

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

RECEIVED

JUL 01 2015

SC Court of Appeals

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.

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STATEMENT OF ISSUES

- I. Are the orders at issue immediately appealable?
- II. Has the Respondent misread and incorrectly relied upon Midfirst Bank, SSB v. C.W. Haynes & Co., Inc., 893 F. Supp. 1304 (D.S.C. 1994), which does not stand for the proposition that Respondent claims it does?
- III. Is the Respondent's best-evidence-rule argument in reliance on dicta from W.R. Grace & Co. v. LaMunion, 245 S.C.1, 138 S.E.2d 337 (1964), correct?
- IV. Has the Respondent conceded that the admission of the evidence at issue prejudiced the Appellants?
- V. Does the Respondent incorrectly conflate the Unfair Trade Practices Act's requirement of proving an impact on the public interest with the notion that the only way that can be done is through demonstration of potential for repetition?

ARGUMENT

The Respondent (hereinafter “FV-I”) makes numerous arguments in its brief that simply misstate the law. Misstatement seems to be part of FV-I’s strategy. In this reply brief, the Dolans address some of FV-I’s more important misconceptions, rather than every misstatement.

I. This is a proper appeal, and FV-I has already lost on that argument.

a. This appeal, an appeal of orders refusing a new trial after the trial of the Dolans’ counterclaims to final judgment, is proper.

FV-I takes the position that because this case was bifurcated and the trial on some claims has not already occurred, the order denying the Dolans’ motion for a new trial as to the claims that have been tried to a directed verdict and a jury verdict in this case is not appealable. FV-I takes the position that the directed verdict and jury verdict were not final judgments in this case, seeming to argue that only after the equitable claims have been tried would any appeal lie in this case.

FV-I’s argument conflicts with controlling precedent. It is settled law in South Carolina that “[a]n order that grants or refuses a new trial affects a substantial right and is immediately appealable” pursuant to S.C. Code Ann. § 14-3-330(2)(b). Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 97 (2d ed. 2002) (citing S.C. Code Ann. § 14-3-330(2)(b); S.C. State Hwy. Dept. v. Clarkson, 267 S.C. 121, 126-27, 226 S.E.2d 696, 697 (1976)). The statute that speaks generally to the appealability of orders, S.C. Code Ann. § 14-3-330, specifically lists an order that “grants or refuses a new trial” as appealable. S.C. Code Ann. § 14-3-330(2)(b). The order denying the Dolans’ motion for a new trial that is

subject of this appeal is immediately appealable because it is an order that refuses a new trial. Id.

Rule 54(a), SCRPC, provides that the definition of “judgment” under the Rules of Civil Procedure “includes any decree or order which dismiss the action as to any party or finally determines the rights of any party.” The directed verdict at the jury trial as to one of the Dolans’ causes of action tried in that trial and the jury verdict as to the other cause of action tried in that trial are final judgments, for appealability purposes, as they finally determined the rights of the parties with respect to those claims. Rule 54(a), SCRPC. The directed verdict ruling and jury verdict finally determined the rights of the parties as to the breach of contract and unfair trade practices claims.

The Supreme Court of South Carolina has held that an order that ends one of several claims in a case but leaves the other claims pending *is* an immediately appealable order, ruling against the argument that an aggrieved party must wait until all the causes of action have been finally determined in order to appeal. Link v. Sch. Dist. of Pickens County, 302 S.C. 1, 4 fn. 2, 393 S.E.2d 176, 178 fn. 2 (1990) (overruling Plaza Dev. Services v. Joe Harden Builder, Inc., 296 S.C. 115, 370 S.E.2d 893 (Ct. App. 1988), “to the extent that it holds that one may not appeal the granting of a 12(b)(6) motion under § 14-3-330 if the ruling affects some but not all of a party’s causes of action”); Lebovitz v. Mudd, 289 S.C. 476, 479, 347 S.E.2d 94, 96 (1986) (“order granting a Rule 12(b) motion as to one of multiple claims is directly appealable under § 14-3-330(2) because it affects a substantial right and strikes out part of a pleading”; rejecting argument that circuit court had to make Rule 54(b)

certification to make an order appealable where it is already appealable under S.C. Code Ann. § 14-3-330). FV-I's argument that the Dolans' appeal is improper because there has been no final judgment in this case is against this precedent and fails.

The denial of the Dolans' motion for a new trial under Rule 59, SCRCP, with respect to the claims tried in the jury trial is, accordingly, immediately appealable under S.C. Code Ann. § 14-3-330(1), which provides for appeals from orders "involving the merits[,] as well as under S.C. Code Ann. § 14-3-330(2)(b). "An order 'involves the merits,' as that term is used in Section 14-3-330(1) and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense." Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 7, 630 S.E.2d 464, 467 (2006). The directed verdict and jury verdict here finally determined the causes of action tried in the jury trial, and the Dolans' new trial motion was a post-trial motion directed at those final judgments.

If a case is bifurcated into a jury trial on at-law claims and a bench trial on equitable claims, that does not mean that the result of the jury trial is not a final judgment. See Rule 54(a), SCRCP. The jury trial is no less a trial simply because it occurs before the bench trial. The claims that were tried in the jury trial were tried to final judgment in that trial. The verdict in the jury trial is the final judgment as to the at-law claims subject of that trial; otherwise, it would not be true that in a bifurcated case "the jury's determination of common factual issues shall be *binding* upon the court" in the following bench trial. Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 330, 755 S.E.2d 437, 442 (2014) (emphasis added). The fact that the equitable

claims remain pending does not affect the finality of the at-law claims' verdict, nor does it affect appealability with regard to post-trial motions directed at that verdict. S.C. Code Ann. § 14-3-330(1)&(2)(b); Rule 54(a), SCRPC; Capital U-Drive-It, 369 S.C. at 7; Link, 302 S.C. at 4 fn. 2; Lebovitz, 289 S.C. at 479.

b. The law of the case doctrine would prohibit FV-I from prevailing on this argument in any event.

“[A] party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.” Bakala v. Bakala, 352 S.C. 612, 632, 576 S.E.2d 156, 166 (2003). FV-I moved before the master-in-equity for the master to proceed with the trial of the equitable claims in this case even while this appeal is pending. (R. p. 12.) The master ruled against FV-I, including in his order a specific ruling that the very contention that FV-I makes in this argument – that the orders subject of this instant appeal are not immediately appealable – is incorrect. (R. pp. 13-16.) FV-I appealed that order, but it did not raise the appealability issue in its appeal. (R. pp. 445-57.) This court dismissed FV-I's appeal. (R. p. 27.) FV-I did not petition for rehearing of that dismissal or take any further action about it.

It is FV-I that chose to raise the issue of appealability to the master to begin with. FV-I invited a ruling from the master-in-equity on this issue and received one – just not the one it wanted. FV-I did nothing further about having received an adverse ruling on this point, even when it appealed the order. The law of the case doctrine would bind FV-I on this point even if FV-I were substantively correct in its argument (which it is not).

II. FV-I has misread and incorrectly relied upon Midfirst Bank, SSB v. C.W. Haynes & Co., Inc., 893 F. Supp. 1304 (D.S.C. 1994).

Midfirst Bank, SSB v. C.W. Haynes & Co., Inc., 893 F. Supp. 1304 (D.S.C. 1994), does not stand for the proposition that no foundation for the satisfaction of the elements of the business records exception needs to be laid where the documents in question have been received by one loan servicer from another. Even if it did, however, that would not matter to the outcome of this appeal because Midfirst Bank is a federal district court case that is not precedent and does not bind this court. Further, if Midfirst Bank did stand for the proposition that FV-I claims, it would be contrary to South Carolina law.

a. Midfirst Bank is not precedent, does not bind this court, and, if it stood for what FV-I claims it does, would directly conflict with South Carolina law.

Midfirst Bank is a federal district court case. It is not precedent in South Carolina state courts and has no binding effect upon this court. Blyth v. Marcus, 335 S.C. 363, 368 n. 3, 517 S.E.2d 433 (1999) (South Carolina federal district court decision “[o]f course . . . is not binding on this Court”). If it did stand for the proposition that FV-I claims – that no foundation for the satisfaction of the elements of the business records exception needs to be laid where the documents in question have been received by one loan servicer from another – that would be contrary to what is precedent in our state’s law. Under South Carolina law, “[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). Under our law, there is a “mandate” that, in order for them to be admissible under

Rule 803(6), SCRE, “[b]usiness record entries must have been made at or near the time of the act to which they relate[.]” Id. at 332. To authenticate a document as falling under the “business records” exception to the hearsay rule, 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).

The Supreme Court of South Carolina held evidence was improperly admitted under the business records exception in State v. McFarlane, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983), stating 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. It is the absence of evidence about the way the report was prepared and about how it was maintained *by the entity that made the report* that drove the Supreme Court’s holding on this ground in the McFarlane decision. See id.

Our courts require evidence to satisfy each element of the business records exception in every case in which a document is offered for admission under that exception, period. The alternative, argued by FV-I, would eviscerate the Rule, because, under the interpretation FV-I offers, if Servicer 1 ships its records to Servicer 2, the records are now admissible under Rule 803(6) *even if they do not meet the elements of this hearsay exception*. Frankly, that is absurd, is against the plain language of the Rule, and contravenes the reasoning behind the Rule, which is that if its requirements are met, the records are more trustworthy than if they are not.

- b. **Midfirst Bank does not stand for the proposition that there is some applicable exception to laying a proper foundation for the admission of documents under the business records exception to the hearsay rule.**

Midfirst Bank, however, does not stand for the proposition that no foundation needed to have been laid to admit the Saxon loan history document. In Midfirst Bank, the district court ruled on cross-motions for summary judgment. The district court's opinion states that a deposition in the record, that of a Mr. Celifarco, shows that, as to the records at issue there, that the elements of the business records exception were satisfied. Midfirst Bank, 893 F. Supp. at 1310. This included deposition testimony "that the record was made at or near the time of the transaction [and] that the record was transmitted by a person with knowledge[.]" Id. In Midfirst Bank, the authenticating witness *did* know how the records were made and gave testimony satisfying the elements of the business records exception. Id. Notably, evidence of those things was not offered in the instant case.

The Dolans are not saying that Rule 803(6) requires records to be authenticated by a witness who works for the company that created that record, nor are they saying that the Rule "require[s] the testifying witness to have personally participated in the creation of the document or to know who actually recorded the information." Id. at 1311. Just as the Midfirst Bank opinion states, though, "the business records exception requires the witness to be familiar with the record keeping system" of the company that made the record. Id. In the instant case, no evidence of that was offered.

III. FV-I's best-evidence-rule argument in reliance on dicta from W.R. Grace & Co. v. LaMunion, 245 S.C. 1, 138 S.E.2d 337 (1964), is misplaced.

In W.R. Grace & Co. v. LaMunion, 245 S.C. 1, 7, 138 S.E.2d 337, 340 (1964), the plaintiff objected to expert testimony offered by the defendant as to the amount of a farmer's crop yield, "upon the ground that it was speculative and conjectural, and that the best evidence would be to call [the farmer] as a witness to what the actual production was." In declining to reverse the trial court for overruling the objection, the Court, latching on to the terminology used in the objection, stated that

[t]he exclusionary rule, known as the "best evidence rule," in the law of evidence applies only to oral testimony tending to vary the terms of a written instrument, and lends no strength to the contention that the expert estimates of the crop yield were incompetent.

Id. at 8.

It seems that the Court was confusing the best evidence rule with a similarly named cousin, the parol evidence rule. The parol evidence rule is a poorly named rule of law, since it is not a rule of evidence at all but, rather, one of the substantive law of contract construction. "The parol evidence rule has been held inapplicable to tort causes of action (including negligent misrepresentation) since the rule is one of *substantive contract law*." Redwend Ltd. Partnership v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003) (emphasis added). The rule is applicable in cases where a party argues that the terms of a contract are *different from* what is contained in an integrated writing. E.g., Crafton v. Brown, 346 S.C. 347, 550 S.E.2d 904 (Ct. App. 2001) ("Where the terms of [a] written guaranty are clear and complete, extrinsic

evidence of agreements or understandings contemporaneous with or prior to its execution cannot be used to contradict, explain, or vary its terms, in the absence of fraud, accident, or mistake in its procurement”).

In any event, the reference to the best evidence rule in W. R. Grace is dicta. Neither the best evidence rule nor the parol evidence rule were at issue there. Evidently, the plaintiff’s lawyer in that case simply used the words “best evidence,” referring to the quality, i.e. weight, of the evidence, and this led to the term’s inclusion in a statement that is actually about a different rule of law.

Whether referred to as the best evidence rule or something else, Rule 1004, SCRE, ordinarily bars a witness from testifying as to the contents of a writing. That is virtually all that FV-I’s only witness testified to in this case.

IV. FV-I has conceded that the admission of the improper evidence prejudiced the Dolans.

FV-I appears not to take any issue with the Dolans’ argument that the admission of the evidence at issue in this appeal prejudiced them, i.e. that “there is a reasonable probability the jury’s verdict was influenced by the wrongly admitted . . . evidence.” Conner v. City of Forest Acres, 363 S.C. 460, 611 S.E.2d 905, 908 (2005) (internal citations omitted). FV-I does not respond in its brief to the Dolan’s argument that the admission of the Saxon loan history document and Ms. Poch’s substantive testimony created a reasonable probability that the jury’s verdict was influenced by this evidence. By failing to address it in its brief, FV-I has conceded this point. First Union Nat. Bank v. FCVS Communications, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996)(where respondent fails to respond to issue in respondent’s brief, court may treat failure to respond as concession that appellant is

correct). Accordingly, if the court determines that this evidence was improperly admitted, FV-I has conceded that the Dolans are entitled to reversal because FV-I has conceded the prejudice.

V. FV-I's argument that the UTPA's element of impact on the public interest can *only* be satisfied by showing potential for repetition is not consistent with South Carolina jurisprudence.

To contend that the *only* way a litigant can satisfy the public interest element of a cause of action for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (hereinafter "UTPA"), is through demonstrating potential for repetition is to say more than this court or our Supreme Court ever has. An element of a UTPA cause of action is an impact on the public interest, not that the acts complained of be capable of repetition. *E.g., Crary v. Djebelli*, 329 S.C. 385, 388, 496 S.E.2d 21 (1998).

To be sure, demonstrating capability of repetition will almost certainly prove an impact on the public interest. To say, though, that impact on the public interest is *only* present if capability of repetition is shown is to put a UTPA cause of action in far smaller a box than the statute, this court, or our Supreme Court has ever done.

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,

A handwritten signature in black ink, appearing to read 'Andrew S. Radeker', written over a horizontal line.

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CERTIFICATE OF COUNSEL

I certify that the foregoing brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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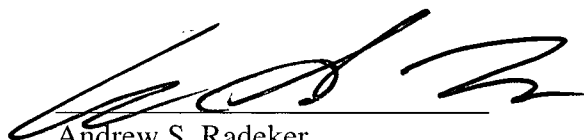
Of whom Bryon J. Dolan and Lisa S. Dolan are the.....Appellants.

PROOF OF SERVICE

I certify that I served the final brief of appellants and final reply brief of
appellants by depositing a copy of each of them on the date shown below in the
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