2020 WL 1444996
District Court of Appeal of Florida, Second District.

Kenneth **MACE** and Janice **Mace**, Appellants,
v.
M&**T BANK**, Appellee.

Case No. 2D16-3381
|
Opinion filed March 25, 2020.

Synopsis

Background: Mortgagee brought a mortgage foreclosure action. After a bench trial, the Circuit Court, 20th Judicial Circuit, Lee County, Michael T. McHugh, C.J., entered judgment in favor of mortgagee and denied mortgagors' motion for involuntary dismissal. Mortgagors appealed.

Holdings: The District Court of Appeal, Salario, J., held that:

[1] testimony of mortgagee's assistant vice president that a letter of mortgage default was mailed by mortgagee to mortgagors was not based on personal knowledge and thus was inadmissible to establish that mortgage terms requiring such mailing were satisfied;

[2] testimony of mortgagee's assistant vice president did not establish mortgagee's routine practice for mailing mortgage default letters;

[3] copy of certified mail card produced by mortgagee did not establish that mortgagee mailed particular mortgage default letter to mortgagors; and

[4] appropriate remedy for mortgagee's failure to present legally sufficient evidence that mortgage default letter was mailed to mortgagors was to remand for entry of order of involuntary dismissal.

Reversed and remanded with instructions.

Black, J., dissented and filed an opinion.

West Headnotes (15)

[1] **Mortgages and Deeds of Trust**

A mortgage lender's obligation to give notice of default in accord with a notice of default letter is a condition precedent to its acceleration of the debt due on the underlying note and commencement of a foreclosure suit.

[2] **Appeal and Error**

Appellate court may review the sufficiency of the evidence in a civil, nonjury trial without the issue being preserved with a motion in the trial court. Fla. R. Civ. P. 1.530(e).

[3] **Appeal and Error**

The legal sufficiency of the evidence in a bench trial is reviewed de novo.

[4] **Appeal and Error**

Legally sufficient evidence, on review following bench trial, is generally understood to be equivalent to competent substantial evidence.

[5] **Mortgages and Deeds of Trust**

The mere fact that a mortgage foreclosure plaintiff drafted a notice of default letter is not enough to allow a trial court to infer that the default letter was mailed, as could be required for foreclosure under mortgage terms.

[6] **Mortgages and Deeds of Trust**

To establish additional evidence that a mortgage default letter was mailed, as could be required for foreclosure under mortgage terms, a lender may need to produce the testimony of a witness or witnesses with personal knowledge of relevant facts, perhaps someone involved with the mailing of the letter.

[7] **Mortgages and Deeds of Trust**

To establish additional evidence that a mortgage default letter was mailed, as could be required for foreclosure under mortgage terms, the lender may need to produce evidence that the organization responsible for mailing the letter had a routine practice with respect to mailing letters of that type from which a court can infer that the routine practice was followed and the letter was mailed.

[8] **Mortgages and Deeds of Trust**

To establish additional evidence that a mortgage default letter was mailed, as could be required for foreclosure under mortgage terms, a lender may need to produce properly admitted records, such as a return receipt or a log entry generated upon mailing, that bear on the question of mailing.

[9] **Mortgages and Deeds of Trust**

Testimony of mortgagee's assistant vice president that a letter of mortgage default was mailed by mortgagee to mortgagors was not based on personal knowledge and thus was inadmissible to establish that mortgage terms requiring such mailing were satisfied, in foreclosure action; any information that assistant vice president had about mailing of letter came from conversations she had with someone at agency of mortgagee. Fla. Stat. Ann. § 90.604.

[10] **Mortgages and Deeds of Trust**

Testimony of mortgagee's assistant vice president did not establish mortgagee's routine practice for mailing mortgage default letters, as would have constituted legally sufficient evidence to support conclusion mortgage default letter, as required for foreclosure under mortgage terms, was mailed to mortgagors as part of a routine practice of mailing default letters, where assistant vice president never testified as to what mortgagee's routine practice of mailing was, and assistant vice president did not testify to any third party's practice for mailing default letters on behalf of mortgagee. Fla. Stat. Ann. § 90.406.

[11] **Mortgages and Deeds of Trust**

An organization's legally sufficient proof of its routine business practices for mailing mortgage default letters, as would be legally sufficient evidence to support conclusion that a mortgagee mailed mortgage default letter to mortgagors when required by mortgage terms for foreclosure, generally requires that a witness testify based on personal knowledge as to what the organization's routine practice for mailing mortgage default letters is. Fla. Stat. Ann. § 90.406.

[12] **Evidence**

An organization's reliance on its routine practice to prove its conduct in a specific case, such that the evidence could be admitted pursuant to evidence code section concerning routine practice, requires that it actually present evidence of the routine practice of the organization, that is, evidence of what the organization's practice in fact was. Fla. Stat. Ann. § 90.406.

[13] **Mortgages and Deeds of Trust**

Even if mortgagee established its routine practice for mailing mortgage default letters to mortgagors, copy of certified mail card produced by mortgagee did not establish that mortgagee mailed particular mortgage default letter to mortgagors, as would be required for foreclosure pursuant to mortgage terms, where copy of the card was a separate exhibit from the copy of the default letter the **bank** admitted into evidence, the face of the card did not demonstrate any connection to the default letter, the card was undated and lacked any indication of what correspondence it was intended to convey, the copy of the card contained no reflection that it was ever placed in the mail and no return receipt showing its delivery to the borrowers.

[14] Mortgages and Deeds of Trust

Appropriate remedy for mortgagee's failure to present at bench trial legally sufficient evidence that a mortgage default letter was mailed to mortgagors, as required by mortgage terms for foreclosure, was to remand for entry of order of involuntary dismissal of mortgagee's foreclosure action; it was not a close call as to whether or not mortgagee's proof was sufficient, and there were no exceptional circumstances that would warrant a do-over. Fla. R. Civ. P. 1.530(e).

[15] Evidence

The requirement that a witness have personal knowledge such that their testimony may be admitted is a requirement of the portion of evidence code concerning a lack of personal knowledge, and a determination that a witness lacks personal knowledge means that the witness's testimony is inadmissible. Fla. Stat. Ann. § 90.604.

Appeal from the Circuit Court for Lee County; Michael T. McHugh, Judge.

Attorneys and Law Firms

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Charles P. Gufford of McCalla Raymer Liebert Pierce, LLC, Orlando, for Appellee.

Opinion

SALARIO, Judge.

***1** Kenneth and Janice **Mace** appeal from a final judgment of foreclosure in favor of **M&T Bank**. We reverse because the **Bank** failed to introduce legally sufficient evidence that it mailed the **Maces** a default notice before filing suit for foreclosure as required by paragraphs fifteen and twenty-two of the mortgage. We remand for the entry of an order of involuntary dismissal.

I.

[1] This is a more-or-less typical residential foreclosure case alleging that borrowers under a mortgage loan defaulted on their obligation to make monthly payments of principal and interest on a note secured by a mortgage. Paragraph twenty-two of the mortgage contains a standard provision that requires the lender (here, the **Bank**) to give the borrowers (here, the **Maces**) thirty days' written notice of the default before accelerating the balance due on the loan. [1] Paragraph fifteen of the mortgage requires that any notice to the borrowers be in writing and be deemed given when mailed by first-class mail or actually delivered to the borrower. A lender's obligation to give notice of default in accord with these provisions is a condition precedent to its acceleration of the debt due on the underlying note and commencement of a foreclosure suit. See Spencer v. Ditech Fin., LLC, 242 So. 3d 1189, 1191 (Fla. 2d DCA 2018); Green Tree Servicing, LLC v. Milam, 177 So. 3d 7, 12 (Fla. 2d DCA 2015).

The **Bank's** complaint alleged compliance with all conditions precedent. The **Maces'** answer denied that allegation and asserted that the **Bank** had failed to provide them with a pre-acceleration default notice. Thus, it became the **Bank's** burden to prove that it had given the **Maces** notice of default in accord with paragraphs fifteen and twenty-two of the mortgage. See, e.g., Spencer, 242 So. 3d at 1191; Allen v. Wilmington Tr., N.A., 216 So. 3d 685, 688 (Fla. 2d DCA 2017).

The case proceeded to a nonjury trial. The **Bank's** sole witness was Shelly Andreas, an assistant vice president and operations manager at the **Bank**. Through Ms. Andreas, the **Bank** introduced a default letter addressed to the **Maces** dated February 13, 2015. The **Bank** also introduced a copy of a certified mail card addressed to the **Maces** and bearing the return address of an entity called McCalla Raymer, LLC. When asked about whether there was any evidence that a third party was used to mail the February 13, 2015 letter to the **Maces**, Ms. Andreas pointed to the certified mail card and said she was "considering McCalla Raymer a third party, as an agent for" the **Bank**. The certified mail card was admitted as a separate exhibit from the default letter. It was not dated or signed. There were no markings or other indications on the document suggesting that it was filled out for purposes of mailing the default letter or, if it was, that it had in fact been mailed to the **Maces**. The **Bank** did not seek to admit

any other documents that might have borne on the questions whether and when the default letter was mailed.

***2** Ms. Andreas testified that she had personal knowledge that the default letter was sent because she was "personally involved" in sending the letter. Ms. Andreas did not, however, actually mail the letter or have any firsthand knowledge that the letter was mailed. As it turned out, the personal involvement upon which Ms. Andreas's personal knowledge was based consisted of (1) conversations she had with people at McCalla Raymer about the default letter and (2) records she had reviewed that, according to Ms. Andreas, reflected that the letter had been sent. Ms. Andreas did not describe those records, and the **Bank** did not have them admitted into evidence. The **Maces** repeatedly objected to Ms. Andreas's testimony, asserting that Ms. Andreas lacked personal knowledge of the mailing of the letter and that her testimony about it was based on hearsay—namely what she heard from McCalla Raymer and what she saw in other documents. The trial court overruled the objections.

Ms. Andreas testified that she was "familiar with the normal business operation and practices of [the **Bank**] as it pertains to servicing loans and record-keeping." She further testified that she had received "training" regarding sending out default notices, which consisted of "interactions" with the department responsible for sending out breach letters and "interactions with my counsel's office" regarding its process for sending breach letters. Beyond this, however, Ms. Andreas did not testify that the **Bank** had a routine or ordinary practice for sending default letters, what the practice was, or whether she had personal knowledge of it. To the extent the **Bank's** process is to use a third party such as a vendor, she did not testify what the third party's regular practices or policies were either.

At the close of the **Bank's** case, the **Maces** moved for an involuntary dismissal. They argued, among other things, that the **Bank** failed to adduce legally sufficient evidence that the default notice admitted into evidence was mailed by first class mail to the **Maces** as required by paragraph fifteen of the mortgage.[2] The trial court denied the motion. After hearing the defense case—during which Mr. **Mace** testified that he never received the default notice—the trial court entered a final judgment of foreclosure in favor of the **Bank**. This is the **Maces'** timely appeal.

II.

[2] **[3]** On appeal, the **Maces** argue that the **Bank's** proof that it mailed them a default letter was legally insufficient because the only evidence it introduced came from a witness without personal knowledge and was inadmissible hearsay. We may review the sufficiency of the evidence in a civil, nonjury trial without the issue being preserved with a motion in the trial court. See Fla. R. Civ. P. 1.530(e). Our review is de novo. See Norman v. Padgett, 125 So. 3d 977, 978 (Fla. 4th DCA 2013).

[4] Legally sufficient evidence is generally understood to be equivalent to competent substantial evidence. See, e.g., N.J. v. Dep't of Children & Families, 143 So. 3d 1109, 1112 (Fla. 2d DCA 2014) ("Competent substantial evidence is tantamount to legally sufficient evidence." (quoting S.T. v. Dep't of Children & Family Servs., 87 So. 3d 827, 833 (Fla. 2d DCA 2012))); Tsavaris v. NCNB Nat'l **Bank** of Fla., 497 So. 2d 1338, 1339 (Fla. 2d DCA 1986) (equating legal sufficiency to competent substantial evidence (quoting Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981))). We have explained that evidence is competent when it is "admissibl[e] under legal rules of evidence" and is substantial when it is "material" and has a "definite probative value." Savage v. State, 120 So. 3d 619, 621 (Fla. 2d DCA 2013) (quoting Dunn v. State, 454 So. 2d 641, 649 n.11 (Fla. 5th DCA 1984) (Cowart, J., concurring specially)); see also Lonergan v. Estate of Budahazi, 669 So. 2d 1062, 1064 (Fla. 5th DCA 1988) (same).

***3** **[5]** Applying these standards to this case, we begin by observing that it is now settled that the mere fact that a foreclosure plaintiff drafted a paragraph twenty-two default letter is not enough to allow a trial court to infer that the letter was mailed. Spencer, 242 So. 3d at 1191; see also Edmonds v. U.S. **Bank** Nat'l Ass'n, 215 So. 3d 628, 630 (Fla. 2d DCA 2017) ("Although the letters were admitted into evidence, the fact that they were drafted is insufficient by itself to show that they were mailed."). The reason is plain enough: One cannot conclude from the fact that someone wrote a letter that they also mailed it, at least not without engaging in speculation about what happened. See Allen, 216 So. 3d at 688. Thus, we have held that "mailing must be proven by producing additional evidence such as proof of regular business practices, an affidavit swearing that the letter was mailed, or a return receipt." Id.; see also Spencer, 242 So. 3d at 1191.

[6] **[7]** **[8]** Our statements that these types of "additional evidence" can establish that a default letter was mailed point to three broad categories of proof that, individually or in combination, may be capable of doing the job in any given case. See Allen, 216 So. 3d at 688. One is the testimony of a witness or witnesses with personal knowledge of relevant facts, perhaps someone involved with the mailing of the letter. See id. A second is evidence that the organization responsible for mailing the letter had a routine practice with respect to mailing letters of that type from which a court can infer that the routine practice was followed and the letter was mailed. See, e.g., Thorlton v. Nationstar Mortg., LLC, 257 So. 3d 596, 601-02 (Fla. 2d DCA 2018); CitiMortgage, Inc. v. Hoskinson, 200 So. 3d 191, 192 (Fla. 5th DCA 2016). And a third is properly admitted records—such as a return receipt or a log entry generated upon mailing—that bear on the question of mailing. See Edmonds, 215 So. 3d at 630 (explaining that plaintiff failed to "produce any return receipts, a mailing log, or any documentary evidence" bearing on mailing); cf. Knight v. GTE Fed. Credit Union, 43 Fla. L. Weekly D348 (Fla. 2d DCA Feb. 14, 2018) (describing plaintiff's attempt to prove mailing with a mailing log and holding that the log was inadmissible), review stayed, SC18-790 (Fla. May 29, 2018). None of these kinds of evidence are present in this case.

[9] First, the **Bank** did not present any testimony by a witness with personal knowledge that the letter was mailed. Although Ms. Andreas said that she was personally involved in the mailing of the letter, it quickly became clear that (1) she had no personal knowledge whatsoever of whether the default notice was mailed and (2) any information she did have came from conversations she had with someone at McCalla Raymer and her review of **Bank** records that were not offered or admitted into evidence. It should go without saying (1) that testimony by a witness without personal knowledge is inadmissible, see § 90.604, Fla. Stat. (2016), and (2) that testimony based on what other people or documents say, when offered for the truth of the matter, is hearsay and, when unaccompanied by any showing that an exception to the hearsay rule applies, is inadmissible, see § 90.801(1)(c); Sas v. Fed. Nat'l Mortg. Ass'n, 112 So. 3d 778, 779 (Fla. 2d DCA 2013) (holding that a trial court erred "in allowing Greenlee to testify over objection about the contents of Fannie Mae's business records ... without having first admitted those business records"). The **Maces** objected to Ms. Andreas's testimony on personal knowledge and hearsay grounds and on the grounds that her testimony was not sufficient to sustain a judgment in the **Bank's** favor. See, e.g., Knight, 43 Fla. L. Weekly D348 (holding that hearsay records were inadmissible and, when that evidence was excluded, that plaintiff's evidence of mailing was legally insufficient); Holt v. Calchas, LLC, 155 So. 3d 499, 507 (Fla. 4th DCA 2015) (same; involving hearsay testimony).

***4** **[10]** **[11]** Second, the **Bank** did not establish its routine practice for mailing default letters. Under section 90.406, "[e]vidence of the routine practice of an organization ... is admissible to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice." Thus, we have held that an organization's legally sufficient proof of its routine business practices for mailing default letters is legally sufficient to prove that a default letter was mailed in a specific case. See Thorlton, 257 So. 3d at 601-02; Spencer, 242 So. 3d at 1191 (quoting Allen, 216 So. 3d at 688). Generally, this requires that a witness testify based on personal knowledge as to what the organization's routine practice for mailing default letters is. See Spencer, 242 So. 3d at 1191 (stating that a witness testifying to routine practice "must have personal knowledge of the company's general mailing practice—meaning that the witness must be employed by the entity drafting the letters and must have firsthand knowledge of the company's routine practice for mailing letters." (first citing Allen, 216 So. 3d at 688; then citing Edmonds, 215 So. 3d at 630)). When an organization's routine practice is to use a third party to mail letters, we have found routine practice evidence legally sufficient "where a testifying witness establishes his or her personal knowledge of a foreclosing entity's and third-party vendor's routine business practices and policies for drafting and mailing a default letter." Thorlton, 257 So. 3d at 602 (emphasis added) (citing PNC **Bank** Nat'l Ass'n v. Roberts, 246 So. 3d 482, 482 (Fla. 2d DCA 2018)).

[12] As the text of section 90.406 and the foregoing authorities make clear, an organization's reliance on its routine practice to prove its conduct in a specific case requires that it actually present "evidence of the routine practice of [the] organization"—i.e., evidence of what the organization's practice in fact was. See also Eig v. Ins. Co. of N. Am., 447 So. 2d 377, 379 (Fla. 3d DCA 1984) (holding that section 90.406 requires a party "to prove by competent evidence what its routine practice is"). That evidence is entirely missing here. Assuming without deciding that Ms. Andreas's testimony about her training was sufficient to establish some awareness that the **Bank** had a routine practice for mailing—a debatable proposition—she never testified as to what that practice was. Nor did she testify to any third party's practice for mailing default letters on behalf of the **Bank**, if in fact using a third

party was the **Bank's** routine practice. The trial court was, as a result, in the dark as to what the **Bank** routinely does with default notices—whether it mails them itself, whether it uses a third party, whether it uses McCalla Raymer, whether it does something else, and what any third party does in terms of mailing. And without that evidence, the trial court had no legally sufficient basis to infer that the **Bank** mailed the **Maces'** default letter in this case on account of it having a routine practice for mailing them. See Soule v. U.S. **Bank** Nat'l Ass'n, 253 So. 3d 679, 680 (Fla. 2d DCA 2018) (holding that evidence of routine practice was insufficient because witness lacked personal knowledge and therefore "could not provide competent, substantial evidence of those practices"); Eig, 447 So. 2d at 378 (holding that organization could not rely on routine practice to establish the signing of an agreement where its trial witness could not testify to what the routine practice was); cf. Thorlton, 257 So. 3d at 601-02 (holding that plaintiff could rely on routine practice to establish mailing where a witness with firsthand knowledge testified to what the practice was). On the evidence the **Bank** provided, any conclusion as to whether the **Bank** had a routine practice or what that practice was would be sheer speculation.

[13] Third, as far as records that might prove that the default notice was mailed are concerned, the only record the **Bank** introduced was the copy of the certified mail card. The copy of the card was a separate exhibit from the copy of the default letter the **Bank** admitted into evidence. The face of the card does not demonstrate any connection to the default letter, as distinguished from some other piece of correspondence; the card is, for example, undated and lacks any indication of what correspondence it was intended to convey. Furthermore, the copy of the card contains no reflection that it was ever placed in the mail and no return receipt showing its delivery to the **Maces**. The most the card establishes, then, is that at some unspecified time some person addressed a certified mail card to the **Maces**. See Torres v. Deutsche **Bank** Nat'l Tr. Co., 256 So. 3d 903, 906 (Fla. 4th DCA 2018) (concluding that a request for a return receipt with a barcode at the top of a letter "establishes only that the letter was created and printed," not that it was mailed). One cannot reasonably infer from that fact that the card was actually used to mail the default letter or that both were actually put together in the mail—not any more than one could reasonably infer from the fact that a default letter was drafted that it was mailed. See Strod v. Lewenstark, 958 So. 2d 1138, 1140 (Fla. 4th DCA 2007) (explaining that an attached certified mail receipt does not prove the letter was mailed where the receipt is incomplete). That too would be speculation, not reasonable inference.

***5** When Ms. Andreas's hearsay testimony that the default letter was mailed is excluded, there is no evidence left that shows that the **Bank** mailed a default letter to the **Maces**. In two decisions that are materially indistinguishable from the facts here, our court has held that a foreclosure plaintiff's evidence that a default notice was mailed was legally insufficient. In Knight, a foreclosure plaintiff's only proof that a default notice was mailed were documents that were admitted into evidence over a well-taken hearsay objection. 43 Fla. L. Weekly D348. We held that the evidence was legally insufficient because the plaintiff "failed to introduce any admissible evidence that the default letter was actually mailed to the Borrowers" and therefore "did not meet its burden of proving it satisfied the condition precedent of giving notice." Id. (emphasis added). Likewise, in Spencer, we reversed a final judgment of foreclosure based on the insufficiency of the evidence that a default notice was mailed where the plaintiff's only evidence of mailing was the hearsay testimony of an employee of a mortgage servicer who lacked personal knowledge of the facts and to which the defendant, like the **Maces** here, repeatedly objected. 242 So. 3d at 1190-91. And the Fourth District reached the identical result in Holt, 155 So. 3d at 507 (holding that foreclosure plaintiff's evidence of mailing was legally insufficient where it was based on inadmissible, objected-to hearsay).

In similar circumstances—although not involving the mailing issue—where without some wrongly admitted evidence, the remaining evidence is insufficient to sustain a foreclosure judgment after a nonjury trial, our court has found the evidence legally insufficient and reversed. See Mathis v. Nationstar Mortg., LLC, 227 So. 3d 189, 193 (Fla. 2d DCA 2017) (holding that evidence was insufficient to prove plaintiff's standing after determining that the trial court incorrectly allowed a witness to testify, over objection, to the contents of an allonge in violation of the best evidence rule); Evans v. HSBC **Bank**, USA, Nat'l Ass'n, 223 So. 3d 1059, 1062 (Fla. 2d DCA 2017) ("Accordingly, the admission of the payment history into evidence was erroneous. Consequently, HSBC **Bank** failed to present sufficient evidence as to its damages."); Channell v. Deutsche **Bank** Nat. Trust Co., 173 So. 3d 1017, 1020 (Fla. 2d DCA 2015) ("Because those documents were admitted in error, there is insufficient evidence to support the amount due and owing under the loan."); see also Burdeshaw v. **Bank** of N.Y. Mellon, 148 So. 3d 819, 826 (Fla. 1st DCA 2014) (reversing due to evidentiary insufficiency where a foreclosure plaintiff's evidence of the amount due was hearsay and "no other evidence was

presented to support the amount owed on the note"). This case is not different in any legally consequential respect, and our precedents require that we reverse as well.

III.

The parties dispute—and have helpfully provided us with supplemental briefs about—whether on remand the **Bank** gets a new trial or the **Maces** get an order of involuntary dismissal. How we make that decision has been a hotly contested matter in residential foreclosure cases, and our opinions on the subject have not always been explicit. See generally Spencer, 242 So. 3d at 1191-95 (Salario, J., concurring) (overviewing various outcomes courts have reached when remanding residential foreclosure cases). Last year, our court clarified the proper inquiry for "scope of remand" decisions in Tracey v. Wells Fargo **Bank**, N.A., 264 So. 3d 1152, 1157-69 (Fla. 2d DCA 2019).

In Tracey, the plaintiff filed a complaint alleging payment defaults on a note and mortgage without making any reference to a modification of the loan the note and mortgage evidenced. Id. at 1154. At trial, however, the plaintiff sought to proceed on a theory that the defendant had breached the terms of certain loan modification agreements. Id. Over the defendant's objection, the trial court admitted the agreements into evidence and granted the plaintiff's motion to amend the pleadings to conform to the evidence—namely to present a theory based on the loan modification agreements that was not alleged in the complaint. Id. We held that the trial court erred by granting the motion to amend, reasoning that the defendant had been prejudiced by the late amendment, and we reversed a final judgment the trial court rendered in the plaintiff's favor. Id. at 1155-56. Without the erroneous decision to allow amendment, the plaintiff's evidence at trial did not prove the theory it alleged in its complaint. See id. at 1154.

***6** We then addressed the proper scope of remand—whether the trial court should on remand hold a new trial or enter an order of involuntary dismissal. See id. at 1157-69. We conducted a detailed review of the applicable statutory and case law, emphasizing two key principles throughout: (1) that interests of finality and fairness have yielded a "long-standing aversion to remanding" a case for retrial when a party fails to prove its case in the first trial, id. at 1161; and (2) that appellate courts retain discretion to remand for further proceedings notwithstanding a failure of proof in cases presenting exceptional circumstances in which the interests of equity and fairness call for an "extra bite of the apple," id. at 1162 (quoting Morton's of Chicago, Inc. v. Lira, 48 So. 3d 76, 80 (Fla. 1st DCA 2010)). We concluded as follows:

> [W]hen fashioning remand for a civil appeal where the party with the burden of proof fails to sufficiently plead the claim it presents at trial or to establish a basis in admissible evidence for a claim at trial, an appellate panel may exercise some level of equitable discretion to consider the circumstances of a particular case. This discretion is bounded by both the substantive relief sought within the appeal and the strong preference for finality of trial proceedings. The prohibition against proverbial multiple "bites at the apple" for trials remains rooted as the leading, guiding principle to govern the scope of remand and should serve as the default direction when these kinds of decisions are being made. We agree with how the Morton's court put it: only "exceptional legal or factual" circumstances will justify a deviation from this general prohibition.

Id. at 1168 (emphasis added) (quoting Morton's, 48 So. 3d at 80). In so holding, we rejected the argument that remand for a new trial is necessarily required when a party relies in good faith on a trial court ruling we later find to be erroneous—in Tracey, the trial court's decision on a motion to amend the pleadings. Id. at 1167 n.9, 1172-73 (Sleet, J., dissenting).

Applying that holding to the facts of the case, we concluded that the default assumption against a retrial applied and found no exceptional circumstances warranting a different outcome. See id. at 1165. Our analysis emphasized equities relating to the procedure in the trial court and the reasons why the plaintiff's proof was insufficient. Among other things, we focused on the facts that the plaintiff failed to explain why it waited until trial to raise the issue, that on appeal the plaintiff confessed to an "inadvertent" pleading error, and that the defendant would be prejudiced by "having to relitigate her defense in piecemeal, seriatim trials while her adversary

vacillates around what the alleged basis of its claims will ultimately be." Id.

[14] Informed by our decision in Tracey, we conclude that remand for entry of an order of involuntary dismissal is the correct result in this case.[3] The **Bank** failed to present legally sufficient evidence that the paragraph twenty-two letter was mailed, so remand for involuntary dismissal is our default direction. And our record reflects no exceptional circumstances that would warrant a do-over. Without intending to require a subsequent panel to consider any particular factors in deciding whether to exercise its discretion to determine whether exceptional circumstances warranting further proceedings exist, the following facts are salient to us. The **Bank's** proof was insufficient because the only evidence of mailing it offered was inadmissible because the testifying witness lacked personal knowledge and conveyed only hearsay. That is not a close call; Ms. Andreas had no relevant personal knowledge to convey, and the idea that testimony about what other people and documents say is generally regarded as inadmissible hearsay is the stuff of law school evidence classes. It appears from the record that Ms. Andreas's testimony was presented to the trial court as though it was actually based on Ms. Andreas's "personal involvement" in mailing the letter—even though it was quickly revealed that her personal involvement consisted of nothing more than conversations with others and a review of documents.

***7** Moreover, we see nothing in our record to suggest that had the trial court excluded the evidence as the law requires, the **Bank** would have been prepared to present other admissible evidence of mailing—Ms. Andreas was the only witness it brought to trial. Given those facts, we see no exceptional circumstances that justify a remand for a new trial. See also Spencer, 242 So. 3d at 1194 (Salario, J., specially concurring) (explaining that remanding for a new trial in similar circumstances "seems to reward either (or both) a litigant's insufficient trial preparation or a strategic decision that it might be able to convince a court to admit clearly inadmissible evidence—precisely the kinds of results the general rule against granting a new trial ... is designed to avoid"). Remanding for an involuntary dismissal in this case is consistent both with the scope of remand analysis we clarified in Tracey and with every published decision this court has rendered in which we have reversed a foreclosure judgment because the plaintiff's proof of mailing a default letter was insufficient. See Soule, 253 So. 3d at 681 (remanding for entry of order of involuntary dismissal); Spencer, 242 So. 3d at 1191 (same); Knight, 43 Fla. L. Weekly D348 (same); Edmonds, 215 So. 3d at 631 (same); Allen, 216 So. 3d at 688 (same). Seen in that light, there is nothing exceptional about the circumstances of this case.

IV.

Now we must address the dissent. The dissent concedes that Ms. Andreas's testimony about mailing inadmissible, and it all but concedes that her testimony was the **Bank's** sole evidence of mailing.[4] The dissent boils down to an argument that our decision is in "conflict with long-standing precedent" holding (1) that we are legally required to consider inadmissible evidence—here, Ms. Andreas's testimony—in determining whether the evidence at a nonjury trial is legally sufficient and (2) that when a party's sole evidence on a point on which it bears the burden of proof is inadmissible, we are legally required to remand for a new trial. The dissent overclaims the authorities upon which it relies and overlooks those most applicable here.

The dissent's objection that an appellate court reviewing the sufficiency of the evidence to support a judgment after a nonjury trial must consider improperly admitted, objected-to testimony is puzzling because our dissenting colleague has previously authored an opinion for a unanimous court doing the precise opposite—excluding inadmissible evidence and holding the remainder legally insufficient. See Doyle v. CitiMortgage, Inc., 162 So. 3d 340, 342 (Fla. 2d DCA 2015). In Doyle, the court held that a foreclosure plaintiff's proof of the amount of the defendant's indebtedness was legally insufficient because "the testimonial evidence presented to establish the total amount of indebtedness was inadmissible hearsay and the total amount of indebtedness is not supported by competent, substantial evidence."[5] As shown in part II, our colleague is far from alone in having evaluated evidentiary sufficiency in the context of a nonjury trial in this way.

***8** **[15]** Furthermore, the dissent actually concedes that our decision in Knight and the Fourth District's decision in Holt stand for the proposition that where a plaintiff's sole proof of mailing is inadmissible, the evidence is insufficient to sustain a foreclosure judgment. And although the dissent tries to cast Spencer as a case that did not involve a determination that the plaintiff's only evidence of mailing was inadmissible, it does not read that opinion fairly. In Spencer, the plaintiff's evidence of mailing was, like the **Bank's** here, the testimony

of an employee of a servicer who lacked personal knowledge. 242 So. 3d at 1190. Like the **Maces** here, the defendant objected to that testimony on personal knowledge and hearsay grounds. Id. On appeal, we agreed that the witness lacked personal knowledge and held the evidence was insufficient. Id. at 1191. The requirement that a witness have personal knowledge is, of course, a requirement of the evidence code, and a determination that a witness lacks personal knowledge means that the witness's testimony is inadmissible. See § 90.604; Leonard v. State, 192 So. 3d 1258, 1260 (Fla. 2d DCA 2016) ("[T]he detective's testimony on this point was inadmissible because it was not based on personal knowledge."). Spencer was thus quite plainly a case where the plaintiff's only evidence of mailing was inadmissible, and we held the evidence insufficient. See also 242 So. 3d 1189 (Salario, J., specially concurring) ("The Spencers argue in this appeal that the evidence was insufficient to sustain the judgment. They correctly point out that Everhome's sole trial witness, Ms. Knight, lacked any personal knowledge ... and that without her testimony the evidence was insufficient as a matter of law. ...").

Thus, to agree with the dissent, we would have to ignore two precedents of this court and one of a sister court that involve materially identical facts. We would also have to ignore our court's decisions in Doyle, Evans, Channell, and Mathis and at least the First District's decision in Burdeshaw, all of which involve an appellate court reviewing the sufficiency of the evidence after a nonjury foreclosure trial and expressly excluding inadmissible, objected-to evidence from its consideration of evidentiary sufficiency.[6] These decisions cannot be understood as anomalies. There are ample judicial opinions in a variety of contexts outside foreclosure in which appellate courts reviewing the sufficiency of the evidence after a nonjury proceeding have excluded objected-to, inadmissible evidence from their consideration in determining whether the evidence is legally sufficient. See, e.g., Tallahassee Hous. Auth. v. Fla. Unemployment Appeals Comm'n, 483 So. 2d 413, 414 (Fla. 1986) ("[T]he summary of absences upon which the referee relied in denying Barron's unemployment compensation benefits was erroneously admitted into evidence. Consequently, no substantial competent evidence supports a finding of misconduct ...."); De Hoyos v. Bauerfeind, 286 So. 3d 900, 901, 904-05 (Fla. 1st DCA 2019) (reversing injunction against domestic violence where movant's sole evidence was inadmissible hearsay and concluding that movant "did not provide competent, substantial evidence to support the injunction"); D.J.S. v. State, 242 So. 3d 448, 449 (Fla. 2d DCA 2018) (holding that objected-to, inadmissible hearsay was insufficient to prove value for purposes of a grand theft delinquency adjudication); Washburn v. Washburn, 211 So. 3d 87, 91 (Fla. 4th DCA 2017) (holding, in a child support case, that when improperly admitted hearsay was excluded "there is no competent, substantial evidence of the husband making any income other than that from his business" and remanding with directions to consider "only the evidence properly admitted"); Council v. State, 206 So. 3d 155, 156 (Fla. 1st DCA 2016) (reversing conviction after nonjury trial for grand theft where the State's evidence on value "constituted inadmissible hearsay and was legally insufficient as a matter of law to prove the stolen ring's replacement value"); A.S. v. State, 91 So. 3d 270, 271 (Fla. 4th DCA 2012) (reversing delinquency adjudication because hearsay testimony "should have been stricken" and "[w]ithout this evidence the record does not provide competent, substantial evidence demonstrating the essential element of value"); St. Augustine Marine Canvas & Upholstery, Inc. v. Lunsford, 917 So. 2d 280, 286 (Fla. 1st DCA 2005) (reversing award of medical benefits by judge of compensation claims where the expert testimony supporting the award "was not admissible ... and without his testimony there was no competent, substantial evidence" supporting the award); Henderson v. Henderson, 537 So. 2d 125, 128 (Fla. 1st DCA 1988) (holding that evidence was insufficient to support factual finding in support of modification of child custody where it was based solely on inadmissible hearsay that "does not constitute competent, substantial evidence"). Seen in this light, the dissent's contention that our decision today is a departure from precedent is difficult to understand.

***9** Nonetheless, the dissent opens with the claim that the United States Supreme Court's decision in Lockhart v. Nelson, 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988), requires that we consider objected-to, inadmissible evidence in evaluating the sufficiency of the evidence of a nonjury trial. That is not what Lockhart holds. The issue in Lockhart was not whether the evidence in a nonjury trial was sufficient to support a judgment; it was whether the double jeopardy clause precludes the retrial of a criminal defendant after an appellate court reverses a conviction based on an evidentiary error at a sentencing hearing before a jury. Id. at 34, 109 S.Ct. 285. The Supreme Court distinguished reversals involving evidentiary errors or other defects in procedure from reversals based "solely on evidentiary insufficiency" and held that in the former circumstance, but not the latter, double jeopardy does not preclude a retrial. Id. at 40, 109 S.Ct. 285. That holding says nothing about whether a state court applying

state law to determine the legal sufficiency of the evidence to support a judgment after a nonjury trial must consider evidence that was improperly admitted over the appellant's well-taken objection. [7]

The dissent also claims a departure from our court's prior decision in R.K. v. Department of Children & Family Services, 38 So. 3d 859 (Fla. 2d DCA 2010), but it misstates what that case says. In R.K., a father appealed an order adjudicating his children dependent and argued both that the trial court improperly admitted hearsay and that the evidence was insufficient. Id. at 860. The dissent states that "although both the evidentiary errors and the sufficiency of the evidence argument were raised [in R.K.], this court reversed only on the issue of evidentiary errors," not the sufficiency of the evidence. But our opinion in R.K. said that

> [m]ost of the evidence presented at the hearing was inadmissible hearsay to which the Father made repeated and timely objections. To the extent that the evidence was admissible, it was insufficient to establish the trial court's findings by a preponderance of the evidence. Accordingly, we must reverse the trial court's order and remand for further proceedings.

***10** Id. at 863 (emphasis added). R.K. thus did the opposite of what the dissent claims: It addressed both admissibility and sufficiency, excluded the inadmissible evidence, and then held that, without it, the remaining evidence was insufficient.

The dissent correctly observes that in R.K. we remanded for further proceedings, id., but that does not support its argument that R.K. stands for the proposition that a reviewing court may not exclude objected-to, inadmissible evidence in reviewing a sufficiency argument. The directions we give for remand are a separate question from whether the evidence is legally sufficient and, as we explained in Tracey, have always been rooted in an appellate court's consideration of the particular circumstances of the individual case. 264 So. 3d at 1165 ("Today we are simply recognizing what appellate courts have always done when issuing directions on remand."). R.K. did not explain why it chose the remand directive it did in that case. The dissent says that it remanded for a new trial because the evidentiary error was harmful—the fact that the remaining evidence was insufficient established the harm, in the dissent's telling—and the rule is that we remand for a new nonjury trial when there has been a harmful evidentiary error. That, however, is a rationale entirely of the dissent's creation; nothing in R.K. actually says what the dissent wants it to say.

The dissent asserts that the **Maces** have abandoned any challenge to the inadmissibility of the **Bank's** evidence of mailing because they "do not ask this court to reverse the judgment" on that basis. That is factually inaccurate. The **Mace's** brief presents an argument titled "The **Bank** Did Not Prove It Mailed The Notice Required By Paragraph 22." The body of that argument went as follows: (1) the **Bank's** sole evidence of mailing was inadmissible; (2) the inadmissible evidence was objected to; and (3) "without admissible evidence showing the Default Letter was mailed" the evidence was insufficient to prove mailing. The brief then asks the court to reverse on that basis.

The dissent does not really mean that the **Maces** have failed to present a clear and thorough argument for reversal that relies on the admissibility of the **Bank's** evidence; incontestably, they have. The dissent means that the **Maces** were required to present that argument separately from any argument concerning evidentiary sufficiency—presumably under a different roman numeral and heading—because admissibility and sufficiency require "separate analyses." The reason the dissent regards admissibility and sufficiency as requiring "separate analyses" is that it believes that a court reviewing the sufficiency of the evidence in a nonjury trial must consider erroneously-admitted, objected-to evidence. The dissent's assertion that admissibility and sufficiency are separate issues does not prove the conclusion it wants to reach —that an appellate court must consider erroneously admitted, objected to evidence when reviewing evidentiary sufficiency after a nonjury trial. It simply assumes it.

Furthermore, the dissent's rigid approach to the presentation of issues in an appellate brief fails on its own terms. The dissent cites Florida Rule of Appellate Procedure 9.210(b)'s requirements that an initial brief identify the issues on appeal and present argument with respect to each issue but identifies nothing in the text of that rule and cites no decision applying this rule to show that a party is forbidden from undertaking two "separate analyses" within a single issue. This omission is presumably because that is not what the rule says and appellate courts deal with separate analyses within a single issue on appeal all the time. For example, the evaluation of a single mixed question of law and fact requires that a

court answer different questions and apply different standards of review. See generally Jarrard v. Jarrard, 157 So. 3d 332, 337-38 (Fla. 2d DCA 2015) (describing mixed questions of law and fact). Similarly, even addressing a single evidentiary issue will often involve the separate questions of whether the trial court correctly interpreted a rule of evidence and whether the court's specific evidentiary ruling was within its discretion based on the facts of the case. See, e.g., Roop v. State, 228 So. 3d 633, 639 (Fla. 2d DCA 2017). Seen in that light, there is no reason we should deem an appellate argument regarding admissibility abandoned simply because it was put under a heading directed to evidentiary sufficiency and used as an argumentative predicate for the ultimate conclusion that the evidence was insufficient. On the contrary, the dissent's view of abandonment is quite likely to surprise a good many appellate advocates and judges who have, as we have shown, written numerous briefs and opinions making exactly the kind of argument the **Maces** have made here. See, e.g., De Hoyos, 286 So. 3d at 901 ("De Hoyos argues that the trial court erred by relying on child hearsay. ... He argues that without the inadmissible hearsay, no competent substantial evidence supports the trial court's finding. ... We agree and reverse."); Sas, 112 So. 3d at 779 ("Sas argues that Fannie Mae representative Jon Greenlee's oral testimony ... was hearsay and, therefore, legally insufficient to establish the amount of the debt. ... We agree with this argument.").

***11** The precedential lynchpin for the dissent's formalistic approach to the presentation of the issues in this case is the Third District's two-paragraph opinion in Southeastern Fire Insurance Co. v. King's Way Mortgage Co., 481 So. 2d 530, 531 (Fla. 3d DCA 1985), which held that a party's argument that the evidence was insufficient because it consisted solely of inadmissible testimony at a nonjury trial did not warrant reversal. To be sure, the court in describing the facts noted that "[a] separate point on appeal is not raised concerning the admissibility of evidence," id., but it is a bridge too far for the dissent to characterize that factual recitation as a holding that a party wishing to present both sufficiency and admissibility arguments must file a brief that reads "Issue I: The Evidence Was Insufficient. Issue II: The Evidence Was Inadmissible" in order to have his or her arguments considered by the court of appeal. And the remaining authorities the dissent cites—although numerous, to be sure—are so far removed from either expressly or by fair implication supporting its argument that they merit no discussion. [8]

Admittedly, the Southeast Fire decision did say—without citation or analysis—that the trial court was required to consider all of the evidence that it admitted in determining sufficiency. 481 So. 2d at 531. But it does not say that there was a proper objection to the admissibility of the evidence, as was the case here, which, of course, the trial court would have been free to reconsider at any time before rendering judgment. See Silvestrone v. Edell, 721 So. 2d 1173, 1175 (Fla. 1998) ("[T]he trial court retains inherent authority to reconsider and, if deemed appropriate, alter or retract any of its nonfinal rulings prior to entry of the final judgment or order terminating an action ...."); Spindler v. Brito-Deforge, 762 So. 2d 963, 964 (Fla. 5th DCA 2000) ("The 'shifting sands' of trial may cause a judge to rethink an earlier evidentiary ruling based on a matured understanding of the case."). And it does not say anything about an appellate court's review of the sufficiency of the evidence when the trial court has improperly admitted evidence over objection in a nonjury trial. Southeastern Fire could easily have been a case of a party trying to assert an unpreserved evidentiary problem by dressing it up as a sufficiency challenge. The dissent reads that opinion too broadly to say that it states a rule that an appellate court reviewing the sufficiency of the evidence at a nonjury trial must consider evidence that the trial court improperly admitted over an objection. The remaining cases the dissent cites also fail to support that proposition. [9]

***12** The dissent's second objection that our only permissible option for remand in this case is a new trial is inconsistent with the decisions of our court and others that have remanded for an involuntary dismissal after a nonjury trial when we have determined that a party's only evidence on a point on which it bears the burden of proof is inadmissible. It is also inconsistent with our decision in Tracey, which, as described above, makes remand directions in these circumstances discretionary with the appellate panel based on the circumstances of the case, with a default in favor of not conducting a new trial.

The dissent says that Tracey does not apply here because that case did not involve a determination that a party's only evidence on an issue on which it bore the burden of proof was inadmissible. That is a factual difference between this case and Tracey, true enough, but not one that matters. Tracey was a case in which, but for an erroneous midtrial ruling on a motion to amend to conform to the evidence, the plaintiff failed to prove its case (i.e., the one it pleaded). Quite similarly, this case involves circumstances where, but for the trial court's erroneous midtrial ruling on an evidentiary question, the plaintiff failed to prove its case because there was no proof but the inadmissible evidence. As a matter of

legal principle, there is no reason why the remand directions in the former situation should be determined any differently from the latter. Indeed, in Tracey we explicitly treated the two questions as being analytically identical. 264 So. 3d at 1169 (certifying a question about remand directions "when a party with the burden of proof in a civil case fails to plead the claim presented at trial or to establish a basis in admissible evidence for a claim at trial").

Although the dissent argues that a new trial should be required in cases involving admissibility problems because the proponent of the evidence may be prejudiced because it relied on the trial court's evidentiary ruling in making decisions about what other evidence to offer, that could just as well be said of the amendment ruling in Tracey. Indeed, that is precisely the argument the dissent in Tracey made. Id. at 1172-73, (Sleet, J., dissenting). And Tracey's rejection of that argument makes clear that a party's arguable reliance on such a ruling does not entitle it to remand for a new trial as a matter of law.[10] See id. at 1163 n.7 (responding to the dissent's argument that the appellate identification of an evidentiary error should always result in a new trial by explaining that "[t]here is no legal basis for such a didactic approach to remand"). That said, neither does Tracey foreclose an appellate court from considering such reliance in determining whether exceptional circumstances justify remand for a new trial.

***13** The dissent argues that our decision today and other foreclosure cases remanding for an entry of involuntary dismissal in similar circumstances conflict with certain foreclosure opinions that have remanded for a new trial. Compare Deutsche **Bank** Nat'l Tr. Co. v. Baker, 199 So. 3d 967, 969 (Fla. 4th DCA 2016) (reversing and remanding for the **bank** to introduce further evidence of damages), with Holt, 155 So. 3d at 507 (reversing and remanding with instructions for the trial court to dismiss). But the dissent has identified nothing in these cases that states the categorical rule it demands—namely, that a new trial is required whenever an appellate court deems the evidence legally insufficient because a party's only evidence was inadmissible and objected to. And in the absence of such a holding, the fact that different courts have reached different remand decisions does not demonstrate conflict. On the contrary, as Tracey explains, whether to remand for involuntary dismissal or for a new trial is and always has been a discretionary decision made by each appellate panel based on the circumstances it sees in the cases. 264 So. 3d at 1161 n.5, 1163-66 (harmonizing varying remand directives and concluding that "[o]ur conception of the principles that apply to remand directions in civil appeals is not a new one at all" because "we are simply recognizing what appellate courts have always done"). It is perfectly reasonable to expect that courts can and will reach different remand decisions in different cases.

V.

This case is not as complicated as the dissent would make it. The **Bank's** evidence was legally insufficient to prove that the default notice was mailed because the **Bank's** only evidence was inadmissible hearsay to which the **Maces** objected. Our prior precedents in Knight and Spencer are not distinguishable and require that we reach that conclusion. Those decisions are consistent with decisions routinely issued by this court and others standing for the proposition that an appellate court reviewing the sufficiency of the evidence after a nonjury trial may properly exclude inadmissible, objected-to evidence from its consideration. The only remaining question is whether, under Tracey, we should give the **Bank** a second bite at the apple. Under the circumstances here, we should not. We reverse the final judgment of foreclosure and remand with instructions for the trial court to enter an order of involuntary dismissal.

Reversed and remanded with instructions.

SILBERMAN, J., Concurs.

BLACK, J., Dissents with opinion.

BLACK, Judge, Dissenting.

The Supreme Court has held that in considering the sufficiency of the evidence, a trial court "considers all of the evidence it has admitted" and that the reviewing court—this court—must consider "this same quantum of evidence." Lockhart v. Nelson, 488 U.S. 33, 41-42, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988). This court, pursuant to Lockhart and other authorities cited herein, cannot simply disregard evidence admitted by the trial court in reviewing whether the **Bank** presented sufficient evidence to obtain the foreclosure judgment. The majority's resolution of this case is flawed because it merges two separate and distinct issues, only one of which was raised by the **Maces**: the sufficiency of **M&T Bank's** evidence. The quantum of evidence admitted at trial must be reviewed by this court and that evidence was

sufficient. And the **Maces** implicitly concede the sufficiency of the admitted evidence in the issue they raise on appeal. I would affirm the judgment; therefore, I dissent.

The majority concludes that reversal is required because the **Bank's** evidence was insufficient to overcome the **Maces'** motion for involuntary dismissal. The majority's conclusion, however, rests upon the compound conclusion that the **Bank's** evidence was insufficient only because of evidentiary errors made by the trial court. But the majority fails to recognize that the alleged improper denial of a motion for involuntarily dismissal based on the insufficiency of the evidence is a distinct issue from alleged errors in the admission of evidence. The **Maces** do not argue that reversal is required based on evidentiary errors made by the trial court. And the law is clear that where a judgment is premised on improperly admitted evidence under chapter 90, Florida Statutes, the error is not in the denial of a motion for involuntary dismissal, directed verdict, or judgment of acquittal identifying those evidentiary mistakes; the error is in the admission of the evidence.

***14** Where the error in admission of evidence is properly presented to this court and cannot be deemed harmless, reversal and remand for a new trial is required. But where the appellants have not sought a determination that evidence was erroneously admitted or sought a reversal on the basis of the erroneous admission of evidence, this court cannot grant relief on that basis; we may only consider the issues properly identified and briefed. In this case, we are not asked to reverse the judgment on the basis of judicial error in the admission of evidence; we are asked to review only the trial court's finding of sufficient evidence to defeat the **Maces'** motion for involuntary dismissal based on the totality of the evidence admitted by the trial court. See Lockhart, 488 U.S. at 42, 109 S.Ct. 285.

I. The determinative issue on appeal

At the conclusion of the **Bank's** case, the **Maces** moved for involuntary dismissal, arguing in part that the **Bank** failed to present competent evidence that the default letter had been sent. However, there is a significant omission from the **Maces'** argument below: at no point did the **Maces** contend that the evidence which had been admitted could not be considered as part of the **Bank's** burden of establishing compliance with paragraph twenty-two because it was improperly admitted hearsay. The **Maces** now contend that because the sufficiency of the **Bank's** evidence was predicated upon inadmissible evidence, the motion for involuntary dismissal should have been granted and therefore reversal and remand for dismissal is necessary. [11]

***15** Whether the trial court correctly denied a motion for involuntary dismissal is a distinct issue which may be raised in an appeal from a final judgment. See, e.g., Perez v. Deutsche **Bank** Nat'l Tr. Co. ex rel. JPMorgan Mortg. Acquisition Tr. 2007-CH4, 264 So. 3d 1117, 1119 (Fla. 2d DCA 2019). Likewise, the sufficiency of the evidence under rule 1.530(e) is an issue separate and apart from any other issue which may be raised. See, e.g., Correa v. U.S. **Bank** Nat'l Ass'n, 118 So. 3d 952, 954 (Fla. 2d DCA 2013). Rulings on evidentiary issues are also discrete issues and may require reversal regardless of other claims of error. See, e.g., Colson v. State Farm **Bank**, F.S.B., 183 So. 3d 1038, 1040 n.2 (Fla. 2d DCA 2015). Although related, these are independent issues which this court may be asked to review. They require separate analyses, and they are not interchangeable and should not be merged into one error. See Wolkoff v. Am. Home Mortg. Servicing, Inc., 153 So. 3d 280, 283 (Fla. 2d DCA 2014) ("Because we are not reviewing an evidentiary ruling, our standard of review is different than the standard applied in [cases reviewing evidentiary rulings]."); R.K. v. Dep't of Children & Family Servs., 38 So. 3d 859, 860 (Fla. 2d DCA 2010) (recognizing that a claim of error in overruling objections to hearsay evidence and a claim of legally insufficient evidence to support adjudication are two separate appellate issues); cf. Deutsche **Bank** Tr. Co. Ams. ex rel. Residential Accredit Loans, Inc. v. Harris, 264 So. 3d 186, 192 (Fla. 4th DCA 2019) (recognizing that the issue raised was "whether the **Bank** presented evidence that the letter was mailed[ ] and not the admissibility of the letter into evidence").

The **Maces** do not ask this court to reverse the judgment on the basis of the trial court's evidentiary rulings. They do not seek reversal premised on the trial court's rulings as to the admissibility of Ms. Andreas's testimony, the paragraph twenty-two notice, or the return receipt. As such, the **Maces** have waived an argument based on the validity of the trial court's rulings on the admission of evidence. See Coolen v. State, 696 So. 2d 738, 742 n.2 (Fla. 1997) ("[F]ailure to fully brief and argue these points constitutes a waiver of these claims."); Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

The **Maces**' argument "consists of an attack on the admissibility of the testimony given by the plaintiff's sole witness below. [But] [a] separate point on appeal is not raised concerning the admissibility of this testimony." See Se. Fire Ins. Co. v. King's Way Mortg. Co., 481 So. 2d 530, 531 (Fla. 3d DCA 1985); see also Roop v. State, 228 So. 3d 633, 642 (Fla. 2d DCA 2017) (concluding that an "argument that ha[d] not been presented to us as a ground for reversal" could not support reversal (emphasis added)); Advanced Chiropractic & Rehab. Ctr. Corp. v. United Auto. Ins. Co., 103 So. 3d 866, 869 (Fla. 4th DCA 2012) (concluding that party had waived issue where it "did not rely on th[e] purported errors as a basis for reversal in its appellate brief" (emphasis added)). That is, the **Maces** have not asked this court to review the trial court's evidentiary rulings; the erroneous admission of evidence is not the identified judicial error. Cf. Fla. R. App. P. 9.210(b) (requiring the initial brief to contain, among other things, "subheadings that identify the issues presented for review," "argument with regard to each issue," and "a conclusion ... setting forth the precise relief sought"); Nat'l Car Rental Sys., Inc. v. Holland, 269 So. 2d 407, 410 (Fla. 4th DCA 1972) ("The function of assignments of error is to identify the specific judicial act of which complaint is made. ... [A]ppeals are determined on the basis of identified judicial error which has been made the subject of a proper assignment of error ...."). Moreover, "[p]rofessional advocacy requires that the judicial errors relied on for reversal should be stated in the brief with points argued, even in the absence of a rule requiring it." Fla. Citrus Comm'n v. Owens, 239 So. 2d 840, 841 (Fla. 4th DCA 1969).

***16** The issue identified by the **Maces** is the **Bank's** failure to prove that it mailed the notice required by paragraph 22. At best, the **Maces** have argued that the **Bank** failed to present sufficient evidence to establish compliance with paragraph twenty-two of the mortgage as it related to their motion for involuntary dismissal. The **Maces** contend "that the trial court, at the close of all the evidence, should have disregarded the testimony of the plaintiff's sole witness because it was entirely inadmissible—even though the trial court had previously admitted the testimony during the trial." See Se. Fire Ins. Co., 481 So. 2d at 531. However, "[o]nce having admitted the testimony in evidence, the trial court ... was not free, as urged, to disregard this testimony on the ground that it was inadmissible under the rules of evidence." Id. This court must, "accordingly, examine[ ] the testimony attacked in this appeal" and determine whether "it constitutes sufficient, competent evidence to support the judgment entered below." Id.; accord Singer v. Borbua, 497 So. 2d 279, 280 (Fla. 3d DCA 1986) ("A trial court, however, is not privileged to disregard evidence admitted at trial when considering a motion for directed verdict because all evidence admitted before the jury[—including inadmissible hearsay—]must be considered when ruling on such a motion." (citing Se. Fire Ins. Co., 481 So. 2d at 531)). Once the trial court admits testimony, it "is not free to disregard it as inadmissible." McCabe v. Hanley, 886 So. 2d 1053, 1056 (Fla. 4th DCA 2004). Simply stated, Ms. Andreas's testimony as admitted into evidence below was and remains for purposes of appeal part of the prima facie case established against the **Maces**. See McCabe, 886 So. 2d at 1056.

The supreme court has concluded an appellate court reviewing a bench trial judgment "cannot presume the trial court disregarded evidence that was specifically admitted" in reaching its judgment. Petion v. State, 48 So. 3d 726, 737 (Fla. 2010). The presumption "that the trial court judge rested its judgment on admissible evidence and disregarded inadmissible evidence" is rebutted where there is "a specific finding of admissibility or another statement that demonstrates the trial court relied on the inadmissible evidence." Id. And while the majority correctly notes that a trial court is free to reconsider its rulings at any time prior to rendering judgment, the beneficiary of the original ruling must not be prejudiced by a change in the ruling. See Willson v. Big Lake Partners, LLC, 211 So. 3d 360, 364-65 (Fla. 4th DCA 2017). The trial court abuses its discretion when it enters "a mid- or post-trial change in the admission of evidence" and "the affected party is prejudiced." Id. (citing Garcia v. Emerson Elec. Co., 677 So. 2d 20, 21 (Fla. 3d DCA 1996)). That is, the affected party suffers a "surprise in fact" but is not permitted to present additional evidence. See id. at 364 (quoting Binger v. King Pest Control, 401 So. 2d 1310, 1314 (Fla. 1981)); cf. John Hancock Mut. Life Ins. Co. v. Zalay, 522 So. 2d 944, 946 (Fla. 2d DCA 1988) ("We find that the defendants were entitled to rely on the trial court's order directing a verdict in their favor and, when the judge reversed this decision, should have been permitted to submit additional evidence."). In the absence of an opportunity for the affected party to present new evidence following a change in the ruling, the remedy for a trial court's reconsideration of an evidentiary ruling—even where the trial court correctly determined that it erred in its original ruling—is a new trial. Willson, 211 So. 3d at 365. A new trial is appropriate because "[a] party who relies on a favorable trial court ruling should not be placed at risk of being worse off than had the ruling been unfavorable in the first instance" and "litigants must

be granted an opportunity to present their case under the correct[ ] ruling." Moody v. Dorsett, 149 So. 3d 1182, 1184 (Fla. 2d DCA 2014) (quoting John Hancock Mut. Life Ins., 522 So. 2d at 946); accord Gulf Eagle, LLC v. Park E. Dev., Ltd., 196 So. 3d 476, 479 (Fla. 2d DCA 2016).

This court's precedent establishes that even where "virtually all of the evidence" below is inadmissible hearsay, reversal on the basis of insufficiency of the evidence is not appropriate. R.K. v. Dep't of Children & Family Servs., 38 So. 3d 859, 862 (Fla. 2d DCA 2010). In R.K., "[m]ost of the evidence presented" to the trial court was inadmissible hearsay. 38 So. 3d at 863. And although both the evidentiary errors and the sufficiency of the evidence argument were raised, this court reversed only on the issue of evidentiary errors: "[W]e reverse the order of dependency with regard to the Father because, as the Department properly concedes, virtually all of the evidence that the trial court relied on for its findings was inadmissible hearsay." Id. at 862. The court noted that the admissible evidence was otherwise "insufficient to establish the trial court's findings" under the required standard, thus establishing the harm in the trial court's erroneous evidentiary rulings which necessitating reversal and remand for further proceedings. Id. at 863. We did not remand for dismissal of the petition. Id. at 860-61; see also Universal Ins. Co. of N. Am. v. Warfel, 82 So. 3d 47, 64 (Fla. 2012) ("Universal fails to provide any authority that required the Second District to engage in the factual inquiry of sufficiency prior to answering the legal inquiry present[ed] ...."); cf. Channell v. Deutsche **Bank** Nat'l Tr. Co., 173 So. 3d 1017, 1020 (Fla. 2d DCA 2015) ("Because these documents were admitted in error, there is insufficient evidence to support the amount due and owing under the loan. Accordingly, while we affirm the judgment of foreclosure, we must reverse and remand for further proceedings to properly establish the amount due and owing."). The Fourth District has similarly declined to reach a sufficiency conclusion where the evidence to be considered included improperly admitted testimony. See A.G. v. Dep't of Children & Families, 193 So. 3d 1097, 1099-1100 (Fla. 4th DCA 2016) ("Without A.J.'s testimony and his out-of-court statements (all erroneously admitted), the Department did not establish by a preponderance of the evidence that the Father's infant daughter was at substantial risk of future abuse .... For this reason, we reverse the supplemental adjudication and remand for a new hearing consistent with this opinion. We decline to address in further detail the Father's claim that the evidence was insufficient and trust that on remand, the trial judge will apply the correct law based on the evidence properly admitted."); see also Bayview Loan Servicing, LLC v. Luciano Del Lupo, 208 So. 3d 97, 98 (Fla. 4th DCA 2017) (reiterating that an involuntary dismissal can only be entered when the evidence—including erroneously admitted hearsay evidence—fails to establish a prima facie case on the nonmoving party's claim).

***17** The cases relied upon by the majority in equating legal sufficiency with competent substantial evidence do not discuss admissibility as a factor. See, e.g., Tsavaris v. NCNB Nat'l **Bank** of Fla., 497 So. 2d 1338 (Fla. 2d DCA 1986). They say nothing about evaluating only the properly admitted evidence before the lower court; in fact, Wachovia Mortgage, F.S.B. v. Goodwill, 199 So. 3d 346 (Fla. 4th DCA 2016), concludes that the payment history, "erroneously admitted without the proper foundation," and witness testimony "were sufficient to present a prima facie case." Id. at 348. Doyle v. CitiMortgage, Inc., 162 So. 3d 340 (Fla. 2d DCA 2015), Evans v. HSBC **Bank**, USA, Nat'l Ass'n, 223 So. 3d 1059 (Fla. 2d DCA 2017), and Mathis v. Nationstar Mortgage, LLC, 227 So. 3d 189 (Fla. 2d DCA 2017), do not rest their conclusions solely upon the sufficiency of only the properly admitted evidence. In Doyle, our conclusion was based on the absence of evidence to support the figures other than the principal balance in the final judgment, where only the loan payment history, establishing the principal, had been admitted into evidence but there was no evidence as to the other figures set forth in the final judgment. 162 So. 3d at 342. I do concede, however, that there is some language in Doyle that appears to be in conflict with this dissent, as pointed out by the majority. In retrospect I can see how the following sentence can be read as equating inadmissible evidence with lack of competent sufficient evidence: "[T]he testimonial evidence presented to establish the total amount of indebtedness was inadmissible hearsay and the total amount of indebtedness is not supported by competent, substantial evidence." Id. at 342. While the wording is unfortunate, it does not change the result of Doyle, which is consistent with my position here. The conclusion in Doyle is in line with both Wagner v. **Bank** of Am., N.A., 143 So. 3d 447 (Fla. 2d DCA 2014), and Sas v. Federal Nat'l Mortgage Ass'n, 112 So. 3d 778 (Fla. 2d DCA 2013), both relied upon in Doyle, and it rests on the absence of evidence supporting the figures other than the principal balance included in the final judgment and not on the improper admission of hearsay testimony reciting only "the current amount due on the loan." 162 So. 3d at 341-42.

In Evans, this court clearly concluded the witness's "testimony showed that HSBC **Bank** did not fail 'to offer any evidence at all—whether admissible or not.' " 223 So. 3d at

1064 (quoting Beauchamp v. Bank of N.Y., 150 So. 3d 827, 829 n.2 (Fla. 4th DCA 2014)). The Mathis opinion holds that Nationstar's failure to produce the original allonge to the note required reversal because in the absence of the allonge there was insufficient evidence of Nationstar's standing to enforce the note where there was no evidence of the allonge being unavailable or lost. 227 So. 3d at 193. [12] In both Evans and Doyle, this court followed its precedent in Sas and remanded for further proceedings. See Evans, 223 So. 3d at 1064; Doyle, 162 So. 3d at 342. [13] In Mathis, applying its prior conclusions in summary judgment cases to the facts in the bench trial at issue, this court followed the precedent set forth in Wolkoff, 153 So. 3d at 283, and Russell v. Aurora Loan Services, LLC, 163 So. 3d 639, 643 (Fla. 2d DCA 2015).

Moreover, the argument the **Maces** raise on appeal implicitly concedes that the admitted evidence was sufficient to withstand involuntary dismissal. Cf. Paeth v. U.S. **Bank** Nat'l Ass'n ex rel. C-Bass Mortg. Loan Asset-Backed Certificates, Series 2006-RP2, 220 So. 3d 1273, 1275 (Fla. 2d DCA 2017) ("Paeth also argues that the payment history was legally insufficient to support the trial court's determination of the amount of indebtedness because it is incomplete—an argument concerning the sufficiency of the admitted evidence that is properly before this court in this appeal."). However, even had the **Maces** argued that the evidence as admitted was insufficient, their argument would fail. Not only must this court consider all of the evidence admitted below—properly or improperly—in determining whether the **Bank** presented sufficient evidence of its compliance with paragraph twenty-two of the mortgage but it must construe that evidence in the light most favorable to the nonmoving party, drawing "every reasonable conclusion or inference based thereon" in favor of the nonmoving party. See Deutsche **Bank** Nat'l Tr. Co. ex rel. Harborview Mortg. Loan Tr. 2006-8 v. Kummer, 195 So. 3d 1173, 1175 (Fla. 2d DCA 2016) (quoting Day v. Amini, 550 So. 2d 169, 171 (Fla. 2d DCA 1989)); see also Bayview Loan Servicing, 208 So. 3d at 98 ("An involuntary dismissal or directed verdict is properly entered only when the evidence considered in the light most favorable to the non-moving party fails to establish a prima facie case on the non-moving party's claim." (quoting McCabe, 886 So. 2d at 1055)).

***18** This is not a case where the only evidence presented was a copy of the default notice or evidence that the letter was drafted; the **Bank** presented a certified mail receipt and testimony supporting the mailing of the notice. The **Bank's** witness was employed by the **Bank**, an agent of which drafted and mailed the default letter; and the witness personally reviewed the **Bank's** business records, including the electronic copies of the default letter and certified mail receipt, indicating that the letter had been mailed to the **Maces** at the property address on the date shown on the letter. And although the **Maces** objected to the witness's testimony, the **Maces** themselves "elicited specific testimony from the witness supporting [the **Bank's**] contention that the default notice was properly sent." See **Bank** of Am., Nat'l Ass'n v. Asbury, 165 So. 3d 808, 811 (Fla. 2d DCA 2015) (Silberman, J., concurring specially). "In fact, based on [the **Maces**'] prodding, the witness testified that [the **Bank's**] business records would establish the mailing." See id. (Silberman, J., concurring specially). As argued by the **Maces** below, the certified mail receipt "speaks for itself." The receipt in conjunction with the witness's testimony allows for a singular inference to be drawn: the paragraph twenty-two notice was mailed to the **Maces** on the date indicated on the letter as confirmed by the **Bank's** business records. Sufficient evidence that the **Bank** mailed the paragraph twenty-two notice was admitted at trial; thus, the trial court did not err in denying the motion for involuntary dismissal or in entering judgment in favor of the **Bank**. [14]

II. The applicability of chapter 90

Although the sufficiency of the evidence in this case is predicated on evidence which I would conclude was erroneously admitted had relief been sought on that issue, a defendant is not entitled to dismissal or directed verdict "merely because evidence that is critical to the court's finding of sufficiency was improperly admitted." See Barton v. State, 704 So. 2d 569, 573 (Fla. 1st DCA 1997); see also Redd v. State, 49 So. 3d 329, 335 n.3 (Fla. 1st DCA 2010) ("We are required to consider even erroneously admitted evidence when reviewing the denial of a motion for judgment of acquittal." (citing Lewis v. State, 754 So. 2d 897, 902 (Fla. 1st DCA 2000))).

The rationale and rulings expressed in the significant body of criminal law on this issue apply to civil proceedings because, except as otherwise specified, there is no distinction in chapter 90 between civil and criminal cases with regard to the admissibility of hearsay. See § 59.041, Fla. Stat. (2016) ("No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made ...

the error complained of has resulted in a miscarriage of justice." (emphasis added)); § 90.103(2), Fla. Stat. (2016). Likewise, there is little distinction in the standard applicable to motions for involuntary dismissal and directed verdict in civil cases and motions for judgment of acquittal in criminal cases; in fact, "the motion which triggers the ruling [on a motion for directed verdict] is indistinguishable from its more modern criminal counterpart, the motion for judgment of acquittal." Meus v. Eagle Family Disc. Stores, Inc., 499 So. 2d 840, 841 (Fla. 3d DCA 1986); see also Day, 550 So. 2d at 171 ("A motion for involuntary dismissal pursuant to Florida Rule of Civil Procedure 1.420(b), which is used in nonjury trials, was formerly known as a motion for directed verdict, and the same law is applicable." (citing Curls v. Tew, 346 So. 2d 1242, 1243 (Fla. 1st DCA 1977))). "The difference between the names used in criminal and civil practice is 'purely one of nomenclature,' not one of substance." Meus, 499 So. 2d a 841 (citing 2 Charles Alan Wright, Federal Practice and Procedure § 461 (2d ed. 1982)); compare Williams v. State, 261 So. 3d 1248, 1252 (Fla. 2019) ("A defendant who moves for a judgment of acquittal admits the facts in evidence and every conclusion favorable to the State that may be reasonably inferred from said evidence."), with Harvey v. GEICO Gen. Ins. Co., 259 So. 3d 1, 6 (Fla. 2018) ("When reviewing a trial court's ruling on a motion for directed verdict, this Court views the evidence and all inferences of fact in the light most favorable to the nonmoving party." (quoting Christensen v. Bowen, 140 So. 3d 498, 501 (Fla. 2014))).

***19** Thus, precedent addressing the error alleged by the **Maces** but occurring in criminal cases is applicable. And as the United States Supreme Court explained in Lockhart, procedural errors in the admission of evidence do not require an acquittal even if that evidence is crucial to the government's case and without which the evidence would be insufficient to support a conviction. 488 U.S. at 40, 109 S.Ct. 285. Reversals based upon evidentiary insufficiency have "fundamentally different implications" than reversals based upon the "incorrect receipt or rejection of evidence." Id. (quoting Burks v. United States, 437 U.S. 1, 15, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)). The latter "implies nothing" about the merits of the case and is only a determination that the process by which the case was tried was defective. Id. The Supreme Court has held that reversals based on the "incorrect receipt" of evidence are distinguishable from reversals based on the insufficiency of the evidence. Burks, 437 U.S. at 15, 98 S.Ct. 2141.

> Some procedural errors, such as the failure to establish a predicate for the admission of evidence or the failure to make required findings to justify the admission of evidence, might be corrected on remand and, if that is the case, the same evidence may be used again. Consequently, the appellate courts must consider the sufficiency of the evidence and alleged trial errors separately.

Barton, 704 So. 2d at 573; see also Moody v. State, 842 So. 2d 754, 757 n.1 (Fla. 2003) (concluding that motion for judgment of acquittal was properly denied and citing Lewis, 754 So. 2d 897, for the proposition that a reviewing court considers all evidence at trial, including evidence erroneously admitted, when determining sufficiency of the evidence to support a conviction); Pacheco v. State, 698 So. 2d 593, 596 (Fla. 2d DCA 1997) (rejecting the argument that because the only evidence of an element necessary for conviction was inadmissible hearsay acquittal was required; holding that retrial was warranted where evidence was erroneously admitted even where "without the inadmissible evidence there was insufficient evidence to support a conviction" (quoting Lockhart, 488 U.S. at 40, 109 S.Ct. 285)); N.C. v. State, 947 So. 2d 1201, 1204 (Fla. 1st DCA 2007) ("When determining whether the evidence is sufficient to withstand a motion for a judgment of dismissal, the reviewing court must consider all evidence adduced at the delinquency hearing, even evidence that is erroneously admitted."). As a result, even had the **Maces** argued below that the court could not consider improperly admitted evidence when ruling on their motion to dismiss, the law does not support reversal and remand for dismissal. [15] As clearly shown, in the context of a criminal prosecution where double jeopardy is a paramount concern, remand for a new trial is required in the face of a harmful evidentiary error—even one raised as a basis for a motion for judgment of acquittal. Thus, it is only equitable to conclude that in a civil case, where there is no concern reaching the magnitude of double jeopardy, the improper admission of evidence should result in a new trial even where the evidentiary error was harmful, i.e., without the benefit of the error the plaintiff failed to present a prima facie case. Where an erroneous evidentiary ruling necessitates reversal retrial is not "the proverbial 'second bite at the apple.' " Burks, 437

U.S. at 17, 98 S.Ct. 2141. And it is certainly an abuse of discretion to so hold.

***20** On the issue the **Maces** raise, after reviewing the evidence in the light most favorable to the **Bank** and drawing all inferences from that evidence in the **Bank's** favor, I find no basis to reverse and certainly no basis to reverse for dismissal. In reversing the final judgment on the premise asserted by the **Maces**, the majority has disregarded long-standing precedent in both the civil and criminal contexts without explanation as to why foreclosure cases can or should be treated differently than any others.

III. The inconsistency in the law

I acknowledge that this majority is not the first to improperly merge evidentiary errors with the sufficiency of the evidence and suggest that Knight v. GTE Federal Credit Union, 43 Fla. L. Weekly D348 (Fla. 2d DCA Feb. 14, 2018), on review SC18-790, stayed pending disposition of Jackson v. Household Finance Corp. III, SC18-357, Holt v. Calchas, LLC, 155 So. 3d 499 (Fla. 4th DCA 2015), and Burdeshaw v. **Bank** of N.Y. Mellon, 148 So. 3d 819 (Fla. 1st DCA 2014), relied upon by the majority, are in conflict with long-standing precedent. Knight correctly described the issue on appeal as whether the trial court abused its discretion in admitting hearsay evidence yet remanded for dismissal in contravention of this court's precedent, including precedent upon which Knight otherwise relied. See Sas, 112 So. 3d at 780. Holt concluded that multiple evidentiary errors had been committed but that the admission of hearsay to support compliance with paragraph twenty-two "justifie[d] dismissal of the entire case." 155 So. 3d at 507. And Burdeshaw recognized the evidentiary errors and relied upon cases remanding for further proceedings based on similar evidentiary errors yet—based on the borrowers' motion to dismiss for lack of prosecution where there was an absence of record activity for over one year—reversed and remanded for dismissal. 148 So. 3d at 826-27. These cases do not provide explanations based on the law of evidence or sufficiency of the evidence for their results; they do not address precedent, including precedent from their respective districts establishing that where an element of the foreclosure action —damages—is proven by inadmissible evidence, remand for further proceedings and not dismissal is appropriate. See, e.g., Sas, 112 So. 3d at 780; Beauchamp, 150 So. 3d at 829; Mazine v. M&I **Bank**, 67 So. 3d 1129, 1131 (Fla. 1st DCA 2011). The majority here has likewise failed to explain the deviation from precedent.

I also note that Soule v. U.S. **Bank** National Ass'n ex rel. BNC Mortgage Loan Trust 2007-1 Mortgage Pass-Through Certificates, Series 2007-1, 253 So. 3d 679 (Fla. 2d DCA 2018), Spencer v. Ditech Financial, LLC, 242 So. 3d 1189 (Fla. 2d DCA 2018), and Allen v. Wilmington Trust, N.A., 216 So. 3d 685 (Fla. 2d DCA 2017), cited by the majority as cases reversing foreclosure judgment because the **banks'** proof of mailing default letters was insufficient, did not involve evidence which was deemed insufficient because it was inadmissible. Rather, Soule and Allen were straight-forward insufficient evidence cases and are therefore inapposite to the majority's resolution here. And while Spencer notes that the witness's testimony was objected to as hearsay, Spencer clearly concludes that "[t]his evidence"—the totality of the witness's testimony described in the opinion—"was insufficient to show that the default letter was actually sent." 242 So. 3d at 1190-91 (focusing on the lack of personal knowledge and what the witness "had never" done and what "had not" taken place). Simply stated, this is not a failure of proof case; it is a case where evidence used to establish a prima facie claim was erroneously admitted by the trial court and the error cannot be deemed harmless. See § 59.041; see also Tracey v. Wells Fargo **Bank**, N.A. ex rel. Certificateholders of Banc of Am. Mortg. Secs., Inc., 2007-2 Tr., Mortg. Pass-Through Certificates, Series 2007-2, 264 So. 3d 1152, 1170-71 (Fla. 2d DCA 2019) (Sleet, J., dissenting) (discussing the distinction between a prima facie case based on erroneous trial court rulings and a complete failure of proof); cf. Levy v. Ben-Shmuel, 255 So. 3d 493, 494 (Fla. 3d DCA 2018).

***21** Moreover, the majority has failed to recognize conflict with other cases in the foreclosure context. See Cassell v. Green Planet Servicing, LLC, 188 So. 3d 104, 105 (Fla. 5th DCA 2016) ("Without that evidence, Green Planet could not establish either Cassell's default or its own compliance with the mortgage's notice requirements. Accordingly, we reverse the final judgment of foreclosure and remand for a new trial."); Helton v. **Bank** of Am., N.A., 187 So. 3d 245, 247-48 (Fla. 5th DCA 2016) (reversing and remanding for further proceedings on the issue of compliance with paragraph twenty-two where but for improperly admitted hearsay there was insufficient evidence to establish compliance with the notice requirement); Webster v. Chase Home Fin., LLC, 155 So. 3d 1219, 1220 (Fla. 5th DCA 2015) (reversing and remanding for further proceedings "on the issue of proof" related to the required default notice where the trial court improperly admitted hearsay evidence); see also Sas, 112

So. 3d at 780 (addressing the element of damages being proven through hearsay); Deutsche **Bank** Tr. Co. Ams. ex rel. Residential Accredit Loans, Inc., Mortg. Asset-Backed Pass-Through Certificates Series 2006-QO1 v. JB Inv. Realty, LLC, 274 So. 3d 1114, 1116 (Fla. 4th DCA 2019) (same); Bayview Loan Servicing, 208 So. 3d at 99; Deutsche **Bank** Nat'l Tr. Co. v. Baker, 199 So. 3d 967, 969 (Fla. 4th DCA 2016) (same).

IV. Conclusion

I would affirm the judgment. Based on the evidence admitted during the bench trial, the entirety of which was correctly relied upon by the trial court in considering whether the **Bank** had presented sufficient evidence of its compliance with paragraph twenty-two of the mortgage, the trial court denied the **Maces**' motion for involuntary dismissal. In reviewing the trial court's ruling, this court in turn must consider all of the evidence relied upon by the trial court. That evidence compels this court to affirm the denial of the motion for involuntary dismissal and the determination necessarily reached by the trial court: that the **Bank** made a prima facie showing that it had complied with the requirements of paragraph twenty-two of the mortgage. [16] In reversing on the basis argued by the **Maces** the majority effectively holds that errors in evidentiary rulings result in involuntary dismissal of the case, without justification for doing so under the rules of evidence.

***22** I suggest that given the ever-growing body of foreclosure law and the inter- and intradistrict conflicts which now exist, a question of great public importance should be certified:

CAN THE REVIEWING COURT DISREGARD ERRONEOUSLY ADMITTED EVIDENCE IN REVIEWING THE ARGUMENT THAT INSUFFICIENT EVIDENCE SUPPORTING A CLAIM WAS PRESENTED BELOW?

All Citations

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Footnotes

1 Here, the **Bank** was technically the servicer on the loan, and the evidence established that it was entitled to enforce the note as a holder. See § 673.3011(1), Fla. Stat. (2015). No one has argued that this affects the applicability of the notice requirements of the mortgage.

2 The **Bank** did not attempt to prove, and has not argued in either the trial court or here, that the evidence was sufficient to show that the default notice was actually delivered to the **Maces**.

3 In nonjury cases where a party has not moved for involuntary dismissal but nonetheless shows on appeal that the evidence is insufficient to support the judgment, see Fla. R. Civ. P. 1.530(e), the correct instruction would be to enter a judgment in favor of the appellant, see Winchel v. PennyMac Corp., 222 So. 3d 639, 646 n.5 (Fla. 2d DCA 2017).

4 The dissent inaccurately characterizes the certified mail card as "indicating that the letter had been mailed to the **Maces**," but as explained in part II, there was no evidence that the card was used to mail the default notice or that the default notice was mailed. The dissent also implies that the fact that some of Ms. Andreas's testimony about the default letter was elicited by the **Maces**' counsel is important—for what reason, it does not say—but fails to note that the testimony was elicited by the **Maces**' counsel in support of the argument that Ms. Andreas lacked personal knowledge of the matters to which she testified.

5 The dissent's attempt to characterize Doyle as a case of unfortunate wording is not convincing. It says that Doyle rests on the absence of proof to support certain figures in the final judgment but overlooks that those figures were simply component parts of the total amount of indebtedness, proof of which is necessary to secure a foreclosure judgment. See Ernest v. Carter, 368 So. 2d 428, 429 (Fla. 2d DCA 1979). The final judgment in Doyle stated a total amount of indebtedness and identified it as being comprised of five items. Doyle, 162 So. 3d at 341 & n.3. The problem Doyle identified was that while there was admissible evidence supporting the principal component—a payment history—the only other evidence supporting the total amount of the indebtedness was hearsay testimony as to the total amount. Id. at 341-42. Doyle held that "the testimonial evidence ... was inadmissible hearsay and the total amount of indebtedness is not supported by competent substantial evidence." Id. at 342. This reads like a holding predicated on admissibility and not a case of words not expressing the court's true meaning. That is made clear by Doyle's reliance on Sas, which also held that the evidence of the total amount of evidence insufficient because the plaintiff's only evidence was inadmissible hearsay. See Sas, 112 So. 3d at 779.

6 The dissent's effort to characterize Evans and Mathis as not involving sufficiency problems created by our determination on appeal that the plaintiff's only evidence on a point was inadmissible is, like its effort to distinguish Doyle, contradicted by what those decisions explicitly state. See Evans, 223 So. 3d at 1062 (Fla. 2d DCA 2017) ("[T]he admission of the payment history into evidence was erroneous. Consequently, HSBC **Bank** failed to present sufficient evidence as to its damages.") (emphasis added); Mathis, 227 So. 3d. at 192-93 (finding plaintiff's proof of standing "insufficient" where it failed to produce an original allonge and the "testimony regarding the contents of the allonge was inadmissible under the best evidence rule").

7 The court in Lockhart did draw an analogy to a motion for a judgment of acquittal and say that "[a] trial court in passing on such a motion considers all of the evidence it has admitted, and to make the analogy complete it must be that same quantum of evidence which is considered by the reviewing court." 488 U.S. at 41-42, 109 S.Ct. 285. But that was dicta —again, the issue was double jeopardy in the context of a sentencing hearing before a jury—and at all events is not determinative of how a state court applying state rules to the review of the sufficiency of the evidence after a nonjury trial must conduct that analysis. The criminal cases the dissent says later in the opinion control by analogy likewise involve the double jeopardy issue, a review of the sufficiency of the evidence after a jury trial, or something different altogether. See Burks v. United States, 437 U.S. 1, 17, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) (addressing when the double jeopardy clause requires a retrial and explicitly stating that "this is not the appropriate occasion to re-examine in detail the standards for appellate reversal on the grounds of insufficient evidence"); Moody v. State, 842 So. 2d 754, 756 n.1 (Fla. 2003) (one-sentence summary affirmance of a sufficiency issue following a jury trial); Redd v. State, 49 So. 3d 329, 332 n.1 (Fla. 1st DCA 2010) (jury trial); N.C. v. State, 947 So. 2d 1201, 1204 (Fla. 1st DCA 2007) (addressing motion for judgment of acquittal in a delinquency case where the evidentiary error was the trial court's failure to make findings supporting the admission of certain evidence); Barton v. State, 704 So. 2d 569, 573 (Fla. 1st DCA 1997) (double jeopardy and jury trial); Pacheco v. State, 698 So. 2d 593, 596 (Fla. 2d DCA 1997) (double jeopardy and jury trial). With respect to those cases addressing the sufficiency of the evidence after a jury trial, we acknowledge that a different rule may well govern there given the differences between a jury and nonjury trial. But that is not an issue we need here to address.

8 See Perez v. Deutsche **Bank** Nat'l Tr. Co., 264 So. 3d 1117, 1119 (Fla. 2d DCA 2019) (holding that the evidence was insufficient, but saying or implying nothing about whether admissibility is a factor); Roop, 228 So. 3d at 642 (holding that an argument not presented in the initial brief at all should not be considered and saying nothing or implying nothing about argument headings covering "separate analyses"); Colson v. State Farm **Bank**, F.S.B., 183 So. 3d 1038, 1040 n.2 (Fla. 2d DCA 2015) (noting that no argument about the admissibility of evidence had been made on appeal, but saying or implying nothing about how such arguments must be presented); Wolkoff v. Am. Home Mortg. Servicing, Inc., 153 So. 3d 280, 283 (Fla. 2d DCA 2014) (noting that different standards of review apply to sufficiency and admissibility questions, but saying or implying nothing about how the issues must be briefed); Correa v. U.S. **Bank**, N.A., 118 So. 3d 952, 954 (Fla. 2d DCA 2013) (holding that the evidence was insufficient, but saying or implying nothing about whether admissibility is a factor); Deutsche **Bank** Tr. Co. Ams. v. Harris, 264 So. 3d 186, 192 (Fla. 4th DCA 2019) (noting that no argument about the admissibility of evidence had been made on appeal, but saying or implying nothing about how such arguments must be presented); Nat'l Car Rental Sys., Inc. v. Holland, 269 So. 2d 407, 410 (Fla. 4th DCA 1972) (discussing former appellate rule 3.5 requiring the filing of assignments of error and saying nothing about argument headings covering "separate analyses"); Florida Citrus Comm'n v. Owens, 239 So. 2d 840, 841 (Fla. 4th DCA 1969) (discussing the assignments of error requirement of former rule 3.7(f)(4) and saying nothing about argument headings involving "separate analyses").

9 See McCabe v. Hanley, 886 So. 2d 1053, 1056 (Fla. 4th DCA 2004) (holding that a trial court in a nonjury trial is not free to disregard evidence it has admitted without revisiting its evidentiary ruling, but not holding that the evidence was in fact inadmissible and saying nothing about an appellate court's review of the sufficiency of the evidence when the plaintiff's only evidence is inadmissible); Singer v. Borbua, 497 So. 2d 279, 280 (Fla. 3d DCA 1986) (addressing a trial court's consideration of a motion for directed verdict in a jury trial and also explaining that "aside from this disputed evidence, there was sufficient circumstantial evidence" to support the verdict).

10 This is not, as the dissent suggests, a situation where the **Bank's** failure to prove mailing is "the result of judicial error." Levy v. Ben-Shmuel, 255 So. 3d 493, 497 n.4 (Fla. 3d DCA 2018). Levy explains that a case can be remanded for a new trial on damages where, for example, a trial court "erred in applying incorrect methodology for computing plaintiff's measure of damages," "precluded plaintiff from pleading and proving damages," or "erred in jury instruction given to jury on measure of damages." Id. (first citing R & B Holding Co. v. Christopher Advert. Grp., Inc., 994 So. 2d 329 (Fla. 3d DCA 2008); then citing Sharick v. Se. Univ. of the Health Scis., Inc., 780 So. 2d 136 (Fla. 3d DCA 2000); and then citing Alonso v. Fernandez, 379 So. 2d 685 (Fla. 3d DCA 1980)). Each scenario involves a trial court cutting off a plaintiff's ability to prove an element of the case. The dissent cites to other cases where an appellate court determined that a trial

court's error or change in position warranted a retrial, but each involves a situation where the error or change prevented the plaintiff from proving his case or where the remaining evidence needed to be reweighed by a jury. See Futch v. Fla. Dep't Highway Safety & Motor Vehicles, 189 So. 3d 131, 134 (Fla. 2016) (Canady, J., dissenting); Special v. W. Boca Med. Ctr., 160 So. 3d 1251, 1261 (Fla. 2014); Willson v. Big Lake Partners, LLC, 211 So. 3d 360, 364-65 (Fla. 4th DCA 2017); Moody v. Dorsett, 149 So. 3d 1182, 1184 (Fla. 2d DCA 2014). Here, the **Bank** had a full and fair opportunity to present evidence of mailing and instead chose to bring a single witness who had no personal knowledge of the matter. There is nothing here to suggest that, had the trial court properly excluded Ms. Andreas's testimony, the **Bank** would have been prepared to prove mailing through some other evidence. In no sense can the **Bank's** failure to prove its case here be said to have been caused by the trial court's mistaken evidentiary rulings.

11 It is worth noting that generally "the trial court should be afforded an opportunity to correct the error before the aggrieved party seeks reversal of the order on appeal." Pensacola Beach Pier, Inc. v. King, 66 So. 3d 321, 324 (Fla. 1st DCA 2011). And while rule 1.530(e) provides that "a motion for rehearing, for new trial, or to alter or amend the judgment" is unnecessary "[w]hen an action has been tried by the court without a jury," it is implicit in the rule "that, in all other instances in which there is a concern about a judgment, it is necessary to file one of the enumerated motions to preserve the issue for appeal." Pensacola Beach Pier, 66 So. 3d at 324 (quoting Fla. R. Civ. P. 1.530(e)). The enumerated motions under rule 1.530 require further proceedings. See, e.g., Heidkamp v. Warren, 990 So. 2d 1, 2 (Fla. 2d DCA 2007). Therefore, given that rule 1.530(e) provides that a listed motion is unnecessary for appellate review of the sufficiency of the evidence, I am unconvinced that reversal based on insufficiency of the evidence pursuant to the rule requires dismissal rather than a new trial in all instances. See Sanabria v. Pennymac Mortg. Inv. Tr. Holdings I, LLC, 197 So. 3d 94, 95 n.1 (Fla. 2d DCA 2016) (discussing failure to preserve standing argument via motion for involuntary dismissal and stating that "[w]e cannot attempt to unravel this confusion because the homeowners failed to adequately preserve the issue of plaintiff's standing in their motion for involuntary dismissal"); Loundin v. Bayview Loan Servicing, LLC, 208 So. 3d 789, 790 (Fla. 3d DCA 2016) (holding that failure to raise specific argument with regard to paragraph twenty-two notice below prevented review on appeal); U.S. **Bank**, Nat'l Ass'n v. Angeloni, 199 So. 3d 492, 494 (Fla. 4th DCA 2016) (declining to consider application of lost note statute because borrowers failed to raise argument in moving for involuntary dismissal); see also E & Y Assets, LLC v. Sahadeo, 180 So. 3d 1162, 1163 (Fla. 4th DCA 2015) (stating that "[a]ppellant is correct that dismissal should not have also been based on the failure of the mortgagee to perform a condition precedent," where the condition precedent was waived).

12 This court further supported its conclusion regarding the necessity of admitting the original allonge by noting that "surrendering the original promissory note and allonge [i]s necessary 'to remove it from the stream of commerce and prevent the [potential] negotiation of the note to another person.' " Mathis, 227 So. 3d at 193 n.2 (second alteration in original) (quoting Heller v. **Bank** of Am., N.A., 209 So. 3d 641, 644 (Fla. 2d DCA 2017)). This is true regardless of the admissibility of additional evidence.

13 The additional cases cited by the majority as examples of appellate courts' excision of improperly admitted evidence in determining whether sufficient evidence had been presented turn not on the sufficiency of the evidence under rule 1.530(e) but on whether the evidentiary errors committed were harmful and thus necessitated further proceedings or on the failure to establish the charged degree of the criminal offense. In none of the cases was dismissal of the action the directive on remand.

14 I note that had the trial court in this case granted the involuntary dismissal, reversal would be required because evidence of compliance with the notice requirement had been presented. See Deutsche **Bank** Tr. Co. Ams. ex rel. Residential Accredit Loans, Inc., Mortg. Asset-Backed Pass-Through Certificates Series 2006-QO1 v. JB Inv. Realty, LLC, 274 So. 3d 1114, 1116 (Fla. 4th DCA 2019) ("Having admitted that evidence, the trial court erred by granting an involuntary dismissal."); Wells Fargo **Bank**, N.A. v. Eisenberg, 220 So. 3d 517, 523 (Fla. 4th DCA 2017) ("When considered in the light most favorable to **Bank**, the evidence regarding the incomplete payment history was sufficient to establish a prima facie case on damages. Having admitted that evidence, the trial court erred by granting Borrower's motion for involuntary dismissal."). Even where some of the evidence of compliance with paragraph twenty-two was hearsay erroneously admitted at trial, sufficient evidence of compliance had been presented, precluding involuntary dismissal. See Deutsche **Bank** Nat'l Tr. Co. ex rel. Gsamp Tr. 2007-HSBC1 Mortg. Pass-Through Certificates, Series 2007-HSBC1 v. Baker, 199 So. 3d 967, 968-69 (Fla. 4th DCA 2016).

15 Had the **Maces** contended that reversal is required based on the trial court's evidentiary ruling errors—an issue they do not raise—a new trial would undoubtedly be necessary. See Cassell v. Green Planet Servicing, LLC, 188 So. 3d 104, 105 (Fla. 5th DCA 2016) (reversing on evidentiary errors and noting that without the inadmissible evidence "Green Planet could not establish either Cassell's default or its own compliance with the mortgage's notice requirements"); M.S. v. Dep't

of Children & Families, 6 So. 3d 102, 105 (Fla. 4th DCA 2009) (reversing on evidentiary error issue and declining to address the claim that the evidence was insufficient "because the sufficiency of the evidence depend[ed] in considerable part on the [inadmissible] evidence"). Harmful evidentiary errors require remand for a new trial rather than dismissal, a conclusion which is consistent in both civil and criminal cases. See, e.g., Special v. W. Boca Med. Ctr., 160 So. 3d 1251, 1261 (Fla. 2014) (holding that a new trial was required where evidentiary errors were not harmless); Corona v. State, 64 So. 3d 1232, 1245 (Fla. 2011) (holding that defendant was entitled to a new trial where evidence should have been excluded and "there was minimal additional evidence on which to convict"); Saul v. John D. & Catherine T. MacArthur Found., 499 So. 2d 917, 920 (Fla. 4th DCA 1986) ("[W]e hold that the trial court erred in overruling Saul's objection to the admissibility of the evidence in question requiring reversal for a new trial."). The remedy of a new trial is appropriate because had the trial court properly sustained the objections below, the proponent of the evidence would have had an opportunity to lay the foundation, elicit nonhearsay testimony, or otherwise present its case; the court would not have granted dismissal unless the proponent of the evidence—having received correct evidentiary rulings—failed to present a sufficient case. See Futch v. Fla. Dep't of Highway Safety & Motor Vehicles, 189 So. 3d 131, 134 (Fla. 2016) (Canady, J., dissenting) ("When an error made in a ruling on an evidentiary question is identified in a review proceeding, the result is not an automatic victory for the party aggrieved by the error. It is an 'elementary' principle of the appellate process that 'where findings are infirm because of an erroneous view of the law, a remand is the proper course ....' " (quoting Pullman-Standard v. Swint, 456 U.S. 273, 292, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982))); Masci Corp. v. Fortiline, Inc., 202 So. 3d 434, 436 (Fla. 5th DCA 2016) (reversing and remanding for a new trial and stating that "[h]ad Exhibit 115 been properly excluded, the trial court may have arrived at different conclusions [regarding the motion for involuntary dismissal]"); cf. State v. Hampton, 44 So. 3d 661, 666 (Fla. 2d DCA 2010) ("[H]ad [counsel] made a timely objection to the admissibility of [the evidence], the trial court would not have granted an acquittal. Instead, it would merely have denied the admission of the exhibit until the State properly presented the evidence needed to establish chain of custody.").

16 Although the majority cites Tracey, 264 So. 3d at 1168, for the proposition that remand for involuntary dismissal is appropriate, the error alleged and resolved in Tracey was the trial court's ruling permitting Wells Fargo to amend its complaint to conform with the evidence presented at trial; the sufficiency of the evidence to foreclose was not at issue. As stated by the majority, Tracey involved a ruling on a midtrial motion to amend the pleadings and not a ruling on the admissibility of evidence; thus Tracey's statement that it governs remand instructions when a party fails "to establish a basis in admissible evidence for a claim at trial" is dicta and inapplicable here. See Gonzalez v. Fed. Nat'l Mortg. Ass'n, 276 So. 3d 332, 335 (Fla. 3d DCA 2018), review denied, No. SC18-2064, 2019 WL 3856470 (Fla. Aug. 18, 2019). "One of the basic principles of appellate law is that the holding of a decision cannot extend beyond the facts of the case." Miccosukee Tribe of Indians v. Lewis Tein, P.L., 227 So. 3d 656, 661 (Fla. 3d DCA 2017). Language which is not necessary to the determination of the issue before the court is dicta. Hilkmeyer v. Latin Am. Air Cargo Expediters, Inc., 94 So. 2d 821, 825 (Fla. 1957); see State v. Yule, 905 So. 2d 251, 259 n.10 (Fla. 2d DCA 2005) (Canady, J., concurring specially) ("A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta." (quoting Michael Abromowicz & Maxwell Stearns, Defining Dicta, 57 Stan. L. Rev. 953, 1065 (2005))).