THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Judge

Appellate Case No.: 2014-0001384
Common Pleas Case No. 2012-CP-32-2816

FV-I, Inc. in trust for Morgan Stanley Mortgage Capital Holdings LLC,...Respondent,

v.

Bryon J. Dolan; Lisa S. Dolan; First Citizens Bank and Trust Company, Inc.; Wells Fargo Bank, N.A.; Branch Banking and Trust Company, Defendants,

Of whom Bryon J. Dolan and Lisa S. Dolan are the.....Appellants.

INITIAL BRIEF OF APPELLANT

Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellants

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II. **Did the trial court commit reversible error by allowing the Respondent's sole witness to testify to the content of documents, particularly since those documents were either inadmissible or unadmitted?**

III. **Did the trial court err in granting the Respondent's directed verdict motion as to the Appellants' claim for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, where there was evidence tending to show its violation by the Respondent?**

STATEMENT OF THE CASE

This is a case in which the Respondent (hereinafter "FV-I") seeks mortgage foreclosure and the Appellants (hereinafter "the Dolans") asserted both legal and equitable counterclaims. (R. pp. ___; complaint; answer and counterclaim.) The Dolans' legal counterclaims were for FV-I's breach of contract and FV-I's violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (hereinafter "UTPA"). (R. pp. ___; answer and counterclaim.)

FV-I moved to strike the Dolans' jury demand, and the Honorable Edgar W. Dickson, in deciding that the Dolans' breach of contract counterclaim is compulsory, ruled that "[i]f what the [Dolans] allege is true, then they are not in default of the note and mortgage, and [FV-I] thus cannot enforce the note or be granted foreclosure of the mortgage." (R. pp. ___; Order on motion to strike jury demand and refer case.) Judge Dickson ruled that the UTPA claim was not compulsory, but the parties later agreed to let that claim be tried to the jury as well. (R. pp. ___; Order on motion to strike jury demand and refer case; transcript of pre-trial motions hearing p. 8 ln. 19 through p. 9 ln. 10.)

This case was bifurcated by consent order on the cusp of the jury trial, with the Dolans' at-law counterclaims tried to a jury before the Honorable R. Keith Kelly on April 17, 2014, and the foreclosure claim and the Dolans' claim for an accounting referred to the Honorable James O. Spence, Master-in-Equity for Lexington County, to be tried later. (R. pp. ___; Order bifurcating case.) Since the only claims tried to the jury were the Dolans', the parties agreed that the trial would proceed basically as though the Dolans were the plaintiffs. (R. pp. ____; transcript of pre-trial motions

hearing p. 15 ln. 9 through p. 16 ln. 11.) The Dolans presented a memorandum of law concerning several matters anticipated to come up during the trial, among them matters subject of this appeal. (R. pp. ___; Dolans' memorandum of law.)

The gravamen of the Dolan's counterclaims was that FV-I, through personnel of its mortgage servicer at the time, Saxon Mortgage Services, represented that a $65,250.00 lump sum payment the Dolans made in connection with the release of a portion of the mortgaged property either would be sufficient to reinstate the subject mortgage loan or would be treated as such (in essence, modifying the loan such that the loan would be treated as having been brought current once the payment was made), but that FV-I did not honor this, did not permit the Dolans to make payments on the loan as the parties had agreed, and, once the loan servicing was transferred to a different servicer (Specialized Loan Servicing, LLC, the servicer during the pendency of this case), brought this foreclosure action. (R. pp. ____; transcript of trial pp. 14-24, p. 32 ln. 8 through p. 33 ln. 2, p. 51 ln. 5-11, p. 89 ln. 22 through p. 90 ln. 19, p. 97 ln. 4-7, p. 98 ln. 18-20, p. 123 ln. 20-25, pp. 178-91; Def. Exh. 4; Def. Exh. 18.) (This was in addition to two $3,000.00 payments to follow. (R. pp. ____; transcript of trial p. 116 ln. 17-23.)) In support of this, the Dolans offered the testimony of Bryon Dolan, who handled the Dolans' communications with the mortgage servicer and with BB&T, which was the original owner and servicer of the loan, and a number of exhibits. (R. pp. _____; trial transcript p. 24 ln. 11 through p. 129 ln. 5; Def. Exhs. 1-18.) Mr. Dolan testified that Kevin Flanagan, who worked at Saxon and handled the communications about partial mortgage release, told him that this amount would be sufficient with FV-I to bring the loan current. (R. pp. ____; transcript of trial p. 32

ln. 8 through p. 33 ln. 2, p. 51 ln. 5-11, p. 89 ln. 22 through p. 90 ln. 19, p. 97 ln. 4-7, p. 98 ln. 18-20, p. 123 ln. 20-25.) Mr. Dolan testified, in accordance with emails exchanged between him and Mr. Flanagan shown in Defendants' Exhibit 18, that Mr. Flanagan had originally presented the amount as $69,000.00, but that was changed to $65,250.00 plus two payments of in order to accommodate a junior lienor's partial payment when the mortgage release was done. (R. pp. ____; transcript of trial p. 89 ln. 22 through p. 90 ln. 4.) In an email, Mr. Flanagan refers to "the $65,250 (revised amount due Saxon less the 3,7500." (R. pp. ___; Def. Exh. 18 p. 1.) Saxon received the $65,250.00 payment on September 30, 2011. (R. pp. ____; Def. Exh. 5.)

Only after that lump sum payment was made did Mr. Flanagan inform the Dolans that FV-I claimed that an additional $35,603.88 was needed to bring the loan current, in an October 12, 2011, email message with a reinstatement quote attachment also dated October 12. (R. pp. ____; Def. Exh. 6.) Further, Mr. Dolan testified that Saxon did not allow the Dolans to make the two following $3,000.00 payments and actually instructed them not to. (R. pp. ____; transcript of trial p. 35 through p. 38 ln. 1, p. 39 ln. 15-21.)

The Dolans presented evidence to support their theory that the lump sum payment was either actually sufficient to bring the loan current or that FV-I had decided to treat it as though it was, modifying the loan. The mortgage loan subject of this case was in foreclosure at the time of the $65,250.00 payment, subject of a foreclosure action brought by BB&T.[1] (R. pp. ____; Pl. Exh. 4.) Through its

[1] While that foreclosure action was pending, servicing of the loan transferred from BB&T to Saxon, apparently as a result of FV-I's purchase of the loan. (R. pp. ____; transcript of trial p. 28 ln. 18 through p. 29 ln. 5, p. 134 ln. 2-9.) Though Saxon controlled the foreclosure action, BB&T continued to be listed as the plaintiff in the case. (R. pp. ____; Def. Exh. 10.)

servicer, Saxon, FV-I had the foreclosure judgment in then-pending foreclosure action undone and the case "closed" via a consent order it proposed that stated that "*the Note and Mortgage of the Defendant are hereby reinstated* without merger into the judgment released herein as fully as if the released judgment had not been obtained[.]" (R. pp. ____ Def. Exh. 10 (emphasis added).) The Dolans introduced Saxon's servicing notes from the time period in question, which state that "THE LITIGATION ON THIS LOAN IS NOW CLOSED/RESOLVED" in a note dated four days before Saxon received the lump sum payment. (R. pp. ___; Def. Exh. 9 p. 1.) On October 10, 2011, ten days after the lump sum payment was received, those servicing notes state "PLEASE KILL AND BILL FC, MONEY HAS BEEN RECEIVED FOR THE NEGOTITED [sic] PARTIAL RELEASE APPROVED BY KF1" and "FC STOP – LOSS MIT. ISSUE COMMENTS: PLEASE CLOSE AND BILL FILE DUE TO FUNDS HAVE" and "SHUT DOWN FCL PROCESS DUE TO LOSS MIT ACTIVITY." (R. pp. ___; Def. Exh. 9 p. 2.) These servicing notes contain an entry dated January 12, 2012, that states "SPOKE TO C1 IN A FOLLOW UP PHONE CALL REGARDING CHECK FOR 3K SENT IN MAIL AND HADNT BEEN RECEIVED YET, ADVISED THAT WOULD HAVE TO GET THIS POSTED[.]" (R. pp. ___; Def. Exh. 9 p. 4.) Three servicing note entries dated January 18, 2012, state "WE RECEIVED FUNDS IAO 3000/00 EMAILED WHOLE LOANS FOR ADVISING[,]" "DO NOT SEND FUNDS BACK, NEE [sic] TO BE APPLIED TO ACCOUNT ASKED FF TO REACH OUT TO ME PRIOR TO SENDING BACK OR POSTING[,]" and "AFS APPROVAL TRECEIVED [sic] RETURN ALL FUNDS NO ACTIVE AGREEMENT ON FILE[.]" (R. pp. ___; Def.

Exh. 9 p. 4-5.) When Saxon returned the Dolans' $3,000.00 payment, it sent a letter back to the Dolans with the check. (R. pp. ____; Def. Exh. 8.) While the letter contained blanks to check beside the words "The payment amount is not correct" and "The funds are insufficient to liquidate the account[,]" neither one of those blanks were checked; rather, the letter stated "Other: CHECK# 194076 IN AMOUNT OF 3000.00; RETURNED DUE TO STATUS OF LOAN." (R. pp. ___; Def. Exh. 8.) On a document dated November 30, 2011, and labeled "Foreclosure Review – Verification for Morgan Stanley/Saxon Loans[,]" the "[r]eason for default" given is not default in payments or anything like it; rather, it is "other, see notes." (R. pp. ___; Def. Exh. 13 p. 2.)

The Dolans also called the sole witness FV-I brought to the trial, Loretta Poch, in their case-in-chief. (R. pp. ___; trial transcript p. 132 ln. 3 through p. 138 ln. 20.) Ms. Poch is an employee of Specialized Loan Servicing, the present servicer of the subject loan. (R. pp. ___; trial transcript p. 132 ln. 10-13.) Ms. Poch testified that she had never worked for either of the loan's two previous servicers, BB&T and Saxon. (R. pp. ___; trial transcript p. 133 ln. 8-12.) She testified that Saxon's procedures "match industry standard procedure[,]" but no evidence was offered of what industry standard procedure is with regard to record creation and maintenance or of what Saxon's procedures were in that regard. (R. pp. ___; trial transcript p. 134 ln. 16-18.) Ms. Poch had never observed how Saxon implemented any of its procedures. (R. pp. ___; trial transcript p. 134 ln. 24 through p. 135 ln. 1.) She testified that everything she knows about the subject loan comes from looking at documents and that any information her company has about this loan comes from the records of prior

servicers. (R. pp. ___; trial transcript p. 135 ln. 2-5, p. 135 ln. 12 through p. 136 ln. 16.)

At the close of the Dolans' case, the trial judge directed a verdict on the UTPA claim but denied FV-I's motion for a directed verdict on the breach of contract claim. (R. pp. ___; trial transcript p. 139 ln. 17 through p. 146 ln. 23.)

FV-I called Ms. Poch in its case. (R. pp. ___; trial transcript p. 147 ln. 10 through p. 176 ln. 17.) Though Ms. Poch had testified that her only knowledge of any matters involved in this case came only from the content of documents, FV-I elicited – and the court permitted – testimony from her about the status of the loan account at issue at various points in time, including testimony about the status of the loan at points in time before Specialized Loan Servicing began servicing the loan. (R. pp. ___; trial transcript p. 151 ln. 11 through p. 152 ln. 14, p. 153 ln. 6 through p. 154 ln. 2, p. 154 ln. 22 through p. 158 ln. 4, p. 165 ln. 3 through p. 172 ln. 6, p. 173 ln. 13 through p. 174 ln. 13.) This was over the Dolans' objections. (R. pp. ___; trial transcript p. 153 ln. 20 through p. 154 ln. 19, p. 158 ln. 3 through p. 162 ln. 9.) Though Ms. Poch had not testified as to how Saxon's records were made or kept, the court permitted the introduction through her testimony of a *Saxon*-made loan history document, Plaintiff's Exhibit 12, into evidence. (R. pp. ___; p. 162 ln. 10 through p. 164 ln. 22, p. 166 ln. 24 through p. 167 ln. 7; Pl. Exh. 12.) This was also over the Dolans' objections. (R. pp. ___; trial transcript p. 162 ln. 10 through p. 164 ln. 22.)

Ms. Poch's testimony, the substance of which was solely the content of documents per her own admission, and the Saxon loan history document were the only evidence offered in support of FV-I's contention that the lump sum payments

made and agreed by the Dolans were insufficient to bring the loan current. (R. pp. ___; p. 135 ln. 2-5, p. 135 ln. 12 through p. 136 ln. 16, p. 147 ln. 16 through p. 176 ln. 24; Pl. Exh. 12.)

The jury returned a verdict for FV-I on the breach of contract counterclaim, and the Dolans moved for an order granting them a new trial as to the claims subject of the jury trial (the Dolans' counterclaims for breach of contract and violation of the). (R. pp. ___; jury verdict form; motion for new trial and supporting memorandum.)

The Dolans moved for reconsideration of the order denying their motion for a new trial. (R. pp. ___; order denying motion for new trial; motion to reconsider.) To their motion to reconsider, the Dolans attached a circuit court order by the Honorable Clifton B. Newman from another case, contrasting Judge Newman's analysis of materially similar evidentiary issues in that case with the trial court's rulings in this one. (R. pp. ___; motion to reconsider and attached CACH v. Moran order.) The trial court denied that motion, and this appeal followed. (R. pp. ___; order denying motion to reconsider.)

STATEMENT OF FACTS

The Dolans' sole purpose in calling Loretta Poch as a witness in their case in chief was to expose that she had no knowledge of the subject loan other than the content of documents she had read and that she could not provide sufficient testimony to lay a foundation for the admission of documents offered by FV-I under the business records exception to the hearsay rule. Her testimony demonstrated that plainly. Despite that, the trial court permitted her to testify to the content of

documents and allowed the admission of Saxon's loan history document when it was plainly hearsay. The trial court allowed FV-I to use this inadmissible evidence as virtually its entire defense to the Dolans' case.

STANDARD OF REVIEW

A trial court's decision to admit or exclude evidence will not be disturbed on appeal unless that ruling was an abuse of discretion. Conner v. City of Forest Acres, 363 S.C. 460, 611 S.E.2d 905, 908 (2005). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support. To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, *i.e.*, there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence." Id. (internal citations omitted).

"On appeal from a directed verdict, a court must view the evidence and all its reasonable inferences in the light most favorable to the nonmoving party. If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should be denied." Shelton v. Oscar Mayer Foods Corp., 319 S.C. 81, 459 S.E.2d 851, 855 (Ct. App. 1995), *aff'd* 325 S.C. 248, 481 S.E.2d 706 (1997). "The trial court must eliminate from its consideration all evidence contrary to or in conflict with the evidence favorable to the nonmoving party and give to the nonmoving party every favorable inference that the facts reasonably suggest." Small v. Pioneer Machinery, Inc., 316 S.C. 479, 482, 450 S.E.2d 609, 611 (Ct. App. 1994).

> A motion for directed verdict goes to the entire case and may be granted only when the evidence raised no issue

> for the jury as to liability. When the evidence yields only one inference, a directed verdict in favor of the moving party is proper. The trial court must deny the motion when either the evidence yields more than one inference or its inference is in doubt.
>
> When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. The issue must be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror. The appellate court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor. A directed verdict is warranted when the case presents only questions of law and should be allowed only if the evidence would not be legally sufficient to sustain a verdict for the opposite party.
>
> If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury.

Estate of Haley ex rel. Haley v. Brown, 370 S.C. 240, 252-523, 634 S.E.2d 62, 68-69 (Ct. App. 2006) (internal citations omitted).

ARGUMENT

The only evidence FV-I offered at trial to back up its contention that the Dolan's lump sum payment did not bring the loan current was inadmissible evidence. Without Ms. Poch's inadmissible testimony and without the admission of Plaintiff's Exhibit 12, the Saxon loan history document, nothing would have been before the jury that would indicate that FV-I, through its servicer, had been correct to claim that the lump sum payment was not sufficient to bring the loan current.

I. The court's admission of a hearsay document – the linchpin of FV-I's defense – warrants a new trial and requires reversal.

"A business record without evidence about the manner in which it is prepared or the source of its information does not meet the requirements in either section 19-5-510 or Rule 803(6), SCRE." State v. Rice, 375 S.C. 302, 331, 652 S.E.2d 409, 424 (Ct. App. 2007). This court has noted the "mandate" that "[b]usiness record entries must have been made at or near the time of the act to which they relate[.] Id. at 332. In the instant case, the trial court ignored this mandate and altogether swept aside necessary elements of the business records exception to the hearsay rule.

Over objection by the Dolans, the trial court admitted FV-I's Exhibit 12, a document that was generated by Saxon Mortgage Services, the preceding servicer of the subject loan. (R. pp. ___; trial transcript p. 162 ln. 10 through p. 164 ln. 22; Pl. Exh. 12.) No testimony about how this record was prepared or how any of Saxon's records were prepared was ever adduced at trial. (R. pp. ___; trial transcript p. 147 ln. 10 through p. 176 ln. 17.) FV-I claimed that this document meets the elements of the business records exception to the hearsay rule. (R. pp. ___; trial transcript p. 162 ln. 18-24.) The trial court ruled that based on Loretta Poch, the Plaintiff's sole witness, being the custodian of records for this loan at Specialized Loan Servicing (the present servicer of the subject loan), the document met the business records exception and was admissible. (R. pp. ___; trial transcript p. 158 ln. 16-20, p. 163 ln. 1-9, p. 164 ln. 20-22.) (The trial court also seemed to focus on the records being electronic in determining that they met the requirements of Rule 803(6), SCRE. (R. pp. ___; trial transcript p. 158 ln. 24 through p. 159 ln. 2.)) This was despite Ms. Poch having testified that she had never worked at BB&T (the first servicer of the

loan) or Saxon, despite her having testified that she had not observed how either of those companies created or maintained records, and despite no testimony at all being offered as to when, by whom, or how this record or any entry in it was made. (R. pp. ___; trial transcript p. 133 ln. 8-12, p. 134 ln. 16 through p. 135 ln. 1, p. 147 ln. 10 through p. 176 ln. 17.) This was prejudicial error. This document was simply inadmissible hearsay. It was all that was offered to attempt to show that the purported escrow advances FV-I claimed as preventing the loan from being brought current with the $65,520.00 payment had any particular transactions to back up those figures and the only document offered in an attempt to show that the status of the loan was what FV-I claimed it was. (R. pp. ___; trial transcript p. 166 ln. 18 through p. 171 ln. 1; Pl. Exh. 12.) Especially in light of the fact that the substantive testimony FV-I elicited from Ms. Poch about the subject account was all objectionable and should not have been admitted either, as discussed below, admission of this document prejudiced the Dolans.

At the root of the trial court's error in this regard is a misconception of what is known as the "business records exception" to the rule against the admission of hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Hearsay is generally inadmissible. Rule 802, SCRE. One exception to the hearsay rule is usually called the "business records exception," though merely whether the document involved is a record of a business is not what must be shown to satisfy the exception. Rule 803(6), SCRE; S.C. Code Ann. § 19-5-510. The elements of this hearsay exception are as follows:

> [A] memorandum, reports, records, or data compilation, in any form, of acts, events, conditions, or diagnoses can be admissible if they are (1) made at or near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) made and kept in the course of a regularly-conducted business activity; (4) identified by the custodian or a qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court.

High v. High, 389 S.C. 226, 239, 697 S.E.2d 690, 696-97 (Ct. App. 2010) (citing Rule 803(6), SCRE).

Rule 803(6), SCRE, and S.C. Code Ann. § 19-5-510 have the same substantive requirements, as the language of the latter statute notes:

> A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

To authenticate a document as falling under the "business records" exception, a witness qualified to do so must provide sufficient testimony to establish *each* element of the exception. Connelly v. Wometco Enters., Inc., 314 S.C. 188, 192, 442 S.E.2d 204, 206 (Ct. App. 1994). Otherwise, the document is simply inadmissible hearsay. Id. The rule refers to a custodian of records as an example of a person who often would be able to provide the information necessary to lay a foundation of all the elements of this hearsay exception; the rule is *not* that all the elements of the exception must be met unless the document is offered through a records custodian, in which case it becomes automatically admissible. The rule is not that its elements

must be satisfied unless the records are electronic, in which case they become automatically admissible. It seems the trial court here believed that one or both of these erroneous premises was the law. Its ruling ignored that evidence tending to establish necessary elements of this hearsay exception was glaringly absent from the record adduced at trial.

As this court has observed, when a proponent of a purported business record offers it "without evidence about the manner in which it is prepared or the source of its information" that "does not meet the requirements in either section 19-5-510 or Rule 803(6), SCRE." Rice, 375 S.C. at 331.

It is, of course, necessary that the witness have knowledge of how the record was prepared, or at least that some evidence show how the record was prepared. State v. Sarvis, 317 S.C. 102, 107, 450 S.E.2d 606, 609 (Ct. App. 1994). This evidence must be sufficient to establish that the document was "prepared by someone with or from information transmitted by a person with knowledge[.]" Rule 803(6)(2), SCRE. No evidence of who prepared Plaintiff's Exhibit 12 or any entry in it was adduced in this case.

Further, "[b]usiness record entries must have been made at or near the time of the act to which they relate; the purpose of this mandate is to aid in establishing that the record was honestly and fairly kept." Rice, 375 S.C. at 332. Accordingly, testimony must be adduced from the witness as to when the record entries were made. Id. No such evidence was adduced here.

The Supreme Court of Missouri has held that "a document that is prepared by one business cannot qualify for the business records exception *merely* based on

another business's records custodian testifying that it appears in the files of the business that did not create the record." CACH, LLC v. Askew, 358 S.W.3d 58, 63 (Mo. 2012) (emphasis added). This is in accord with the law of other states as well, at least of Wisconsin, Texas, Pennsylvania, and New York (and probably others). Palisades Collection, LLC v. Kalal, 781 N.W.2d 503, 510 (Wis. Ct. App. 2010) (to authenticate under business records exception, witness "must have personal knowledge of how the account statements were prepared and that they were prepared in the ordinary course of [the original creditor's] business"); Riddle v. Unifund CCR Partners, 298 S.W.3d 780, 782-83 (Tex. App. 2009) ("the witness must have personal knowledge of the manner in which the records were prepared"); Martinez v. Midland Credit Mgmt., Inc., 250 S.E.3d 481, 485 (Tex. App. 2008) (purported business records inadmissible where witness "does not provide any information that would indicate that he (or she) is qualified to testify as to the record-keeping practices of the 'predecessor'"); Standard Textile Co. v. Nat'l. Equip. Rental, Ltd., 437 N.Y.S.2d 398, 398 (N.Y. App. Div. 1981) (plaintiff's employee "was not a qualified witness to testify as to the record keeping of another entity" absent personal knowledge of the document's creation"); Commonwealth Financial Systems v. Smith, 2001 PA Super 30, *6 (Pa. Super Ct. 2011) (witness "could not say for certain whether [industry] requirements had actually been followed in the preparation and maintenance of those records because, simply put, he was never in a position to know").

It appears that South Carolina law is consistent with the law of these sister states on this point. Our Supreme Court has held that a sheriff's department's receipt of a record from another office "would not qualify the detective [witness who received the

document] to testify to the identity and mode of preparation of the report or whether it was made in the regular course of business at or near the time of the accident" subject of the report. State v. McFarlane, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983).

While FV-I argued that Twelfth RMA Partners, L.P. v. Nat. Safe Corp., 335 S.C. 635, 518 S.E.2d 44 (Ct. App. 1999), supports the admission of the Saxon loan history document (R. p. ___; trial transcript p. 162 ln. 18-23), Twelfth RMA Partners is readily distinguishable from the instant case. In Twelfth RMA Partners, the basis of the relevant argument on appeal was that the witness had not been the records custodian at or near the time the records were made (which is not a requirement of Rule 803(6), SCRE, or S.C. Code Ann. § 19-5-510), and the trial record apparently showed that the records were created by "a person 'with knowledge' at the time the records were created[.]" 335 S.C. at 642. In the instant case, no showing about who made the entries shown in the document was made at all.

Here, the court simply substituted a finding that Ms. Poch was the custodian of records and a finding that the records were electronic for the required findings that each element of the business records exception was satisfied. (R. pp. ___; trial transcript p. 158 ln. 16 through p. 159 ln. 2, p. 163 ln. 1-9, p. 164 ln. 20-22.) Being a records custodian simply puts a person in a position to testify, if she can, about how a record was prepared. Here, Ms. Poch's own testimony showed that she was incapable of providing any testimony about the first three elements of the business records exception, nor was any testimony having any tendency to speak toward satisfaction of any of those three elements adduced. (R. pp. ___; trial transcript p. 133 ln. 8-12, p. 134 ln. 16 through p. 135 ln. 1, p. 147 ln. 10 through p. 176 ln. 17.) (Also, no

evidence was adduced that Ms. Poch was a custodian of any records – not that it matters.)

Erroneous evidentiary rulings based on conflating requirements of evidence law constitute abuses of discretion. See State v. Page, 406 S.C. 272, 287, 290, 750 S.E.2d 623, 631, 632 (Ct. App. 2013). The trial court either conflated the fourth requirement of the business records exception with the preceding three requirements or ignored those three requirements. (R. pp. ___; trial transcript p. 158 ln. 16 through p. 159 ln. 2, p. 163 ln. 1-9, p. 164 ln. 20-22.) The jury received an inadmissible and objected-to hearsay document for use in its deliberations. (R. pp. ___; Pl. Exh. 12.) It was the only document offered by FV-I to attempt to show that there was anything to back up its contention that the $65,520.00 payment had not brought the loan current or been treated as having done so. (R. pp. ___; trial transcript p. 166 ln. 18 through p. 171 ln. 1; Pl. Exh. 12.) This was prejudicial error that warrants a new trial.

II. The trial court only compounded its error by letting Ms. Poch testify as to the content of inadmissible documents, most of which were not even offered into evidence by FV-I, much less admitted.

Ordinarily, a witness may not testify as to the contents of a writing. Rule 1004, SCRE; W.R. Grace & Co. v. La Munion, 245 S.C. 1, 138 S.E.2d 337 (1964); Moore v. Postal Telegraph-Cable Co., 202 S.C. 225, 24 S.E.2d 361 (1943); Mayfield v. So. R. Co., 85 S.C. 165, 67 S.E. 132 (1910); Rose v. Winnsboro Nat'l. Bank, 41 S.C. 191, 18 S.E. 487 (1894). This rule is, for some reason, often called the "best evidence" rule, perhaps on the rationale that the writing is the best evidence of its contents.

Ms. Poch testified that her only knowledge of the subject loan came from reading written records of the loan's servicers. (R. pp. ___; trial transcript p. 135 ln. 2-5, p. 135 ln. 12 through p. 136 ln. 16.) All she knows is what the writings say. (R. pp. ___; trial transcript p. 135 ln. 2-5, p. 135 ln. 12 through p. 136 ln. 16.) When the Dolans objected to her testimony about the substantive status of and history of the loan, the trial court overruled those objections and allowed her to give testimony that her own words establish violated the best evidence rule. (R. pp. ___; trial transcript p. 153 ln. 20 through p. 154 ln. 19, p. 158 ln. 3 through p. 162 ln. 9.) This was the only testimony offered to contradict Mr. Dolan's testimony and the only testimony offered for the purpose of convincing the jury that FV-I was right about the status of the account. (R. pp. ___; p. 135 ln. 2-5, p. 135 ln. 12 through p. 136 ln. 16, p. 147 ln. 16 through p. 176 ln. 24.) To admit this testimony was error, prejudiced the Dolans, and warrants a new trial.

A *witness* is exactly that: someone who, through what he or she has witnessed (i.e., has observed firsthand), has personal knowledge of a matter at issue in a case. Rule 602, SCRE; M. B. A. F. B. Fed. Credit Union v. Cumis Ins. Soc., Inc., 681 F.2d 930 (4th Cir. 1982); State v. Needs, 508 S.E.2d 857 (1998); State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996). Merely because a person occupies a certain position or status within a company is not sufficient to make that person a competent witness. Englebert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 433 S.E.2d 871 (Ct. App. 1993). The trial court disagreed, ruling Ms. Poch was competent to offer testimony of the content of records because it found she was the custodian of the records. (R.

pp. ___; trial transcript p. 153 ln. 20 through p. 154 ln. 19, p. 158 ln. 3 through p. 162 ln. 9.)

As Ms. Poch testified, her only knowledge of the loan subject of this case comes from reading documents; everything she had to say about this loan was, necessarily, the content of a document. (R. pp. ___; trial transcript p. 135 ln. 2-5, p. 135 ln. 12 through p. 136 ln. 16.) The following excerpts from Ms. Poch's testimony illustrate the error in allowing her to testify from apparent memory of what inadmissible and unadmitted documents stated:

> Q: And how fair would it be to say that anything you know about what Saxon did concerning this loan or any loan just comes from looking at documents. Pretty fair?
>
> A: That is fair, yes.
>
> . . .
>
> Q: . . . So when did Specialized Loan Servicing become the servicer for this loan?
>
> A: January 24, 2012.
>
> Q: And so any information that Specialized Loan Servicing has about this loan from before that comes from some prior servicer's records, right?
>
> A: That's right.
>
> . . .
>
> Q: And do you have personal knowledge of this loan based on your review of those records?
>
> A: Yes, I do.
>
> . . .
>
> Q: Show you what's been marked as Exhibit 4. According to the complaint – which is a copy of the

2009 complaint – according to the complaint that was filed in paragraph 21, it states that the loan was due for December 2008. Do you see that?

A: Yes.

Q: Is that what the records show that you reviewed?

A: Yes.

. . .

Q: Did Saxon apply the $65,250 pursuant to the terms of the loan documents?

A: Yes, they did.

. . .

Q: Was the $65,250 enough to bring the loan current?

A: No, it wasn't. The funds were received in September of 2011 and it was sufficient to make payment through February of 2011. So the next payment was due March 2011.

. . .

Q: The reinstatement quote that been discussed dated October 12, 2011 that was attached to that e-mail states what the reinstatement amount would have been, correct?

A: Yes, it does.

Q: That's after the $65,250 was applied to the loan; is that correct?

A: That's correct.

. . .

Q: . . . If Saxon's records are wrong, then that means what you know about this case because it's based on those records is also wrong, correct?

A: That would be correct.

(R. pp. ___; trial transcript p. 135 ln. 2-5, p. 135 ln. 9-15, p. 149 ln. 7-9, p. 153 ln. 20 through p. 154 ln. 2, p. 166 ln. 18-20, p. 168 ln. 13-16, p. 170 ln. 20 through p. 171 ln. 1, p. 175 ln. 21-25.)

Ms. Poch gave no substantive testimony about the loan involved in this case that actually was admissible. Hers was the only testimony placed before the jury that had a tendency to indicate that FV-I was right about its factual contentions in this case. There is a reasonable probability the jury's verdict was influenced by this wrongly admitted evidence. For the court to allow this testimony was reversible error.

III. The trial court erred in granting FV-I's motion for a directed verdict as to the UTPA claim.

The trial court granted FV-I's motion for a directed verdict as to the Dolan's UTPA claim, apparently on the ground that there was not even a scintilla of evidence tending to show an impact on the public interest. (R. pp. ___; trial transcript p. 139 ln. 17 through p. 142 ln. 17.) This was error.

An action for violation of the UTPA lies where there is a violation of the UTPA (i.e., an unfair or deceptive act in trade or commerce that impacts the public interest) that proximately causes damages to the party asserting the claim. See, e.g., Charleston Lumber Co., Inc. v. Miller Housing Corp., 318 S.C. 417, 458 S.E.2d 431 (Ct. App. 1995). To recover under the UTPA, the party must show: (1) the opposing party engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the party suffered damages as a result. Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006).

The South Carolina Supreme Court has stated that demonstrating the potential for an unfair trade practice's repetition is a demonstration of the requisite "adverse effect on the public interest[,]" though the Court has never held that showing potential for repetition is the *only* way to prove impact on the public interest. Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21 (1998). The Court has "specifically declined" to hold that such potential for repetition must be demonstrated by any particular means and has stated that "each case must be evaluated on its own merits." Id.

Never has a South Carolina appellate court held that repetition or potential for repetition is a necessary element of a UTPA cause of action; rather, our courts have held that showing potential for repetition is *one way* in which a party can satisfy the public interest requirement. Id. As the trial court's ruling granting FV-I's directed verdict motion on this claim appears to have been based on the idea that what was at issue was a unique situation that was unlikely to be repeated, this is particularly important. (R. pp. ___; trial transcript p. 141 ln. 20-23.) The court's ruling was error warranting a new trial because, among other things, 1) the public has an interest in mortgage servicers not deceiving borrowers about the status of their loans (think of how many Americans have mortgage loans) and 2) it was not necessary to show that the specific situation at issue here would be actually repeated. Potential for repetition in misrepresenting the status of a loan to a borrower suffices as proof of potential for repetition; however, it was only necessary for the Dolans to adduce evidence of impact on the public interest, not potential for repetition, in order to survive FV-I's directed verdict motion. (R. pp. ___; trial transcript p. 140 ln. 4-20.)

FV-I argued that Robertson v. First Union National Bank, 350 S.C. 339, 565 S.E.2d 309 (Ct. App. 2002), stands for the proposition that a wrong by a mortgage lender to a mortgage borrower is merely a private wrong, apparently arguing that *as a matter of law*. (R. pp. ___; trial transcript p. 139 ln. 20 through p. 140 ln. 1, p. 141 ln. 20 through p. 142 ln. 8.) Robertson does not stand for that proposition, however. Robertson contains no language to this effect. In Robertson, this court upheld a grant of summary judgment against a bank on a UTPA claim because the record contained no evidence of an unfair or deceptive act in the conduct of trade or commerce by the bank. Id. at 351 & n. 1. Robertson simply does not stand for the proposition of law that a wrong by a mortgage lender to a mortgage borrower cannot involve the public interest.

In a typical case where a contract is breached, there will be no effect on the public interest. The cases discussing a lack of liability under the UTPA for a mere breach of contract, even an intentional one, focus on the isolated nature of a breach of contract under typical circumstances, which makes potential for repetition or other impact on the public interest all but impossible. See Perry v. Green, 313 S.C. 250, 437 S.E.2d 150 (Ct. App. 1993); Columbia East Assocs. V. Bi-Lo, Inc., 299 S.C. 515, 522, 386 S.E.2d 259, 263 (Ct. App. 1989); S.C. Nat. Bank v. Silks, 295 S.C. 107, 111, 367 S.E.2d 421, 423 (Ct. App. 1988); Key Co., Inc. v. Fameco Distributors, Inc., 292 S.C. 524, 357 S.E.2d 476 (Ct. App. 1987). That does not, however, mean that the presence of a contractual relationship between the parties and a breach of that contract by one of them will rule out liability of the breaching party under the UTPA. In a case against a group of landlords, the landlords tried to make that very argument,

and this court rejected it. Burbach v. Investors Mgmt. Corp. Intl., 326 S.C. 492, 496-97, 484 S.E.2d 119, 121 (Ct. App. 1997).

When the "mere breach of contract"/"intentional breach of contract" cases discuss the principle at issue, they state that the UTPA "is not available to redress a private wrong *where the public interest is unaffected*" and that "a deliberate or intentional breach of a valid contract, *without more*, does not constitute a violation of the Unfair Trade Practices Act." Columbia East Assocs., 299 S.C. at 522 (emphasis added). To prove the "more[,]" to prove that the public interest is affected, all one needs to show is potential – just *potential* – for repetition. Crary, 329 S.C. at 388.

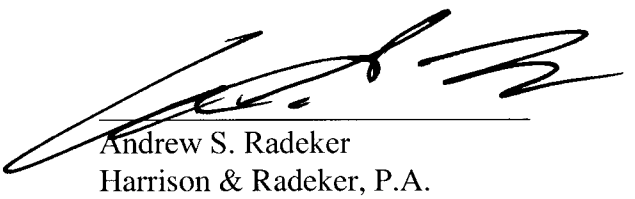
The Dolans showed that. FV-I could just as easily misrepresent to another borrower the amount to bring a loan current, and the public has an interest in mortgage servicers not deceiving borrowers about the status of their loans.

The trial court's decision to grant a directed verdict on the UTPA cause of action was reversible error. A new trial on this claim is warranted.

CONCLUSION

The trial court made prejudicial and erroneous evidentiary rulings, essentially permitting FV-I to defend against the Dolans' case almost entirely on the basis of inadmissible evidence. Further, the court erred in granting FV-I's directed verdict on the Dolans' UTPA claim. This court should reverse and remand this case for a new trial.

Respectfully submitted,



Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellants

March 16, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Judge

Appellate Case No. 2014-001384
Common Pleas Case No. 2012-CP-32-2816

FV-I, Inc. in trust for Morgan Stanley Mortgage Capital Holdings LLC,...Respondent,

v.

Bryon J. Dolan; Lisa S. Dolan; First Citizens Bank and Trust Company, Inc.; Wells Fargo Bank, N.A.; Branch Banking and Trust Company, Defendants,

Of whom Bryon J. Dolan and Lisa S. Dolan are the.....Appellants.

PROOF OF SERVICE

I certify that I served the foregoing initial brief of appellant by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

Charles S. Gwynne, Jr., Esq.
Jason D. Wyman, Esq.
Rogers Townsend & Thomas, PC
P.O. Box 100200
Columbia, SC 29202

March 16, 2015

Andrew S. Radeker
Harrison & Radeker, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellants

LAW OFFICES
HARRISON & RADEKER, P.A.
923 CALHOUN STREET
COLUMBIA, SOUTH CAROLINA 29201

James C. Harrison, Jr.*
Andrew S. Radeker
Taylor M. Smith IV

* Mediator/Arbitrator

P.O. Box 50143
Columbia, SC 29250

(803) 779-2211
(803) 779-6700 (FAX)

March 16, 2015

VIA HAND DELIVERY

The Hon. Jenny Abbott Kitchings
Clerk of Court, Court of Appeals of South Carolina
Edgar Brown Building
1205 Pendleton Street
Columbia, South Carolina 29201

Re: FV-I, Inc., etc. v. Bryon J. Dolan, et al.
Common Pleas Case No.: 2012-CP-32-2816
Appellate Case No.: 2014-0001384

Dear Ms. Kitchings:

Enclosed herewith for filing in the above-referenced case are an original and one copy of Appellant's Initial Appellant's Brief and Designation of Matter to be Included in Record on Appeal, with attached proof of service thereof.

Kindly file these documents and return a file-stamped copy to this office in the stamped and addressed envelope enclosed. Of course, if you or your staff have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am,

Very truly yours,
HARRISON & RADEKER, P.A.

Andrew S. Radeker

ASR/

Enclosures

cc: Charles S. Gwynne, Jr., Esq.
Jason D. Wyman, Esq.