COUNTY OF LEXINGTON) CASE # 2016- 32-CP-

PLAINTIFF,,)

vs.)

DEFENDANT) **ORDER**

INTRODUCTION

Sample—

The parties tried this contested tax sale case on April 15, 2016. John Smith, Esq. represented Plaintiff, Jane Doe, Esq. represented Defendants, and Jeff Anderson, Esq. represented Lexington County. Based on following facts and conclusions of law, the court determines that----.

FINDINGS OF FACT

Sample—

1.-The Court has jurisdiction over the subject matter and parties because—state reason. Dec. Jud Act 15-53-10 et.seq ; 12-61-10 et seq. Tax sale statutes; real estate in Lexington County AND Order of Reference filed ---------referred action to the undersigned. Notice of hearing sent to parties---------.

2. The parties stipulated the following facts if applicable.----ie The County of Lexington sold the subject property at the Dec. 2012 tax sale. Transcript Page--- Line---

3. Continue to outline relevant facts argued by both parties & cite Transcript Page & lines.

If facts disputed, articulate why your witness testimony was more believable:

(a) Plausibility or implausibility of respective testimony. Was it direct or circumstantial?

(b) Witness opportunity to perceive matters testified to.

© Witness bias, interest of motive.

(d) Witness prior consistent or inconsistent statements

(e) Witness character for honesty or lack of honesty

(f) Witness attitude-positive, negative etc.

(g) Witness demeanor evidence while on direct—while on cross.

ISSUES

Sample--

1. First Cause of Action Plaintiff request this court to declare tax sale of property invalid. At issue is whether the relevant portions of the tax sale statute regarding posting were followed…Summarize P & D arguments in separate subsections to the specific tax sale section.

2. Second Cause of Action, Plaintiff argues that Defendant's claiming of the tax sale overage precludes the sale was now being invalidated. At issue is whether….

CONCLUSIONS OF LAW & DISCUSSION

Sample

1. Cite if action is at law or at equity. An action to set aside a tax sale lies in an action in equity. King v James, 694 S.E. 2d 35, 39 (Ct. App. 2010).

2. Cite case law listing your elements of various causes of action.

3. Cite case law listing each cause of actions burden of proof—preponderance, clear and convincing. Lots of Materials to consult, such as Elements of Civil Causes of Action (4th Ed) Sullivan and MacGregor (2009).

- See Appendix B—Questions of Law or Questions of Fact & Appendix C Pages 547-554 Actions at Law or Actions in Equity Pages 555-568 in **Appellate Practice in South Carolina Third Edition Toal, Walker & Baker (2016)

4. Summarize each argument/defense contained above: Plaintiff argued that----summarize argument and Defendant reasons that—summarize each argument and conclusion.

5. Apply Law to Facts: Based upon the determined facts, burden of proof, and application of the relevant law, -------state conclusion on each element of each cause of action and/or defense.

Cite controlling case law and why your facts are applicable and the cases the other party cite are not persuasive because of legal or factual dissimilarities.

If no controlling SC Law etc, then cite if relevant in this order:

1. Federal court cases interpreting SC law.

2. Cases from other jurisdictions that have same law or are directly on point

3. SC Attorney General Opinions.

4. Books, treatises, journals

5. Public Policy & Equity. See Page 275 THe Scrivener A Primer of Legal Writing 3rd Haggard and Moise.

CONCLUSION

Sample-

Wherefore, it is Ordered and adjudged, that:

1. First Cause of Action- i.e. failure to follow tax sale regs dictates ---

2. Second Cause of action- Defendant claiming overage dictates-----

3. Therefore, the sale is-------

_____,2016 _____

Lexington, South Carolina James O. Spence

/ Master-in-Equity/Special Cir. Ct. Judge

JAMES O. SPENCE
LEXINGTON COUNTY MIE
SPECIAL CIRCUIT CT. JUDGE

ANALYSIS

There are two basic catagories of legal reasoning:

(1) Inductive-which includes analogy and inductive reasoning

(2) Deductive-which includes syllogisms.

ORDER WRITING CASE CITATIONS ETC.

PREPONDERANCE OF THE EVIDENCE
THE BURDEN OF PROOF IN THIS CASE IS BY A PREPONDERANCE OF THE EVIDENCE. A PREPONDERANCE OF THE EVIDENCE SIMPLY MEANS THE GREATER WEIGHT OF THE EVIDENCE. IT IS EVIDENCE WHICH, AS A WHOLE, SHOWS THAT THE FACT SOUGHT TO BE PROVED IS MORE LIKELY TRUE THAN NOT TRUE.[3]
THIS CAN BE ILLUSTRATED BY IMAGINING A SET OF SCALES. WHEN THE CASE BEGINS, THE SCALES ARE EVEN. AFTER ALL OF THE EVIDENCE HAS BEEN PRESENTED, IF THE SCALES REMAIN EVEN OR IF THEY TIP EVEN SLIGHTLY IN FAVOR OF THE DEFENDANT, THEN THE PLAINTIFF HAS FAILED TO MEET THE BURDEN OF PROOF AND WOULD NOT BE ENTITLED TO RECOVER IN THIS CASE. IF, ON THE OTHER HAND, THE SCALES TIP EVEN SLIGHTLY IN

[2] Day v. Kilgore, 314 S.C. 365, 444 S.E.2d 515 (1994).
[3] Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121, 117 S. Ct. 1953, 138 L. Ed. 2d 327 (1997).

FAVOR OF THE PLAINTIFF, THE PLAINTIFF WILL HAVE MET THE BURDEN OF PROOF AND YOU

SHOULD RETURN A VERDICT FOR THE PLAINTIFF. THE PREPONDERANCE OF THE EVIDENCE IS NOT DETERMINED BY THE NUMBER OF WITNESSES. INSTEAD, IT MUST BE DETERMINED BY THE GREATER WEIGHT OF ALL OF THE EVIDENCE.

CLEAR AND CONVINCING EVIDENCE

CLEAR AND CONVINCING EVIDENCE IS THAT DEGREE OF PROOF WHICH WILL GIVE YOU A FIRM BELIEF AS TO THE FACTS SOUGHT TO BE PROVED. THIS IS MORE THAN A MERE PREPONDERANCE OF THE EVIDENCE, BUT LESS THAT BEYOND A REASONABLE DOUBT.[4]

DIRECT AND CIRCUMSTANTIAL EVIDENCE

THERE ARE TWO TYPES OF EVIDENCE GENERALLY PRESENTED DURING A TRIAL - DIRECT EVIDENCE AND CIRCUMSTANTIAL EVIDENCE.

DIRECT EVIDENCE IS THE TESTIMONY OF A PERSON WHO CLAIMS TO HAVE ACTUAL KNOWLEDGE OF A FACT, SUCH AS AN EYEWITNESS. IT IS EVIDENCE WHICH IMMEDIATELY ESTABLISHES THE MAIN FACT TO BE PROVED.[5]

CIRCUMSTANTIAL EVIDENCE IS PROOF OF A CHAIN OF FACTS AND CIRCUMSTANCES INDICATING THE EXISTENCE OF A FACT. IT IS EVIDENCE WHICH IMMEDIATELY ESTABLISHES COLLATERAL FACTS

[4] Satcher v. Satcher, 351 S.C. 477, 570 S.E.2d 535 (Ct. App. 2002).

[5] State v. Salisbury, 343 S.C. 520, 541 S.E.2d 247 (2001); Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000).

29

FROM WHICH THE MAIN FACT MAY BE INFERRED. CIRCUMSTANTIAL EVIDENCE IS BASED ON INFERENCE AND NOT ON PERSONAL KNOWLEDGE OR OBSERVATION.[6] IT IS PROOF THAT DOES NOT ACTUALLY ESTABLISH THE FACT IN QUESTION, BUT THAT ASSERTS OR DESCRIBES SOMETHING ELSE

FROM WHICH YOU MAY EITHER REASONABLY INFER THE TRUTH OF THE FACT OR AT LEAST REASONABLY INFER AN INCREASE IN THE PROBABILITY THAT THE FACT IS TRUE.[7] FOR CIRCUMSTANTIAL EVIDENCE TO BE SUFFICIENT TO WARRANT THE FINDING OF A FACT, THE CIRCUMSTANCES MUST LEAD TO THAT FACT WITH REASONABLE CERTAINTY. THE FACTS AND CIRCUMSTANCES SHOULD BE CONSIDERED IN LIGHT OF ORDINARY EXPERIENCE AND COMMON SENSE. THE EXISTENCE OF A FACT CANNOT BE BASED ON SPECULATION, SURMISE, OR CONJECTURE.[8]
THE LAW MAKES ABSOLUTELY NO DISTINCTION BETWEEN THE WEIGHT OR VALUE TO BE GIVEN TO EITHER DIRECT OR CIRCUMSTANTIAL EVIDENCE. NOR IS A GREATER DEGREE OF CERTAINTY REQUIRED OF CIRCUMSTANTIAL EVIDEN

PUBLIC POLICY: Our courts must determine public policy by reference to legislative enactments wherever possible. *See Citizens' Bank v. Heyward*, 135 S.C. 190, 204, 133 S.E. 709, 713 (1925) ("The primary source of the declaration of the public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration."); *Zerjal v. Daech & Bauer Const., Inc*., 405 Ill. App. 3d 907, 912, 939 N.E.2d 1067, 1072-73 (Ill. App. Ct. 2010)

UNCONSCIONABILITY

"In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc*., 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007).

AMBIGUOUS

"An assertion of ambiguity, to be cognizable, must be based on more than possible contestability in the instrument. An agreement is not made ambiguous merely because the parties disagree as to its meaning when the disagreement is not based on reasonable uncertainty of the meaning of the language used….Before concluding that an agreement is ambiguous, the disputed portion should be read in light of the entire instrument and its avowed purpose." See Marathon Oil case page 349 Logic and Legal Reasoning Douglas Lind 2nd Ed (2007)

Questions Presented

1. When a contract is found to be **unambiguous**, will the judge automatically construe the contract against the drafter?
2. When a contract is found to be **ambiguous**, will the judge (1) interpret the ambiguities against the drafter, (2) consider extrinsic evidence to resolve the ambiguity, or (3) combine the two standards of interpretation?
3. Should a judge construe a contract against the drafter when the parties have submitted no or insufficient evidence as to the identity of the drafting party?

Short Answers

1. South Carolina courts do not construe a contract against the drafter if the contract is unambiguous.
2. South Carolina appellate courts have held that if a contract is ambiguous, courts may consider extrinsic evidence as to latent ambiguities and also will construe those ambiguities against the drafter.
3. South Carolina courts have not addressed this issue, but other jurisdictions generally have not applied the rule unless the parties introduce sufficient evidence as to the drafter of the instrument.

Discussion

JAMES O. SPENCE
LEXINGTON COUNTY MIE
SPECIAL CIRCUIT CT. JUDGE

1. **Courts will not construe a contract against the drafter if the contract is unambiguous.**

Under the doctrine of *contra proferentem*, "ambiguities in contract language are construed against the drafter."[1] *Contra proferentem* "has been classified as a secondary rule to be utilized only if the meaning of the contract remains unclear after the primary rules have been applied and all other secondary rules have failed."[2]

South Carolina courts do not seem to construe an agreement against the drafter unless the agreement is ambiguous. The South Carolina Supreme Court in *Southern Atlantic Financial Services, Inc. v. Middleton*—construing a note—found that a default provision in a note was ambiguous and reasoned that ambiguous terms are construed against the drafter, but otherwise, the court will simply interpret the contract according to its terms:

> Generally, if the terms of a contract are clear and unambiguous, this Court must enforce the contract according to its terms regardless of its wisdom or folly. Ambiguous language in a contract, however, should be construed liberally and interpreted strongly in favor of the non-drafting party "After all, the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings."

356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003) (internal citations omitted). Thus, *Middleton* seems to hold that a note and mortgage are not construed against the drafter unless an ambiguity is found; if the contract is ambiguous, however, the contract is then construed against the drafter.

Further, even when interpreting insurance contracts—which are adhesion contracts and are to be construed most liberally in favor of coverage—courts do not construe provisions in favor of the

---

[1] Scott G. Johnson, *Resolving Ambiguities in Insurance Policy Language: The* Contra Proferentem *Doctrine and Use of Extrinsic Evidence*, 33 BRIEF 33, 33 (Winter 2004).

[2] Ed. E. Duncan, *The Demise of* Contra Proferentem *as the Primary Rule of Insurance Contract Interpretation in Ohio and Elsewhere*, 41 TORT TRIAL & INS. PRAC. L.J. 1121, 1123 (2005-2006).

insured unless it first finds the policy is ambiguous or the provision is capable of two different interpretations. In *Stringer v. State Farm Mutual Automobile Insurance Co.*, 386 S.C. 188, 687 S.E.2d 58, 60 (Ct. App. 2009), State Farm argued on appeal that the trial court improperly construed the policy liberally in favor of the insured and strictly against the insurer without finding the policy to be ambiguous. The Court of Appeals held:

> **Ambiguous** terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer. "However, **in cases where there is no ambiguity**, contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary and popular sense."

Id. (emphasis added) (internal citations omitted). The Court of Appeals further found that the trial court had not construed the policy in favor of the insured. *Id.*; *see also Thompson v. Continental Ins. Companies*, 291 S.C. 47, 351 S.E.2d 904 (Ct. App. 1986 ("The rule of strict construction against the insurer does not apply where the language used in the policy is so plain and unambiguous as to leave no room for construction Nor does the rule of strict construction authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists."); *Garrett v. Pilot Life Ins. Co.*, 241 S.C. 299, 304, 128 S.E.2d 171, 174 (1962).

Therefore, when construing contracts that are *not* adhesion contracts, courts likely will not construe the contract against the drafter unless the contract is first found to be ambiguous.

(a) Notes and mortgages

Although notes and mortgages might be considered to be contracts of adhesion, our appellate courts will not go that far. The Supreme Court in *Middleton* stated, "[W]e do not address whether the present contract [a note] is one of adhesion; the Court of Appeals' opinion is modified to the extent it so held." *Middleton*, 356 S.C. at 448 n.3, 590 S.E.2d at 30 n.3. *But see Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998) (finding that retail installment contracts, giving security interests in mobile homes, were adhesion contracts). We could find no cases that applied different rules of contract construction to construe a note and mortgage.

(b) Real estate contracts

We could find no cases in which a real estate contract was found to be a contract of adhesion or that different rules should apply when interpreting those contracts.

2. **After a court finds that a contract is ambiguous, it may consider extrinsic evidence and construe the contract against the drafter.**

South Carolina falls within the majority or modern view,[3] which holds that if the parties' intent can be determined without resort to extrinsic evidence, then that intent is enforced.[4] If, however, the intent is still ambiguous following consideration of the extrinsic evidence, courts construe the contract against the drafter "as an interpretative rule of last resort."[5]

---

[3] Duncan, *supra* n.2, at 1137.

[4] Duncan, *supra* n.2, at 1124; Johnson, *supra* n.1, at 34; *see also State Farm Mut. Auto Ins. Co. v. Wilson*, 782 P.2d 727, 734 (Ariz. 1989); *Travelers Indem. Co. v. Howard Elec. Co.*, 879 P.2d 431, 434-35 (Colo. Ct. App. 1994); *Playtex FP, Inc. v. Columbia Cas. Co.*, 609 A.2d 1087, 1092 (Del. Super. Ct. 1991); *Cameron v. USAA Prop. & Cas. Co.*, 733 A.2d 965, 968 (D.C. 1999); *Claussen v. Aetna Cas. & Sur. Co.*, 380 S.E.2d 686, 687 (Ga. 1989); *University of Ill. v. Continental Cas. Co.*, 599 N.E.2d 1338, 1345 (Ill. App. Ct. 1992); *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 124 (La. 2000); *Bailer v. Erie Ins. Co.*, 687 A.2d 1375, 1378 (Md. 1997); *Simon v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 782 N.E.2d 1125, 1128-29 (Mass. 2003); *Klapp v. United Ins. Group Agency*, Inc., 663 N.W.2d 447 (Mich. 2003); *Essex Ins. Co. v. Laruccia Constr., Inc.*, 71 A.D.3d 818, 819 (N.Y. 2010); *Boso v. Erie Ins. Co.*, 669 N.E.2d 47, 51 (Ohio Ct. App. 1995); *DiFabio v. Centaur Ins. Co.*, 531 A.2d 1141, 1142-43 (Pa. Super. Ct. 1987*); Mescalero Energy, Inc. v. Underwriters Indem. Gen.* Agency, 56 S.W.3d 313, 319 (Tex. Ct. App. 2000); *Meadow Valley Contractors, Inc. v. State Dept. of Transp.*, 266 P.3d 671 (Utah 2011); *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 882 P.2d 703, 721 (Wash. 1994); *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Northwest, Inc.*, No. 66318-6-I, 2012 WL 1605487, at *1 (Wash. Ct. App. May 7, 2012); *Walle Mut. Ins. Co. v. Sweeney*, 419 N.W.2d 176, 179-80 (N.D. 1988); *S. Ins. Co. of Va. v. Williams*, 561 S.E.2d 730, 733 (Va. 2002). *But see Boling v. State Farm Mut. Auto. Ins. Co.*, 466 S.W.2d 696, 699 (Mo. 1971). Other states are undecided, but appear inclined to join the majority view. *See Safeway Ins. Co. of Ala. Inc. v. Amerisure Ins. Co.*, 707 So. 2d 218, 221 (Ala. 1997); *Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 765 A.2d 891, 897 (Conn. 2001); *Williams v. Essex Ins. Co.*, 712 So. 2d 1232 (Fla. Dist. Ct. App. 1998); *Apgar v. Commercial Union Ins. Co.*, 683 A.2d 497, 500-01 (Maine 1996); *Security Mut. Cas. Co. v. Luthi*, 226 N.W.2d 878, 882 (Minn. 1975); *Jaramillo v. Providence Wash. Ins. Co.*, 87 P.2d 1343, 1346-47 (N.M. 1994); *Kerr-McGee Corp. v. Admiral Ins. Co.*, 905 P.2d 760, 764 (Okla. 1995); *Garvison v. St. Paul Fire & Marine Ins. Co.*, 771 P.2d 310, 313 (Or. Ct. App. 1989); *N. River Ins. Co. v. Golden Rule Constr., Inc.*, 296 N.W.2d 910, 913 (S.D. 1980); *Garner v. Am. Home Assurance Co.*, 460 S.W.2d 358, 361 (Tenn. Ct. App. 1969); *Mascott v. Granite State Fire Ins. Co.*, 35 A. 75, 76 (Vt. 1896).

[5] *Id.*; 11 WILLISTON ON CONTRACTS § 32:12 (4th ed. 2012).

In South Carolina, the primary objective in construing a contract is to ascertain and "give effect to the intention of the parties." *Williams v. Teran, Inc.*, 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976). When a contract is unambiguous, "the fact finder must ascertain the parties' intentions from the evidence presented." *Id.* at 528, 221 S.E.2d at 529. When a written contract is "ambiguous in its terms, . . . parol and other extrinsic evidence will be admitted to determine the intent of the parties." *Charles v. B & B Theatres, Inc.*, 234 S.C. 15, 18, 106 S.E.2d 455, 456 (1959). However, when ambiguities arise within a contract, the ambiguities "should be construed liberally and interpreted strongly in favor of the non-drafting party." *Middleton*, 356 S.C. at 447, 590 S.E.2d at 29.

Extrinsic evidence may not be offered to resolve all ambiguities, however. Extrinsic evidence may be introduced to resolve *latent* ambiguities, but not *patent* ambiguities:

> Even if an ambiguity exists in a contract, extrinsic evidence may not be considered if the ambiguity is a patent ambiguity. . . . A patent ambiguity is one that arises upon the words of a will, deed, or contract. A latent ambiguity exists when there is no defect arising on the face of the instrument, but arising when attempting to apply the words of the instrument to the object or subject described. [An example] of a latent ambiguity [is] a named beneficiary in a will that is unambiguous on the face of the will, but creates a latent ambiguity where there are two people with that name). Interpretation of an unambiguous policy, or a policy with a patent ambiguity, is for the court.[6]

Although no South Carolina appellate court has considered extrinsic evidence and also construed the contract against the drafter, the courts make clear that the *contra proferentem* rule is to be applied when construing an ambiguous contract:

- *Davis v. KB Home of South Carolina, Inc.*, 394 S.C. 116, 129 n.4, 713 S.E.2d 799, 806 n.4 (Ct. App. 2011) ("Even if this court were to view the merger clause as ambiguous, any ambiguity must be construed against the drafter of the contract, in this case KB Home.") (citing *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 175, 644 S.E.2d 718, 722 (2007) ("[A] court will construe any doubts and ambiguities in an agreement against the drafter of the agreement.")). The court found that the merger clause in an employment contract was unambiguous and did not consider

[6] *Beaufort County School Dist. v. United Nat'l Ins. Co.*, 392 S.C. 506, 525-26, 709 S.E.2d 85, 95-96 (Ct. App. 2011) (internal citations omitted).

extrinsic evidence, but in the footnote seemed to imply that if it had been ambiguous, the drafter was going to lose because the ambiguity would be construed against the drafter.

- *Mathis v. Brown & Brown of South Carolina, Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010) ("Moreover, even if the language creates an ambiguity, a court will construe any doubts and ambiguities in an agreement against the drafter of the agreement."). The court found that an e-mail created an employment contract and then cited the construction-against-the drafter rule, without further comment, which seems to imply that the drafter would lose.

- *Duncan v. Little*, 384 S.C. 420, 425, 426-27, 682 S.E.2d 788, 791 (2009) (construing a bank safety deposit lease and in dicta construing extrinsic evidence: the bank's forms).

> We reject the suggestion of an ambiguity. In any event, were we to entertain the idea of an ambiguity, such ambiguity would have to be construed against the Bank which drafted the agreement. *Williams v. Teran, Inc.*, 266 S.C. 55, 60, 221 S.E.2d 526, 529 (1976) (noting the rule of contract interpretation that an ambiguous contract will be construed against the drafting party); *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 175, 644 S.E.2d 718, 722 (2007) ("[A] court will construe any doubts and ambiguities in an agreement against the drafter of the agreement.").

> Moreover, an ambiguity would allow resort to the Bank's own forms, which are manifestly at odds with the Bank's position. For example, the form entitled "Inventory of Contents of Safe Deposit Box" provides a signature block for a "surviving co-lessee." That signature block expressly provides that the signature of the "surviving co-lessee" is "[o]nly required if surviving co-lessee and the qualified person are not the same person." The Bank considered Sammy as the "qualified person," yet Sammy was permitted to sign as the "surviving co-lessee." Cleo, as the surviving co-lessee, was entitled to notice and the right to be present at the inventory.

- *Springs & Davenport, Inc. v. AAG, Inc.*, 385 S.C. 320, 326-28, 683 S.E.2d 814, 816-18 (Ct. App. 2009) (construing a real estate listing contract against the defendant seller to determine if the plaintiff broker had earned a commission when the buyer later defaulted in payments after the sales contract was signed; court considered a separate letter between the parties and rejected

seller's argument that the letter constituted a condition precedent that had not been met). The court stated as follows:

> We find this case is similar to *Charles v. West*, 155 S.C. 488, 491, 152 S.E. 644, 644 (1930). In *Charles*, at the closing, the seller gave the broker a "due bill" for payment at a later time instead of cash. Then, because of problems with the transaction, the seller attempted to not pay the broker pursuant to the due bill. *Charles*, 155 S.C. at 491, 152 S.E. at 644–45. The court found the due bill did not state clearly whether payment would not be made unless and until the occurrence of a future event, and because the writing was drafted by the seller, any doubt of its construction must be resolved against him and in favor of the broker. *Id.* at 494, 152 S.E. at 646. The court also determined the broker did not sign the "due bill" and there was no evidence of any new consideration moving to either of the parties for its execution and delivery because when the bill was given to him, the broker had already completed what he had agreed to do, which was to procure a satisfactory customer. *Id.* Here, although Springs did sign the January 6, 2000 letter, when it did so, it had already done what the contract required it to do to receive its commission because AAG and Clark had signed a sales contract. *See Thomas–McCain*, 268 S.C. at 199, 232 S.E.2d at 730 (concluding that pursuant to the contract, the broker had earned the commission, payment of the commission was due even in the event of default, and there were no further obligations to be performed by the broker). If AAG had wanted to ensure it only owed Springs a commission if and when Clark made its payments, AAG could have used language stating no commission was due unless payment was made by Clark. Thus, construing the letter against the drafter, AAG, we find the letter did not create a condition precedent, but merely extended the time AAG had to pay Springs its commission.

- *McGill v. Moore*, 381 S.C. 179, 672 S.E.2d 571 (2009) (affirming master and rejecting buyer's argument that contract for sale of real estate was ambiguous and further stating that even if it were ambiguous, the ambiguous language would be construed in favor of the seller, who was the non-drafting party).

- *Ward v. West Oil Co.*, 379 S.C. 225, 245, 665 S.E.2d 618, 629 (Ct. App. 2008) (construing agreement in favor of drafter defendant because specific clause in the contract waived the rule to construe against the drafter, the rule did not apply), *vacated on other grounds*, 387 S.C. 268, 692 S.E.2d 516 (2010).

JAMES O. SPENCE
LEXINGTON COUNTY MIE
SPECIAL CIRCUIT CT. JUDGE

R&B asseverates the special referee erred by construing the Addition as an "escape clause" for West Oil. Particularly, R&B claims the operative language used in the Addition contradicts the terms of the contract creating an ambiguity which should be construed in R&B's favor. We disagree.

Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage.

Myrtle Beach Lumber Co. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981); *see also Columbia East Assocs. v. Bi–Lo, Inc.*, 299 S.C. 515, 519-20, 386 S.E.2d 259, 261–62 (Ct. App. 1989) ("Where the contract is susceptible of more than one interpretation, the ambiguity will be resolved against the party who prepared the contract.").

- *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 590-91, 658 S.E.2d 539, 542-43 (Ct. App. 2008) (reversing master's decision that ambiguity in payment terms in a construction contract should be construed against construction company that drafted the contract; appellate court finding that contract was not ambiguous and called for specific payments). The court stated as follows:

  Here, we find the language of the contract is clear and unambiguous. *See Hawkins v. Greenwood Dev. Corp.,* 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) ("A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or business."). Read as a whole, the contract states that Homeowner is required to make five specific payments, each corresponding to Contractor's performance of a specific task. This payment schedule is explicitly explained in the section labeled "Payment" and is later reinforced, both in paragraph 14 of "Agreed Conditions" and in the final section of the contract. Homeowner's actions in making the first three payments according to the schedule set forth in parties' written contract indicates that Homeowner and Contractor shared a common understanding of the payment terms.

JAMES O. SPENCE
LEXINGTON COUNTY MIE
SPECIAL CIRCUIT CT. JUDGE

> Because we find this contract is clear, explicit, unambiguous, and capable of only one reasonable interpretation, the court does not look beyond the four corners to discern the parties intentions. *See Keith v. River Consulting, Inc.*, 365 S.C. 500, 506, 618 S.E.2d 302, 305 (Ct. App. 2005) (explaining parol evidence is admissible to discover the parties intentions when a contract is silent regarding a particular issue). Therefore, we reverse the masters finding that the contracts payment terms were ambiguous.

In a somewhat different procedure, the South Carolina federal district court has first construed an insurance contract against the drafter to find that it was ambiguous; then, the court considered extrinsic evidence to determine the parties' intent. *See White v. ACE Am. Ins. Co.*, No. No. 4:07-cv-01551-RBH, 2010 WL 1027872, at *3 (D.S.C. March 17, 2010). *But see Cothran v. Refinance Standard Life Ins. Co.*, No. CA 6:98–3489–20, 1999 WL 33987897, at *4 (D.S.C. Feb. 9, 1999) ("The doctrine of *contra preferentum* provides that ambiguous contract terms are construed against the drafter.").

3. **The rule of *contra proferentem* should not apply unless the parties introduce evidence of the drafter of the contract.**

No South Carolina cases have addressed how a court should proceed in applying *contra proferentem* in the absence of information as to the identity of the drafter. However, the Eighth Circuit recently upheld a trial court's refusal to provide a *contra proferentem* jury instruction because "there was not sufficient evidence in the record" as to who drafted the architectural services contract provision in question. *See Shaw Hofstra & Assocs. v. Ladco Dev., Inc.*, 673 F.3d 819, 828 (8th Cir. 2012).

In *Dobron v. Bunch*, 215 P.3d 35, 40 (Nev. 2009), the Nevada state court also held that the rule did not apply when the parties had not provided evidence or argument regarding which party drafted the guaranty agreement. *Cf. Nestle, USA-Beverage Div., Inc. v. D.H. Overmyer Co.*, 173 F.3d 861 (9th Cir. 1999) (reversing summary judgment, in part, the evidence of who drafted the agreement was inconclusive to determine whether an ambiguity should be construed against the drafter); *Canyon Lake Park, L.L.C. v. Loftus Dental, P.C.*, 700 N.W.2d 729, 735 (S.D. 2005) (court noting that appellant disagreed as to the identity of the drafter, but court held that identity of the drafter was inconsequential because the contract was not ambiguous, so the rule construing a document against the drafter did not apply).

JAMES O. SPENCE
LEXINGTON COUNTY MIE
SPECIAL CIRCUIT CT. JUDGE

For summary judgment purposes, however—when the court must construe all evidence in favor of the opposing party—the court may assume that the moving party drafted the contract if no evidence is entered on this issue. *See In re Gill*, No. 89-02468, 1991 WL 212103, at *2 (Bankr. W.D. 1991 Oct. 17, 1991) (for summary judgment purposes, court assumed that lender drafted the contract although no party had identified the drafters). *But see Seaco Ins. Co. v. Barbosa*, 761 N.E.2d 946, 951, 951 n.6 (Mass. 2002) (refusing, in summary judgment order, to construe ambiguities in lease against either party because no evidence by affidavit or otherwise was offered to show who drafted it).

As this rule is a doctrine of last resort and a "late-inning tiebreaker,"[7] it would follow that without sufficient evidence as to the drafter's identity, application of the doctrine would be impractical. As the trial court in *Shaw Hofstra & Associates* indicated, *contra proferentem* is a ruling of law that, in certain circumstances, can "essentially result in a directed verdict for one side or another." 673 F.3d at 828. Therefore, courts should use it sparingly and only when no other standards of interpretation are available or successful.

Conclusion

As a doctrine of interpretation applied to general contract law, *contra proferentem* is a doctrine of last resort. Therefore, when both parties have equal bargaining power, the court will first attempt to determine the parties' mutual intent by considering the terms of the agreement without resort to extrinsic evidence or construing the agreement against the drafter. If the parties' intent cannot be determined on the face of the agreement, the court will consider extrinsic evidence and construe the agreement against the drafter. Unless the parties enter evidence of the identity of the drafter, however, courts likely will not apply the rule.

BUSINESS RECORDS

DEEP KEEL

We find Deep Keel offered evidence sufficient to authenticate the loan documents. First, Bynum's testimony complied with Rule 901(b)(1), SCRE, which provides that evidence may be authenticated by a witness with knowledge who testifies that an item "is what it is claimed to be." Bynum testified he agreed to purchase a note

[7] Johnson, *supra* n.1, at 33 (quoting 1 JEFFREY W. STEMPEL, LAW OF INSURANCE CONTRACT DISPUTES § 4.04 (2d ed. 2002)).

JAMES O. SPENCE
LEXINGTON COUNTY MIE
SPECIAL CIRCUIT CT. JUDGE

from CresCom Bank, he examined the loan documents while negotiating the agreement, and the loan documents offered in evidence were the ones he examined and later received pursuant to this transaction. This testimony authenticated the loan documents because it was sufficient to support a finding that they were the documents Deep Keel claimed them to be—the note, mortgage, and assignment of leases executed by Atlantic in 2008 when it borrowed the money from Community First; the two loan modification agreements "modify[ing] the original note"; and a partial release of the security interests granted through the mortgage and assignment of leases. *See* Rule 901(a).

Atlantic argues, however, Bynum was not a witness with knowledge under Rule 901(b)(1) because he did not know "when, how, or by whom the documents were prepared, how they came to be in the possession of CresCom Bank, or how they were maintained by that bank." The authentication requirement does not demand this degree of proof. *See Hassan*, 742 F.3d at 133. Bynum's testimony demonstrated he had personal knowledge that the loan documents admitted into evidence were the same ones CresCom Bank provided to him when Deep Keel purchased the asset the loan documents represent—the 2008 note, as modified, with security interests. This is sufficient evidence to meet the Rule 901(a) requirement of authentication.

Second, Deep Keel authenticated the loan documents under Rule 901(b)(4), SCRE, which provides that evidence may be authenticated based on "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in

[3] When South Carolina adopted the Rules of Evidence in 1995, Rule 901(a) was "identical to the federal rule." Rule 901, SCRE, note. The federal rule was amended in 2011 with changes that were "stylistic only" and not "inten[ded] to change any result in any ruling on evidence admissibility." *See* Fed. R. Evid. 901 advisory committee's note to the 2011 amendment.

conjunction with circumstances." The note the master admitted into evidence (1) names Atlantic as the "Borrower"/"Mortgagor" and Community First as the "Lender," (2) states $2,000,000 as the amount of the loan, (3) provides the date of execution—March 27, 2008, and (4) recites a specific "loan number" of 145003387. The mortgage—which was recorded in the public record[4]—contains the same information, including the loan number. The specific and distinctive information on the face of the note, considered in connection with the mortgage, is sufficient to support a finding that the note was the one Atlantic executed in 2008. *See Kershaw Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 398, 396 S.E.2d 369, 373-74 (1990) (finding admission proper under "the principle articulated in Fed. R. Evidence 901(b)(4)" where "[a]n examination of the[] documents establishes that [they] relate to the same subject, are internally consistent, [and] often refer to or answer each other");[5] 59A C.J.S. *Mortgages* § 991 (2009) (stating when promissory notes "correspond on their face with those recited in the mortgage, no further proof of their execution [or] their identity is required until defendant presents countervailing evidence"); 59A C.J.S. *Mortgages* § 987 (2009) (stating a note "is admissible when sufficiently identified as the one recited or referred to in the mortgage" (footnote omitted)). The remaining loan documents each refer to the note and mortgage and, importantly, (1) name Atlantic and Community First as the parties to the transaction, (2) state the same principal amount of the loan—$2,000,000, (3) specifically reference the date March 27, 2008, and (4) recite the same loan number found on the note and mortgage. These facts are sufficient to support a finding that the loan documents were the documents Deep Keel claimed them to be. *See* Rule 901(a).

Third, we find the first five loan documents—excluding the partial release—are self-authenticating under Rule 902(9), SCRE, which provides, "Extrinsic evidence

[4] *See* Rule 901(b)(7), SCRE (providing an item may be authenticated with "[e]vidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept").

[5] *Kershaw* was decided before we adopted the Rules of Evidence. *See* Rule 1103(b), SCRE ("These rules shall become effective September 3, 1995."). However, the adoption of the Rules did not change prior law regarding this principle of

authentication. *See* Rule 901, SCRE, note (stating "[s]ubsection (b)(4) is consistent with prior law," and citing *Kershaw* for support).

JAMES O. SPENCE
LEXINGTON COUNTY MIE
SPECIAL CIRCUIT CT. JUDGE

of authenticity as a condition precedent to admissibility is not required with respect to . . . [c]ommercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law." The note is commercial paper, and the other four loan documents are either commercial paper themselves or "documents relating thereto."[6] *Id.* Each of the five documents bears the signature of Terry L. Rohlfing.

The "general commercial law" of South Carolina includes our Uniform Commercial Code, *see* S.C. Code Ann. § 36-1-101(a) (Supp. 2014), which provides, "In an action with respect to an instrument, the authenticity of . . . each signature on the instrument is admitted unless specifically denied in the pleadings," S.C. Code Ann. § 36-3-308(a) (Supp. 2014). The note Rohlfing signed on behalf of Atlantic is an "instrument,"[7] and thus, this is "an action with respect to an instrument." Deep Keel alleged in its complaint that "Atlantic, . . . by and through . . . Rohlfing, executed and delivered to Community First Bank Note #0145003387 . . . in the amount of $2,000,000" and "a mortgage" on "March 27, 2008." In response to these allegations, Atlantic "admit[ted] . . . that [Community First] made a loan to Defendant Atlantic." Atlantic did not specifically deny anything in response to these allegations. Atlantic also made no specific denial to similar allegations as to the other loan documents. We find Atlantic admitted the

[6] A note is commercial paper. *See* S.C. Code Ann. tit. 36, Commercial Code, Background and Introduction at 7 (2003) (stating "commercial paper" is "the Code term for . . . notes"); *Black's Law Dictionary* 1285 (10th ed. 2014) (defining "commercial paper" as "[a]n instrument . . . for the payment of money," such as "a note"). The loan modification agreements are also commercial paper because they "modify the original note," and the mortgage and assignment of leases, rents, and profits are "documents relating thereto" because they represent security interests to secure repayment of the note.

[7] "'Instrument' means a negotiable instrument," S.C. Code Ann. § 36-3-104(b) (Supp. 2014), and "'negotiable instrument' means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order," S.C. Code Ann. § 36-3-104(a) (Supp. 2014). "[A] promissory note secured by a real estate mortgage" is "a negotiable instrument." *Swindler v. Swindler*, 355 S.C. 245, 247, 250, 584 S.E.2d 438, 439,

440 (Ct. App. 2003). Therefore, the note is an "instrument" for purposes of subsection 36-3-308(a).

JAMES O. SPENCE
LEXINGTON COUNTY MIE
SPECIAL CIRCUIT CT. JUDGE

authenticity of Rohlfing's signature on the first five loan documents pursuant to subsection 36-3-308(a).

Atlantic points out, however, that in its answer it "[made] reference to the original loan documents and den[ied] any allegations of these paragraphs inconsistent therewith." Atlantic argues this denial was sufficient to contest the authenticity of Rohlfing's signature on the note. We disagree and find Atlantic's answer did not "specifically den[y]" the validity of the signatures, § 36-3-308(a), and was too general to challenge the authenticity of the first five loan documents. *See* 29A Am. Jur. 2d *Evidence* § 1200 (2009) ("Authentication of notes . . . is sufficient . . . where the Uniform Commercial Code . . . provides that each signature on an instrument is admitted unless specifically denied in the pleadings." (footnote omitted)); *see also Nat'l Equip., Ltd. v. David Jones Sales, Trucking Div., Inc.*, 268 S.C. 551, 555, 235 S.E.2d 125, 126-27 (1977) (finding appellant's answer "raises no question as to the genuineness of her signature" because she "neither alleged forgery nor specifically denied her signature"); *Conran v. Yager*, 263 S.C. 417, 419, 421, 211 S.E.2d 228, 229, 230 (1975) (finding appellant "plead a general denial" and "concede[d] the existence of the note" and thus "raised no question as to the genuineness of his signature [on the note], [and] the respondent's production of the note . . . entitled him to 'recover on it'").[8] Additionally, we point out Atlantic offered no evidence at the hearing and did not argue Rohlfing's signature on the note was invalid. *See United States v. Vidacak*, 553 F.3d 344, 351 (4th Cir. 2009) (finding exhibits properly admitted where the appellant "offered no basis for inferring that the exhibits were forged or altered that would arouse this Court's suspicion as to their authenticity").

The admission of evidence is within the discretion of the trial court. *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005). We find the master acted within his discretion in admitting the loan documents because Deep Keel presented evidence—Bynum's testimony, the loan documents themselves, and the mortgage—sufficient to support a finding that the loan documents were the documents Deep Keel claimed them to be, and thus sufficient evidence to meet the requirement of authentication. *See* Rule 901(a).

B. Hearsay

[8] For the continued validity of *National Equipment* and *Conran* after the adoption of the Rules of Evidence, see footnote 5.

JAMES O. SPENCE
LEXINGTON COUNTY MIE
SPECIAL CIRCUIT CT. JUDGE

Atlantic also argues the loan documents should have been excluded because they were hearsay. *See* Rule 801(c), SCRE ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). "The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies." *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 411, 764 S.E.2d 249, 253 (Ct. App. 2014); *see also* Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute."). However, "[a] statement that is not offered to prove the truth of the matter asserted should not be excluded as hearsay." *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000).

The master relied on the business records exception to the hearsay rule to admit the loan documents. *See* Rule 803(6), SCRE; S.C. Code Ann. § 19-5-510 (2014). However, the master's reliance on a hearsay exception was unnecessary because the loan documents were not hearsay in the first place. The loan documents form the basis of Deep Keel's claim that Community First loaned Atlantic money in exchange for an obligation to pay it back and a security interest in the real estate. Thus, the loan documents were offered to establish the existence of a contract and the terms of that contract. Written contracts "offered in court not for the truth of any facts stated in [them] but to prove the existence of a contractual right or duty" should not be excluded as hearsay. 31A C.J.S. *Evidence* § 462 (2008); *see also Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 540 (5th Cir. 1994) ("Signed instruments such as wills, contracts, and promissory notes are writings that have independent legal significance, and are non[-]hearsay."); *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 559, 658 S.E.2d 80, 87 (2008) (recognizing that "words of contract" are non-hearsay when they are not "offered for the truth of the matter asserted" and "form[] part of an issue" being litigated). We find the loan documents were 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 were not offered to prove the truth of any statement, they were not hearsay and the master correctly admitted them.

III. Admission of Testimony Regarding Amount Remaining Due

In contrast to Deep Keel's thorough presentation of documents to prove the existence of its agreement with Atlantic and the terms of repayment, Deep Keel offered no documentation of the amount remaining due on the loan. The only

JAMES O. SPENCE
LEXINGTON COUNTY MIE
SPECIAL CIRCUIT CT. JUDGE

evidence Deep Keel offered of the amount due was Bynum's testimony. Atlantic objected to this testimony on the basis of hearsay, but the master admitted it pursuant to the business records exception. Atlantic contends Bynum's testimony should have been excluded because it was hearsay to which no exception applied.[9]

A. Hearsay

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.

B. Business Records Exception

[9] Because no actual records were offered in evidence to prove the amount, there is no authentication issue.

JAMES O. SPENCE
LEXINGTON COUNTY MIE
SPECIAL CIRCUIT CT. JUDGE

The master relied on the business records exception to admit Bynum's testimony. According to Rule 803(6), the following is not excluded by the rule against hearsay:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness . . . .

See also § 19-5-510 ("A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."); *Ex parte Dep't of Health & Envtl. Control*, 350 S.C. 243, 249-50, 565 S.E.2d 293, 297 (2002) (explaining business records are admissible under Rule 803(6) and section 19-5-510 "as long[] as they are (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court").

Atlantic first asserts the business records exception does not apply in this case because no records were actually offered in evidence. Bynum's testimony demonstrates he reviewed bank records that showed the principal balance and total amount due on the note, but these records were never offered in evidence at the hearing. The plain language of Rule 803(6) allows for the admission of "[a] memorandum, report, record, or data compilation," not testimony describing such a document. We hold 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)); *State v. Watkins*, 224 P.3d 485, 492 (Idaho 2009) (finding written notes relied on by the witness "were not offered into evidence" and "[i]n the absence of any document . . . there was simply no 'business record' that might fall within this hearsay exception"); *Bass v. Washington Kinney Co.*, 457 N.E.2d 85, 96 (Ill. App. Ct. 1983) ("[I]t is only the business record itself which is admissible, and not the testimony of a witness who makes reference to the record.").[10]

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.*[11] 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.

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

[10] Deep Keel's argument that Bynum's live testimony could be admitted under the business records exception would require Bynum to testify to the content of the records. This is prohibited by the "Requirement of Original" in Rule 1002, SCRE, which provides, "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." [11] *See also Midfirst Bank, SSB v. C.W. Haynes & Co.*, 893 F. Supp. 1304, 1310 (D.S.C. 1994), *aff'd sub nom. C.W. Haynes & Co. v. Midfirst Bank, SSB*, 87 F.3d 1308 (4th Cir. 1996) ("Business records of an entity

are admissible even though another entity made the records, and the rule does not require an employee of the entity that prepared the record to lay the foundation.").

JAMES O. SPENCE
LEXINGTON COUNTY MIE
SPECIAL CIRCUIT CT. JUDGE

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).

Because 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 did not argue, and we do not find, any other hearsay exception applies. Thus, we find the master abused his discretion in admitting the evidence.

C. Prejudice

We must next determine whether Atlantic was prejudiced by the admission of the evidence. *See Fields*, 363 S.C. at 26, 609 S.E.2d at 509 (stating to warrant reversal, the appellant must prove the evidentiary ruling was erroneous and resulted in prejudice). Without 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.

IV. Findings Related to Liability of Guarantors

Rohlfing and Caldwell argue the master erred by finding they executed and delivered personal guaranties to Community First and were liable on the guaranties because those issues were outside the scope of the order of reference. Specifically, they contend this court should vacate the master's finding 18, which states:

> On or about March 27, 2008, [Rohlfing] and [Caldwell] executed and delivered to [Community First] Bank personal Guaranties to individually guaranty the Note and debt of [Atlantic]. The said unsecured Guaranties make [them] liable for a limited principal amount of $350,000.00.

We first consider whether this issue is preserved for our review because Rohlfing and Caldwell did not argue in their Rule 59(e), SCRCP, motion that the master erred in including finding 18 in his order. We find the issue preserved. A master's

JAMES O. SPENCE
LEXINGTON COUNTY MIE
SPECIAL CIRCUIT CT. JUDGE

authority to determine issues referred to him by the circuit court is a question of subject matter jurisdiction, which "may be raised at any time, including on appeal." *Normandy Corp. v. S.C. Dep't of Transp.*, 386 S.C. 393, 403, 688 S.E.2d 136, 141 (Ct. App. 2009). *Cf.* 386 S.C. at 402-04, 688 S.E.2d at 141-42 (finding the master had subject matter jurisdiction to rule on a particular issue because the order of reference "did not limit the issues to be addressed by the master"). Thus, we address the merits of Rohlfing and Caldwell's argument.

"Pursuant to Rule 53, SCRCP, a master has no power or authority except that which is given to him by the order of reference." *Bunkum v. Manor Props.*, 321 S.C. 95, 98, 467 S.E.2d 758, 760 (Ct. App. 1996). "When a case is referred to a master, Rule 53(c) gives the master the power to conduct hearings in the same manner as the circuit court, unless the order of reference specifies or limits his powers." *Smith Cos. of Greenville, Inc. v. Hayes*, 311 S.C. 358, 360, 428 S.E.2d 900, 902 (Ct. App. 1993). The circuit court referred the case to the master "for the purposes of adjudicating the foreclosure action." The order of reference specifically provided that "upon a resolution or disposition of the foreclosure action, this case is to be returned to the Circuit Court for final hearing and disposition as to any issues triable by jury against" Rohlfing and Caldwell. The order did not authorize the master to decide any issues regarding Rohlfing's and Caldwell's liability on the guaranties; it specifically restricted the master from doing so. Because finding 18 exceeded the scope of the order of reference,[12] we vacate the finding.

V. Conclusion

We find the master acted within his discretion in admitting the loan documents because they were properly authenticated and were not hearsay. However, we find Bynum's testimony regarding the amount due on the note was hearsay to which no exception applied, and thus, the master erred in admitting his testimony on that issue. Finally, we find the master acted outside the scope of the order of reference

[12] We decide only the narrow issue raised by Rohlfing and Caldwell—whether the master exceeded the scope of the order of reference—and do not address their entitlement to a jury trial on the breach of guaranty claims. *See Carolina First Bank v. BADD, L.L.C.*, Op. No. 27486 (S.C. Sup. Ct. filed Jan. 28, 2015) (Shearouse Adv. Sh. No. 4 at 21, 25), *reh'g granted* (Apr. 9, 2015) (stating "a

party does not have a right to a jury trial when he is included in the action solely for the purpose of obtaining a deficiency judgment").

JAMES O. SPENCE
LEXINGTON COUNTY MIE
SPECIAL CIRCUIT CT. JUDGE

by making a finding bearing on the liability of Rohlfing and Caldwell, and we vacate this finding.

We **AFFIRM** the judgment of foreclosure, **REVERSE** the deficiency judgment entered against Atlantic, **REMAND** to the circuit court for further proceedings necessary for final judgment on all claims, and **VACATE** finding 18.

HUFF and WILLIAMS, JJ., concur.

CACH CASE

If a witness's testimony conveys information from a person "with knowledge" at the time the records were created, the witness may be deemed qualified to testify despite not being the custodian "at or near the time" the records were made. *Twelfth RMA Partners, L.P.*, 335 S.C. at 642, 518 S.E.2d at 48 (noting this is "a situation expressly allowed under Rule 803(6)"); *see also Midfirst Bank, SSB v. C.W. Haynes & Co.*, 893 F.Supp. 1304, 1310 (D.S.C. 1994) ("Business records of an entity are admissible even though another entity made the records, and the rule does not require an employee of the entity that prepared the record to lay the foundation."), *aff'd*, 87 F.3d 1308 (4th Cir. 1996); *id.* at 1311 ("The phrase 'other qualified witness' should be broadly interpreted.").

DUTY TO CITE PRECEDENT EVEN IF PARTIES DO NOT ARGUE

State v Phillips SC Sup Ct. April 20, 2016

The State contends Phillips has not preserved her *Hepburn* argument because this precise point—that the testimony offered by a co-defendant should not be considered in reviewing a motion for directed verdict—was never squarely presented to the court of appeals. We acknowledge Phillips never specifically argued until her petition for rehearing that the review of her motion should be limited to the evidence presented in the State's case; however, this does not preclude her from arguing this now, nor, more fundamentally, can it prevent this Court from applying the proper standard of review. Phillips has consistently argued the denial of her motion for directed verdict was in error. Requesting that the Court consider *Hepburn* in its analysis is not a distinct argument, but merely adds nuance

to the inquiry engaged in by the appellate court. Further, it is incumbent upon the court of appeals to apply this Court's precedent. *See* S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."). Simply because a party does not expressly articulate the relevance of a particular case does not excuse the court of appeals from failing to apply controlling precedent. While it may have been preferable for Phillips to make this argument during oral argument, the court of appeals should not have overlooked recent case law—especially where it was expressly cited. Moreover, the court of appeals had the opportunity to correct its error on rehearing but declined to do so. We therefore reject the State's argument that Phillips' reliance on *Hepburn* is not preserved.

Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust as Trustee of the American Mortgage Investment Partners Fund I Trust, Respondent,

v.

Melissa Furmanchik; Masonborough at Park West Association, Inc. and Wells Fargo Bank, N.A., Defendants,

Of whom Melissa Furmanchik is the Appellant.

Appellate Case No. 2014-000906

Appeal From Charleston County Mikell R. Scarborough, Master-in-Equity

Unpublished Opinion No. 2015-UP-353 Heard June 2, 2015 – Filed July 15, 2015

JAMES O. SPENCE
LEXINGTON COUNTY MIE
SPECIAL CIRCUIT CT. JUDGE

AFFIRMED

Mary Leigh Arnold, of Mary Leigh Arnold, PA, of Mount Pleasant, for Appellant.

Jason David Wyman, of Rogers Townsend & Thomas, PC, of Columbia, for Respondent.

JAMES O. SPENCE
LEXINGTON COUNTY MIE
SPECIAL CIRCUIT CT. JUDGE

PER CURIAM: In this foreclosure action, Melissa Furmanchik argues the master-in-equity erred by (1) granting sua sponte relief, (2) determining Selene RMOF REO Acquisition, L.L.C. (Selene) had standing to pursue foreclosure, (3) determining Selene's evidence was sufficient to establish foreclosure, and (4) awarding interest to Selene.[1] We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the master-in-equity erred by granting sua sponte relief: *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge."); *Ex parte McMillan*, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (holding a party cannot acquiesce to an issue at trial and then complain on appeal); *Walterboro Cmty. Hosp. v. Meacher*, 392 S.C. 479, 493, 709 S.E.2d 71, 78 (Ct. App. 2011) (stating for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court, raised by the appellant, raised in a timely manner, and raised to the trial court with sufficient specificity); *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) ("A party cannot for the first time raise an issue by way of a Rule 59(e)[, SCRCP,] motion which could have been raised at trial.").

2. As to whether the master-in-equity erred by determining Selene had standing to pursue foreclosure: Rule 17(a), SCRCP ("Every action shall be prosecuted in the name of the real party in interest."); *Smiley v. S.C. Dep't of Health & Envtl. Control*, 374 S.C. 326, 329, 649 S.E.2d 31, 32 (2007) (noting standing has three components, the first of which is the plaintiff must have suffered an injury in fact); *id.* at 329, 649 S.E.2d at 32-33 (stating the second component of standing is there must be a causal connection between the injury and the conduct complained of, so that the injury is fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court); *id.* at 329, 649 S.E.2d at 33 (noting the third component of standing is that it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision"); S.C. Code Ann. § 36-3-205(b) (Supp. 2014) ("When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed."); S.C. Code Ann. § 36-3-301 (Supp. 2014) (noting the holder of an instrument is entitled to enforce the

JAMES O. SPENCE
LEXINGTON COUNTY MIE
SPECIAL CIRCUIT CT. JUDGE

[1] As indicated in the caption, we grant Selene's motion to substitute Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust as Trustee of the American Mortgage Investment Partners Fund I Trust, as the respondent in this action.

JAMES O. SPENCE
LEXINGTON COUNTY MIE
SPECIAL CIRCUIT CT. JUDGE

instrument); *In re Woodberry*, 383 B.R. 373, 377 (Bankr. D.S.C. 2008) (acknowledging that "[p]ossession of a bearer instrument is *prima facie* evidence of ownership" under South Carolina law); *BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 623, 731 S.E.2d 547, 549 (2012) ("[T]he assignment of a mortgage does not need to be recorded, and failure to do so has no effect on the rights of the assignee."); *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 223, 746 S.E.2d 478, 482 (Ct. App. 2013) ("A holder is a person in possession of [an] instrument drawn, issued, transferred, or indorsed to him."); *id.* ("'[T]here is a general view, which has been accepted in this jurisdiction and others, that a loan servicer is a "party in interest" and has standing by virtue of its pecuniary interest in collecting payments under the terms of the note and mortgage.'" (quoting *In re Neals*, 459 B.R. 612, 617 (Bankr. D.S.C. 2011))); S.C. Code Ann. § 36-3-204(a) (Supp. 2014) ("For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument."); *Cannon v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 371 S.C. 581, 584, 641 S.E.2d 429, 430 (2007) ("It is presumed the Legislature, in adopting an amendment to a statute, intended to make some change in the existing law."); *Aristizabal v. I. J. Woodside-Div. of Dan River, Inc.*, 268 S.C. 366, 370, 234 S.E.2d 21, 23 (1977) (stating that when the legislature removed the word "written" from the notice requirement of section 72-301, oral or actual notice were thereafter sufficient); 2008 S.C. Acts 204, § 2 (amending the statutory language pertaining to indorsements by removing the requirement that a paper be "firmly affixed" in order to become an extension of the instrument and instead requiring a paper to merely be "affixed").

3. As to whether the master-in-equity erred by determining Selene's evidence was sufficient to establish foreclosure: Rule 602, SCRE ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony."); Rule 803(6), SCRE (setting forth the business records exception to the hearsay rule); *State v. Rice*, 375 S.C. 302, 330-31, 652 S.E.2d 409, 423 (Ct. App. 2007) (noting the business records exception in Rule 803(6) is "[p]atterned after the South Carolina Act and the Federal Rules"), *overruled on other grounds by State v. Byers*, 392 S.C. 438, 710 S.E.2d 55 (2011); *Midfirst Bank, SSB v. C.W. Haynes & Co.*, 893 F. Supp. 1304, 1310 (D.S.C. 1994) (holding exhibits can be admitted as business records of an entity, even when that entity was not the maker of those records, so long as the other requirements of Rule 803(6) of the Federal Rules of Civil Procedure are met and the circumstances indicate the records are trustworthy), *aff'd*, 87 F.3d 1308

(4th Cir. 1996); *id.* at 1311 ("Rule 803(6) does not require the testifying witness to have personally participated in the creation of the document or to know who

JAMES O. SPENCE
LEXINGTON COUNTY MIE
SPECIAL CIRCUIT CT. JUDGE

actually recorded the information."); *id.* ("Documents may properly be admitted under this Rule as business records even though they are the records of a business entity other than one of the parties, and even though the foundation for their receipt is laid by a witness who is not an employee of the entity that owns and prepared them." (internal quotation marks omitted)); *id.* ("Rule 803(6) does not require the documents be prepared by the testifying business."); *id.* ("[T]he business records exception should be liberally construed to avoid the former archaic practice of requiring authentication by the preparer of the record."); *Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.*, 335 S.C. 635, 642, 518 S.E.2d 44, 48 (Ct. App. 1999) (finding a witness's testimony was admissible under the business records exception when the witness testified about records that were part of the file she maintained in her employer's regular course of business); *id.* (noting that while the witness's testimony merely conveyed information from a person "with knowledge" at the time the records were created, such a situation was expressly allowed under Rule 803(6)); *Herron*, 395 S.C. at 465, 719 S.E.2d at 642 ("At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge."); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n objection must be sufficiently specific to inform the trial court of the point being urged by the objector.").

4. As to whether the master-in-equity erred by awarding interest to Selene: *Rhodus v. Goins*, 129 S.C. 40, 41, 123 S.E. 645, 645-46 (1924) ("A note is a written instrument, and in computing the amount due thereon in principal and interest the computation must be made in accordance with the terms of said note.").

AFFIRMED.

THOMAS, KONDUROS, and GEATHERS, JJ., concur

JAMES O. SPENCE
LEXINGTON COUNTY MIE
SPECIAL CIRCUIT CT. JUDGE