness may not testify to a matter unless evidence is introduced which is sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may be given by the witness’s own testimony.” The sole exception to this rule—Fla. Stat. § 90.702—applies to expert witnesses and is not applicable here. Under Fla. Stat. § 90.604, “The law seems well established that testimony consisting of guesses, conjecture or speculation — suppositions without a premise of fact — are clearly inadmissible in the trial of causes in the courts of this country.”

Drackett Products Co. v. Blue, 152 So. 2d 463, 465 (Fla. 1963); also *Walton v. Deutsche Bank Nat'l Trust Co.*, 201 So. 3d 831, 834 (Fla. 1st DCA 2016) (Reversal because testimony from a servicer's employee was not based upon personal knowledge); *Bryant v. State*, 124 So. 3d 1012, 1015 (Fla. 4th DCA 2013) ("Where a witness has no personal knowledge of a matter, and the witness's knowledge is derived entirely from information given by another, the witness's testimony is incompetent and inadmissible as hearsay.").

The business record exception's foundational elements include that the document was made at or near the time of the event, by or from a person with knowledge. Fla. Stat. 90.803(6) Here, Ms. Plasse could not establish these elements because she did not know whether the previous servicers' records were made at or near the time of the event, by or from a person with knowledge. (R4154-4157; R4160-4162; R3934-39). Ms . Plasse had similar personal knowledge problems in that her knowledge of Ocwen's boarding process is based upon things that she had read or been told by other people, i.e. hearsay. (R3940) Based upon Ms. Plasse's fundamental lack of knowledge needed to establish basic elements

for the business records exception, the prior servicers' payment histories and the judgment figures that are built upon those payment histories cannot be admissible.

B. *Previous servicers' records are not admissible unless the boarding process verifies the accuracy of the records.*

Here the Trustee also failed to demonstrate that a group of boarded business records were trustworthy and accurate. When a business seeks the admission of another business' records that were not generated by the witness' company, the proponent must establish the document's trustworthiness and accuracy in addition to the foundational elements required for the business records exception. In *Bank of New York v. Calloway*, 157 So. 3d 1064, 1071 (Fla. 4th DCA 2015) the court held that "[t]he company's mere reliance on the document is insufficient to establish trustworthiness. Rather, trustworthiness can be established through a contractual or business relationship that incentivizes accuracy, or through the testimony showing that the company independently confirmed the accuracy of the creator's documents." *Id.* at 1072; also *Evans v. HSBC Bank, USA, N.A.*, 223 So. 3d 1059

(Fla. 2d DCA 2017) (emphasis added). Here, there witness did not establish a contractual or business relationship that incentivizes accuracy. Further, the witness admitted that her employer does not independently verify the accuracy of the entries from the prior servicers during the boarding process:

13 Q. Okay. And in the boarding process, does Ocwen
14 do -- when -- in Ocwen's boarding process, does Ocwen do
15 anything to independently verify the accuracy of the
16 entries of the prior servicers?

17 A. To my knowledge, no, that's not part of the
18 boarding process. Part of the boarding process includes
19 receiving the information, verifying that it belongs to
20 that individual loan. As to going line by line, there's
21 not anything that they do specifically for that, no.

(R3940) also (R3944-45)

She also admitted that the written procedures for the boarding process do not require independent verification of the data from the prior servicers during the boarding process. (R3944-45)

Under these facts, the Trustee could not establish that the previous servicers' records were trustworthy because she did not establish that the predecessor servicers had either (a) had contractual or business relationship that incentivizes accuracy; or

(b) independently confirmed the accuracy of the creator's documents.

In fact, the records established problems with trustworthiness. For example, the witness admitted that there was a nearly three-year gap in the payment histories from the previous servicers (R3929; R3990), and further admitted that these types of gaps were red flags in the boarding process. (R3928-3929) Another problem was that the payment records generated from 2007 to March 2010 (R4163-4205) were made by a mystery entity that the witness could not identify (R3933-3934). Under this woefully deficient proof, the payment histories from the previous servicers (i.e. the servicers prior to PHH and Ocwen) and the judgment figures upon which they are based are inadmissible hearsay. Since the calculation of the foreclosure judgment amount depends on these inadmissible records, the judgment below should be dismissed.

2. Best Evidence and Summaries.

The 5th DCA has previously described the best evidence rule as follows:

The best evidence rule, as codified by statute, requires that if the original evidence or a statutorily authorized alternative is available, no evidence should be received which is merely “substitutionary in nature.” Thus, evidence which indicates that a more original source of information is available should be excluded. In short, unless otherwise excused by the evidence code, the original must be produced unless it is shown to be unavailable for a reason other than the serious fault of the proponent. This rule is predicated on the principle that if the original evidence is available, that evidence should be presented to ensure accurate transmittal of the critical facts contained within it.

McKeehan v. State, 838 So.2d 1257, 1259-1260 (Fla. 5th DCA 2003). Citations omitted.

Invoices and receipts are the best evidence original evidence for property or services for which a person pays value. *Angel v. State*, 305 So. 2d 283, 284) (Fla. 1st DCA 1974) (reversing based on best evidence where a witness testified as to the contents of an invoice but “had not brought the invoice with him to trial.”) Where a foreclosure plaintiff’s proof of the debt violates the best evidence rule, the judgment must be reversed and the case dismissed.

Rattigan v. Central Mtg. Co., 199 So. 3d 966 (Fla. 4th DCA 2016) (Reversing a foreclosure judgment where the bank did not use the best evidence to prove amounts owed).

The best evidence rule dovetails into the rule on summaries in Fla. Stat. § 90.956. There, Florida law requires that a party intending to use a summary “must give timely written notice of his or her intention to use the summary, proof of which shall be filed with the court, and shall make the summary and the originals or duplicates of the data from which the summary is compiled available for examination or copying, or both, by other parties at a reasonable time and place.” Fla. Stat. § 90.956. Under the 5th DCA’s precedent “Florida courts require strict compliance with the ‘timely written notice’ requirement contained in the rule, especially where the record contains no evidence that the underlying data from which the summary was compiled was made available to a complainant.” *Batlemento v. Dove Fountain, Inc.*, 593 So. 2d 234, 240 (Fla. 5th DCA 1991). Where a trier of fact impermissibly uses a summary to prove damages, the Appellate Court must reverse and on remand the “damage award must be reduced by the damage summary amounts not otherwise proved by competent evidence.” *Id.*

Here, the invoices and receipts that substantiate entries for

taxes, insurance, corporate advances, and other expenses are the best original evidence of those charges. The Trustee's use of the payment history and judgment figures as a summary of these documents violated the best evidence rule, thereby requiring a dismissal. The Trustee's witness, Ms. Plasse, even admitted that the "Affidavit of Debt" document at R4206-R4221 was a summary. (R3987 also R3989-90). Because the Trustee failed to comply with the summaries rule in Fla. Stat. § 90.956 to deliver copies of this best evidence and provide the statutorily-required notice, the Trustee is precluded upon relying on the payment histories and judgment figures to prove items for taxes, insurance, and other expenses. It is further precluded from relying on the "Affidavit of Debt" summary document at R4206-R4221.

3. Documents not in Evidence.

The contents of business records that are not in evidence constitute inadmissible hearsay. *Helton v. Bank of Am., N.A.*, 187 So. 3d 245, 247 (Fla. 5th DCA 2016). Here, the Trustee violated this bedrock law repeatedly:

- It attempted to establish an agency relationship between

McCabe—who held possession of the note—and PHH or the Trustee, through an certificate of possession of the note, even though McCabe’s witness testified that he obtained this information from a referral letter, which was not present at trial. (R3909-10)

- The payment histories and judgment figures contain claimed amounts for interest, which is dependent upon the published LIBOR rate. Yet, the Trustee did not introduce the published LIBOR rates.
- The “Affidavit of Debt” document at R4206-R4221 which was derived from unknown payment histories.

Based on this failure, the Trustee had no admissible evidence proving: (a) an agency relationship linking McCabe to the Trustee; (b) the correct interest; and (c) a complete record of the amounts due under the loan.

B. Proof of Agency Relationship and Standing

In *Phan v. Deutsche Bank* 198 So.3d 744, 749 (2d DCA 2016) the Court noted that :some courts have held” that “an agency relationship cannot ordinarily be proven solely through the

statements of the purported agent.” *Citing Bellaire Sec. Corp. v. Brown*, 124 Fla. 47, 168 So. 625, 636 (Fla. 1936); *Orange Belt Ry. Co. v. Cox*, 44 Fla. 645, 33 So. 403, 404 (1902). The rationale for such a rule finds its grounding in Florida’s well-established rule that a proof of an agency relationship requires evidence that the principal designated the agent to act for him or her. Under Florida law, “[t]he essential elements necessary to establish an actual agency relationship are (1) acknowledgment by the principal that the agent will act for him, (2) acceptance by the agent of the undertaking, and (3) control by the principal over the agent's actions.” *Amstar Ins. Co. v. Cadet*, 862 So.2d 736, 741 (Fla. 5th DCA 2003); *Font v. Stanley Steamer International, Inc.*, 849 So. 2d 1214, 1216 (Fla. 5th DCA 2003); *Goldschmidt v. Holman*, 571 So.2d 422, 424 n.5 (Fla. 1990).

It is hearsay for the purported agent to testify what the purported principal said to establish such an agency relationship. As such, the a servicer in a trust case cannot testify as the trustee’s agent without first introducing proof through the trustee that the servicer is an agent. Under the best original evidence rule, this

typically requires the admission of a servicing agreement. That is the primary document setting forth the agency relationship.

A person in possession of a blank endorsed note is “the lawful holder of the note entitled to enforce its terms.” *One West Bank, F.S.B. v. Bauer*, 159 So. 3d 843, 844 (Fla. 2d DCA 2014). Hence, in the absence of a proven agency relationship, McCabe, as the holder in possession of the note, had standing to file this foreclosure case—not the Trustee. In an analogous case, the court in *Tremblay v. U.S. Bank, N.A.*, 164 So. 3d 85 (Fla. 4th DCA 2015) reversed a foreclosure judgment where the testimony and evidence at trial showed that a servicer held possession of the note, but there was no proven agency relationship between the servicer and the plaintiff bank. Based on this evidence, “the servicer was the proper party to initiate the action, not Bank.” *Id.* at 86.

The necessary agency relationship can be proven through a pooling and servicing agreement linking the Trustee with PHH. See *Bank of New York v. Calloway*, 300 So. 3d 220, 224 (Fla. 4th DCA 2020) (“a pooling and servicing agreement can be used to establish a plaintiff’s standing when a mortgage foreclosure lawsuit is filed.”);

US Bank NA v. Bell, Case No. 5D21-2528 (Fla. 5th DCA January 27, 2023); *Caraccia v. U.S. Bank, N.A.*, 185 So. 3d 1277, 1279 (Fla. 4th DCA 2016). A representation agreement between PHH or the Trustee and McCabe could also provide a link necessary to prove that McCabe held the note for the Trustee. Here, the Trustee presented no admissible competent evidence to connect the agency links and prove its standing. As such, the holding in *Tremblay* applies and mandates a reversal and dismissal.

The Trustee is not entitled to a presumption that it held possession of the note in this case. Where a plaintiff attached “a copy of the note” and later presents “the original note in the same condition later at trial” this normally creates “an inference that the plaintiff was in actual possession of the note” and establishes standing so long as there the proof at trial is “[w]ithout evidence to the contrary.” *Bank of N.Y. Mellon v. Milford*, 206 So. 3d 137, 137-38 (Fla. 4th DCA 2016) (emphasis added) *citing Ortiz v. PNC Bank, Nat'l Ass'n*, 188 So. 3d 923, 925 (Fla. 4th DCA 2016).

Since this case follows the material facts in *Tremblay*, the Trustee failed to establish its standing. There, the Court found no

presumption of standing where the “Bank's attachment of a copy of the note with a blank indorsement” because the witness for the servicer testified that the servicer had possession of the note and there was no proof of an agency relationship. So too here, where the proof at trial contradicted any presumption of the Trustee’s possession. The certificate of possession and Mr. Henderson’s testimony showed that McCabe was in possession of the note at the initiation of this case, and that McCabe did not obtain the note from the Trustee. Rather, McCabe obtained the note from the clerk of court. Even more, Mr. Henderson did not have admissible non-hearsay evidence linking McCabe to the Trustee through an agency relationship.(R3907 ln5-9) According to him, this would have been documented through a referral letter that the Trustee did not introduce as evidence. Even more, Ms. Plasse testified that Ocwen, the servicer, had no documents in its possession establishing any agency relationship between McCabe and the Trustee. With this un rebutted evidence that McCabe held possession of the note—coupled with no competent admissible evidence that McCabe held the note as an agent of the Trustee—this case falls under the

holding in *Tremblay*, thereby requiring dismissal.

At best, the Trustee only had speculative evidence that it had an agency relationship with McCabe, but Florida law dictates that standing cannot be established through speculation and conjecture. *See Williams v. Howard*, 329 So. 2d 277, 281-83 (Fla. 1976) (Holding that standing is not established through speculation and conjecture about future events).

C. The Court’s Refusal to Dismiss the Case after Receiving Evidence That the Loan Was Modified.

Where a loan has been modified, the lender can “only foreclose by alleging and proving a breach of the modification agreement.” *Von Kuehlman v. Bank of America, NA*, 177 So. 3d 1282, 1283 (Fla. 5th DCA 2015). Here, Ms. Plasse’s testified that “if the loan was modified...[you would] have a copy of the modification in the collateral file.” (R3992) Ms. Plasse admitted that this collateral file document reflected that a loan modification was in the collateral file. (R3991-93 referencing R4105-4107) It therefore logically follows that the loan was modified.

Additional evidence that the loan was modified was

overwhelming. This included:

- Ms. Plasse identified a loan modification agreement in the corporate records and admitted that the borrower had signed the loan modification agreement. (R3959)
- Shortly before the purported March 2010 loan modification, Citi's business records contained a February 16, 2010 transaction that says "loan closing or pre-disturbed payment." (R3982-88 referencing R4191)
Ms. Plasse admitted that a "loan closing" in the middle of a payment history could indicate a refinancing. (R3983)
She did not want to admit that the notes for "loan closing" meant that the loan was being modified, and agreed that she could not think of "any other way you would have a loan closing in the middle of a payment history" other than if there was a refinance. (R3982-83).
- Ms. Plasse testified "if it was modified, you would see documentation to that effect." (R3962) In accordance with this testimony, the corporate records document a modification with an entry on the payment history that

says “W MODIFICATION” on an entry dated February 15, 2010 (R4194)

- Consistent with a loan modification, the loan history reflected a new principal amount of \$306,814.75 on March 11, 2010 (R4196) even though the payment history records from 2008 (R4162) showed a principal balance of \$243,532.12.
- The borrower made a payment on March 22, 2010 (R4202) consistent with performance under a loan modification.

Ms. Plasse’s speculation that the loan was not modified simply because “the interest rate is 6.5... Loan mods usually are around 2 percent, 3 percent” did not constitute competent substantial evidence to rebut the uncontroverted evidence that the loan was modified. “Surmise, conjecture or speculation have been held not to be substantial evidence” to prove a case. *Florida Rate Conf. v. Florida Railroad & Public Utilities Com’n*, 108 So. 2d 601, 607 (Fla. 1959). Ms. Plasse largely admitted that she had no idea whether the loan was modified because she did not “know what the

agreement was back then with the prior servicer.” (R3997) With uncontroverted evidence that the loan was modified in March 2010, the trial court should have dismissed the case under *Von Kuehlman* as the Trustee failed to allege and prove the terms of the modified agreement.

D. The Lack of Competent Evidence for the Amounts Due

To repeat, “[s]urmise, conjecture or speculation have been held not to be substantial evidence” to prove a case. *Florida Rate Conf. v. Florida Railroad & Public Utilities Com'n*, 108 So. 2d 601, 607 (Fla. 1959). Similarly, “[a] damages award must be supported by competent, substantial evidence.” *Wagner v. Bank of Am., N.A.*, 143 So.3d 447, 448 (Fla. 2d DCA 2014). The term “competent substantial evidence” is synonymous with the concept of admissible evidence, because “[t]he term ‘competent substantial evidence’...refers to the existence of some evidence (quantity) as to each essential element and as to the legality and admissibility of that evidence. Competency of evidence refers to its admissibility under legal rules of evidence.” *Lonergan v. Estate of Budahazi*, 669 So.2d 1062, 1064 (Fla. 5th DCA 1996), *citing Dunn v. State*, 454

So.2d 641, 649 n.11 (Fla. 5th DCA 1984) (Coward concurring)
(emphasis added).

The Trustee's evidence for the amounts due is not substantial competent evidence because it was not admissible. See Sec. A., The foreclosure judgment therefore must be dismissed because the Trustee failed to prove the amounts owed under the loan.

E. The Statute of Repose

The statute of repose bars a mortgage lender from recovering payments made five years prior to a foreclosure action's commencement. Fla. Stat. § 95.281 provides:

(1) The lien of a mortgage or other instrument encumbering real property, herein called mortgage, except those specified in subsection (5), shall terminate after the expiration of the following periods of time:

...

(c) For all obligations, including taxes, paid by the mortgagee, 5 years from the date of payment. A mortgagee shall have no right of subrogation to the lien of the state for taxes paid by the mortgagee to protect the security of his or her mortgage unless he or she obtains an assignment from the state of the tax certificate. Redemption of the tax certificate shall be insufficient for subrogation.

McCabe filed the complaint on 8/1/2020, so any payments for

taxes or insurance prior to 8/1/2015 are barred by the statute of repose. The payment histories reflect the following payments for taxes and insurance that post-date 8/1/2015:

- 11/12/2015 - \$3,473.74 in taxes (R4225)
- 05/05/2016 - \$2,270.00 in insurance (R4225)
- 11/11/2016 - \$3,646.72 in taxes (R4225)
- 07/11/2017 - \$202.50 in insurance (R4227)
- 09/12/2017 - \$202.50 in insurance (R4227)
- 11/13/2017 - \$202.50 in insurance (R4228)
- 11/17/2017 - \$3,796.68 in taxes (R4228)
- 12/18/2017 - \$202.50 in insurance (R4228)
- 02/13/2018 - \$202.50 in insurance (R4228)
- 04/13/2018 - \$221.59 in insurance (R4228)
- 05/11/2018 - \$221.59 in insurance (R4237)
- 06/12/2018 - \$221.59 in insurance (R4237)
- 07/11/2018 - \$221.59 in insurance (R4237)
- 08/13/2018 - \$221.59 in insurance (R4237)
- 09/12/2018 - \$221.59 in insurance (R4237)
- 10/11/2018 - \$221.59 in insurance (R4237)
- 11/14/2018 - \$221.59 in insurance (R4238)
- 11/15/2018 - \$4,136.66 in taxes (R4238)
- 12/11/2018 - \$221.59 in insurance (R4238)
- 01/11/2019 - \$221.59 in insurance (R4238)
- 02/12/2019 - \$221.59 in insurance (R4238)
- 03/15/2019 - \$250.84 in insurance (R4238)
- 04/04/2019 - \$5.26 in insurance (R4238)
- 04/2019 - \$250.84 in insurance [assumed]
- 05/2019 - \$250.84 in insurance [assumed]
- 06/16/2019 - \$752.52 escrow amount (R4250)
- 07/11/2019 - \$250.84 escrow amount (R4250)
- 08/13/2019 - \$250.84 escrow amount (R4250)
- 09/11/2019 - \$250.84 escrow amount (R4250)
- 10/11/2019 - \$250.84 escrow amount (R4250)
- 11/13/2019 - \$250.84 escrow amount (R4250)

- 11/14/2019 - \$4324.95 escrow amount (R4250)
 - 12/11/2019 - \$250.84 escrow amount (R4250)
 - 01/13/2020 - \$250.84 escrow amount (R4251)
 - 02/11/2020 - \$250.76 escrow amount (R4251)
 - 03/11/2020 - \$250.84 escrow amount (R4251)
 - 04/16/2020 - \$284.17 escrow amount (R4251)
 - 05/12/2020 - \$284.17 escrow amount (R4251)
 - 06/11/2020 - \$284.17 escrow amount (R4251)
 - 07/14/2020 - \$284.17 escrow amount (R4251)
 - 08/12/2020 - \$284.17 escrow amount (R4251)
 - 09/14/2020 - \$284.17 escrow amount (R4251)
 - 10/14/2020 - \$284.17 escrow amount (R4251)
 - 11/12/2020 - \$3859.85 escrow amount (R4251)
 - 11/12/2020 - \$284.17 escrow amount (R4251)
 - 12/14/2020 - \$284.17 escrow amount (R4251)
 - 01/13/2021 - \$284.17 escrow amount (R4252)
 - 02/12/2021 - \$284.17 escrow amount (R4253)
 - 03/12/2021 - \$284.34 escrow amount (R4253)
 - 04/16/2021 - \$284.34 escrow amount (R4253)
 - 05/12/2021 - \$284.34 escrow amount (R4253)
 - 06/14/2021 - \$284.34 escrow amount (R4253)
 - 07/14/2021 - \$284.34 escrow amount (R4253)
 - 08/12/2021 - \$284.34 escrow amount (R4253)
 - 09/14/2021 - \$284.34 escrow amount (R4253)
 - 10/13/2021 - \$284.34 escrow amount (R4254)
 - 11/12/2021 - \$284.34 escrow amount (R4254)
 - 11/16/2021 - \$3,673.24 escrow amount (R4254)
 - 12/14/2021 - \$284.34 escrow amount (R4254)
 - 01/12/2022 - \$284.34 escrow amount (R4255)
 - 02/14/2022 - \$284.34 escrow amount (R4255)
 - 03/14/2022 - \$284.34 escrow amount (R4255)
 - 04/15/2022 - \$295.67 escrow amount (R4255)
 - 05/12/2022 - \$295.67 escrow amount (R4255)
 - 06/14/2022 - \$295.67 escrow amount (R4255)
 - 07/13/2022 - \$295.67 escrow amount (R4255)
- TOTAL: \$40,267.92

Statutes of repose extinguish a cause of action. *Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687, 695-96 (Fla. 2015). Applying the statute of repose here, the trial court's award of \$104,806.26 for taxes and insurance exceeded the \$40,267.92 collectible under Florida's statute of repose. Ignoring the inadmissability of the payment histories and judgment figures, this Court must accordingly reverse the judgment to limit the judgment's line item for "Escrow" to \$40,267.92.

The Florida Supreme Court's construction of the statute of limitations for mortgage foreclosure in *Bartram v. US Bank Nat. Ass'n*, 211 So. 3d 1009 (Fla. 2016) is inapplicable to the statute of repose for two reasons. First, *Bartram* involved the statute of limitation, not the statute of repose. These statutes are different in that the statute of repose extinguish an action, and the statute of repose merely bars the relief sought in an action. *Merkle v. Robinson*, 737 So. 2d 540, 542 n6 (Fla. 1999). Second, the holding in *Bartram* only applies to borrowers asserting a statute of limitations defense. *Bartram* declined to apply the statute of limitations to a foreclosure case where the borrower had a right to

reinstate the loan. *Bartram* 211 So. 3d at 1018-1021. This holding does not apply to Mr. Ruffenach, who is a stranger to the loan documents and has no contractual right to reinstate the loan.

F. Awarding Attorney’s Fees through a Payment History and Summary Without Conducting a Fee Hearing and Without Having a Fee Expert.

Here, the judgment awarded \$93,225.35 in attorney’s fees and costs without any testimony from an expert, and without time records or invoices. “[I]t is well settled that the testimony of an expert witness concerning a reasonable attorney’s fee is necessary to support the establishment of the fee.” *Crittenden Orange Blossom Fruit v. Stone*, 514 So. 2d 351, 352-353 (Fla. 1987). A failure to prove the attorney’s fees through expert testimony requires a reversal where the fees are removed from the judgment. *Raff v. Citimortgage, Inc.*, 272 So. 3d 859, 860 (Fla. 2d DCA 2019). Here, the judgment includes both attorney’s fees and costs. This whole amount should be removed since the Trustee made no effort to separate attorney’s fees from the costs, and “[t]he party seeking fees bears the burden to allocate the issues for which fees were

awardable” *Household Finance Corp. III v. Williams*, 290 So. 3d 508, 511 (Fla. 4th DCA 2020); *See also United States Concrete Pipe Co. v. Bould*, 437 So. 2d 1061, 1065 (Fla. 1983) (“If a judgment includes elements for which an insurer is liable and also elements beyond the coverage of the policy, the burden of apportioning or allocating these damages is on the party seeking to recover from the insurer.”)

The Trustee’s failure to submit time records constitutes an independent reason to strike the \$93,225.35. “Generally, a fee award must be supported by competent evidence which must include evidence detailing the services performed and the reasonableness of the fee.” *Faircloth v. Bliss*, 917 So. 2d 1005, 1006 (Fla. 4th DCA 2006) This means “[t]he applicant should present records detailing the amount of work performed and the time to perform each task.” *Nants v. Griffin*, 783 So. 2d 363, 366 (Fla. 5th DCA 2001). A fee award must be reversed without additional findings or hearings where “the record is devoid of any competent evidence regarding the number of hours reasonably expended, the reasonable hourly rate or details of the services performed.” *Faircloth*, 917 So. 2d at 1007). Ignoring the evidentiary

inadmissability of Trustees' payment histories and judgment figures, this Court must strike the \$93,225.35 amount for attorney's fees and costs under the rule in *Faircloth*.

CONCLUSION

For the reasons set forth above, this judgment below must be reversed and the case dismissed, or the judgment must be reduced to those numbers proven by means that are acceptable under Florida law, and within the statute of repose.

CERTIFICATE OF COMPLIANCE WITH RULE 9.210

I HEREBY CERTIFY that the foregoing complies with the requirements of Florida Rule of Appellate Procedure 9.210 and 9.045. Specifically, this initial brief does not exceed 13,000 words, the font is Arial or Bookman Old Style 14-point font, and is double-spaced.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was furnished via eservice to Michael W. Smith at mwsmith@burr.com and nwmosley@burr.com, on this 24th day of March, 2023.

/s/ Nicholas Vidoni

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