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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Judge

RECEIVED
JAN 26 2017
SC Court of Appeals

Appellate Case No.: 2014-0001384

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.

PETITION FOR REHEARING OR REHEARING *EN BANC*

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Attorney for Appellants

The Appellants (hereinafter "the Dolans") hereby move and petition, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law, for an order granting rehearing or rehearing *en banc* in this case and submit the memorandum below in support of the same. This court should not have affirmed the decision that was made below in favor of the Respondent (hereinafter "FV-I"). The Dolans incorporate the arguments set forth in their appellants' brief and reply brief in this appeal and further respectfully submit that the court may have overlooked or misapprehended certain points, as the following shows:

I. The foundation for admission of a document under the business records exception must be "shown by the testimony of the custodian or other qualified witness." Respectfully, by saying *the content of the very document at issue* supplied the necessary foundation to show it met the requirements of the exception, this court has erred and permitted something the law does not.

Among the issues in this appeal is whether the trial court erred in admitting a hearsay document, FV-I's Exhibit 12, referred to as the Saxon loan history. (R. pp. 372-85.) While this court's opinion acknowledges that the Saxon loan history "constituted hearsay[,]" it affirmed the trial court's decision to admit the document by finding "the loan history fit squarely within the business records exception[.]" This is despite this court's acknowledgement that Loretta Poch, the sole witness who discussed this document at trial, "conceded she never worked for Saxon and had no personal knowledge of its internal procedures[.]" The opinion also never stated (because it cannot) that Poch's testimony actually described the mode of the document's preparation, actually described whether it was prepared by someone with or from information transmitted by a person with knowledge of the things stated in it, or actually described whether it was made and kept in the course of Saxon's regularly-conducted business activity. The absence of Poch's testimony to these

necessary elements of the hearsay exception found in Rule 803(6), SCRE, and S.C. Code Ann. § 19-5-510 means that this court should have held that the trial court erred in admitting the Saxon loan history and reversed.

Rule 803(6), SCRE, makes plain that the elements of the business record exception must be "*all* as shown by the testimony of the custodian or other qualified witness" (emphasis added), and S.C. Code Ann. § 19-5-510 also provides that a document is admissible under this hearsay exception "if the custodian or other qualified *witness testifies to* its identity and the mode of its preparation" (emphasis added) and that testimony shows the elements of the exception are met. Our case law bears out that a witness qualified to do so must provide sufficient testimony to establish each element of the exception. E.g., Connelly v. Wometco Enters., Inc., 314 S.C. 188, 192, 442 S.E.2d 204, 206 (Ct. App. 1994).

The court's opinion, however, decided "the Saxon loan history was made at or near the time of the events recorded" by looking to something beyond Poch's testimony: the Saxon loan history document itself. (This is a contention FV-I never made at trial or in its brief.) The opinion states:

> Here, the Saxon loan history reflected 143 entries recorded over the nineteen months Saxon serviced the Dolans' mortgage, the principal amount of the mortgage, late fees assessed for missed payments, disbursements for hazard insurance and property taxes, and the $65,250 payment the Dolans allege should have brought their mortgage current. Accordingly, we find the Saxon loan history met the mandate that records be created at or near the time of the event recorded, ensuring the Saxon loan history was honestly and fairly kept.

Respectfully, the Dolans note that the court has fallen victim to a logical fallacy, one known as a tautology or as circular logic. The court has used the fact that

the entries are dated as evidence that the entries were actually made on the dates given, the court has used the fact of the dates given beside the entries as evidence that the things recorded in the entries actually happened on or near the dates given beside the entries, and the court has used the details given in the entries as evidence that those very same details are, in fact, correct. This is what the explicit requirement in Rule 803(6), SCRE, and S.C. Code Ann. § 19-5-510 that the elements of the business records exception have to be established by witness testimony is designed to prevent. It is almost as if the court seemed *impressed* by the content of the document and allowed that to influence its decision of whether the document was properly admitted. Surely, that is a problem that the testimony requirement of Rule 803(6), SCRE, and S.C. Code Ann. § 19-5-510 was created to keep at bay. See S.C. Nat'l Bank v. Jones, 302 S.C. 154, 155, 394 S.E.2d 323, 324 (1990) ("[A] requisite for the admissibility of business records is that entries therein must have been made at or near the time of the transactions to which they relate. The purpose of this mandate is to aid in establishing that the record was honestly and fairly kept.")

Given the complete absence of evidence to the effect that Saxon *actually* creates the entries in its loan history documents at or near the time of the transactions to which they relate, it is sheer speculation and conjecture to conclude that that the fact that an entry on the document is dated means that the entry was made around the time of any particular event. That is why, when a document is offered for admission under the business records exception, our law requires witness testimony – evidence *outside the document* – to establish that the manner of the document's making and keeping satisfies the elements of Rule 803(6), SCRE, and S.C. Code Ann. § 19-5-510. The only witness to testify about the document at issue "conceded she never worked

for Saxon and *had no personal knowledge of its internal procedures*[.]" (Emphasis added.) She could not and did not provide any testimony about whether the way Saxon makes its loan history documents satisfies those elements.

The explicit requirement that the elements of the business records exception must be established through witness testimony means that this court's opinion is wrong to find any of those elements established by the content of the document itself. Rule 803(6), SCRE; S.C. Code Ann. § 19-5-510. Even if some evidence other than witness testimony could be used to establish an element of the business records exception, that evidence would still have to come from some outside source; it could not come from the very document itself. See id. This court's opinion is in error. The Dolans respectfully submit that this court overlooked or misapprehended the law in this regard.

II. Neither the trial court nor this court can make substitutes for the necessary foundation being laid. This court's decision does that.

In addition to what is discussed above, the court's opinion errs in other ways concerning its determination that a foundation of the necessary elements of the business records exception was laid for the Saxon loan history. What is discussed above is a substitution of something else for evidence that satisfies all or a part of the necessary foundation, as is what is discussed below.

"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.

The court's opinion states the following:

> While Poch conceded she never worked for Saxon and had no personal knowledge of its internal procedures, she also testified she knew Saxon matched industry-standard practices and her employer, Specialized Loan Servicing (SLS), rigorously screened all loan histories sent to it for onboarding to ensure no anomalies or inconsistencies existed. We find this testimony, coupled with the Saxon loan history showing entries that were made at or near the time the events occurred, demonstrate Saxon employees with knowledge of the Dolans' mortgage prepared Saxon's loan history in the ordinary course of business.
>
> . . .
>
> We find Poch's testimony regarding Saxon's conformance with industry standards and SLS's rigorous onboarding process demonstrated Poch, in effect, relayed information on behalf of Saxon employees who obtained knowledge in the ordinary course of business when they entered information regarding the Dolans' mortgage.

What industry standards regarding relevant document creation processes are was never discussed, much less established, in this case. "Rigorous screening" is not an element of the business records exception, nor does it speak to how any document is made. For that matter, Poch never testified that rigorous screening was the standard in the mortgage servicing industry. He testimony never identified what "industry-standard practices" were at all. "Poch's testimony regarding Saxon's conformance with industry standards and SLS's rigorous onboarding process" in reality demonstrated nothing about whether the entries on the Saxon loan history were made by "Saxon employees who obtained knowledge in the ordinary course of business when they entered information regarding the Dolans' mortgage." Is it "industry standard" for entries in a loan history to be made by servicer employees who actually have knowledge of what they entered? Who knows? Would SLS's

"rigorous onboarding process" reveal anything about whether the entries were made by a person who actually had knowledge of what he or she was entering? Who knows? Poch's testimony was totally silent about those things.

Courts are not permitted to substitute other things – like unidentified "industry standards" and a "rigorous onboarding process" – for a showing of actual fulfillment of an element of the business records exception. There is no way to "in effect" satisfy the elements of the business records exception without actually satisfying the elements of the business records exception. Rule 803(6), SCRE; S.C. Code Ann. § 19-5-510. Those elements were not satisfied here. "Rigorous screening," conforming to unidentified "industry-standard practices," and the fact that entries on the Saxon loan history have dates beside them do not show a thing about whether "Saxon employees with knowledge of the Dolans' mortgage prepared Saxon's loan history in the ordinary course of business." The elements of the business records exception remain unsatisfied by the record in this case. Id.

In Bain v. Self Memorial Hosp., 281 S.C. 138, 153 n. 1, 314 S.E.2d 603 (Ct. App. 1984), this court went out of its way to instruct the bench and bar to "[p]lease do not craft from our decision yet another exception to the rule against hearsay . . . lest the exceptions to this complex rule become literally innumerable." In effect, by saying that one can reach the same result as satisfying the elements of the business records exception without actually satisfying the elements of the business records exception, this court is creating a new, catch-all business document exception to the hearsay rule. That cannot lawfully happen, and it should not happen.

The Dolans respectfully submit that this court overlooked or misapprehended the law in this regard.

III. Poch's impermissible testimony was not cumulative.

This court was right to find that the trial court "erred by allowing Poch to testify regarding the Dolans' mortgage and the amount required to bring the mortgage current[.]" This court was wrong, however, to determine that "because Poch's testimony was cumulative, its admission did not prejudice the Dolans and therefore does not constitute reversible error."

This court's opinion states that:

> [W]e find the testimony was cumulative for the following reasons: (1) email correspondence between Bryon and Saxon demonstrated Bryon received a reinstatement quote informing the Dolans an additional $35,000 was required to bring their mortgage current after the $65,250 payment was applied; (2) an escrow shortfall of $26,039.05 existed; and (3) the Dolans had a variety of options available to bring their loan current. In light of this evidence, Poch's testimony did not prejudice the Dolans because the Dolans showed they knew more money was required in order to reinstate their loan.

There is no question that, after it took the Dolans' payment of $65,250.00, FV-I then took the position that the subject account had an escrow shortfall of $26,039.05 and that it then took the position that an additional $35,603.88 was required to bring the account current. (R. pp. 365-67, 398-400.) That is only evidence that FV-I demanded that money and said those amounts were owed; it is not evidence that FV-I was correct about those things. It is not evidence that component figures existed to back up that position. *That* evidence, the only evidence offered to the effect that FV-I was correct about either of those things or that any factual detail existed to back up those figures was the Saxon loan history (which was inadmissible hearsay, as discussed above) and Poch's testimony about the account's status and what would bring it current, which, as this court recognized, should not have been

allowed. FV-I offered Poch's testimony (and the hearsay Saxon loan history document) for the purpose of convening the jury that FV-I was *right* to claim that these amounts were actually owed and *right* to say that the loan was in default. Poch's testimony was not cumulative.

As to the opinion's statement that "the Dolans had a variety of options available to bring their loan current[,]" the undersigned is at a loss to see any evidence to this effect in the record.

The Dolans knew that, after they made the $65,250.00 payment, FV-I then turned around and said more money had to be paid to bring the account current. That is a different thing altogether from "the Dolans show[ing] they knew more money was required in order to reinstate their loan." They knew FV-I was demanding that money, but only the inadmissible evidence the trial court admitted had any tendency to show that FV-I was *right* to demand it.

Poch's testimony was not cumulative and was prejudicial. There is a reasonable probability the jury's verdict was influenced by this wrongly admitted evidence. The Dolans respectfully submit that this court overlooked or misapprehended the law or the content of the record in this regard.

IV. The opinion in this case employs an off-center, unduly restrictive analysis of the "impact on the public interest" element of an Unfair Trade Practices claim.

The court's opinion states that "the Dolans failed to show FV-I's alleged wrongful misrepresentation of the amount required to bring their mortgage current occurred prior to the Dolans working with FV-I, and they failed to show it was likely to occur in the future. . . . Here, the circumstances underpinning the Dolans' efforts

to bring their mortgage current by selling a portion of their property were rare and are unlikely to repeat."

An action for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (hereinafter "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 have our courts said that it is the exact situation at issue that must be capable of repetition for this element to be satisfied. The lower 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 and, thus, impact on the public interest. Such misrepresentation by FV-I is certainly repeatable.

As to the court's statement to the effect that FV-I's misrepresentation to the Dolans would have had to come before they even entered into negotiations with FV-I about the $65,250.00 reinstatement payment, there is no support for that premise in this state's law.

The Dolans respectfully submit that this court overlooked or misapprehended the law in this regard.

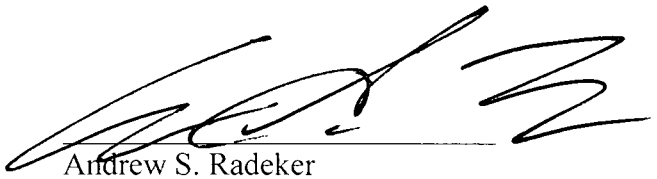
V. Rehearing *en banc* would be proper.

"A hearing or rehearing en banc is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 219(a), SCACR.

Here, the opinion this court has issued departs from its earlier decisions about the business records exception to the hearsay rule, among them Connelly 314 S.C. at 192, and Rice, 375 S.C. at 331-32. The opinion crosses the line expressed in Bain, 281 S.C. 138, 153 n. 1, about not creating any new hearsay exceptions or at least comes dangerously close. It runs counter to the express language of Rule 803(6), SCRE, and S.C. Code Ann. § 19-5-510's requirement of witness testimony to establish the elements of the business records exception. It is worthy of rehearing by this full court.

WHEREFORE the Dolans pray for an order granting rehearing or rehearing *en banc* in this case.

Respectfully submitted,



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January 26, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Judge

Appellate Case No. 2014-001384

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 petition for rehearing or rehearing *en banc* by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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January 26, 2017

VIA HAND DELIVERY
The Hon. Jenny Abbott Kitchings
Clerk of Court, Court of Appeals of South Carolina
1220 Senate Street
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RECEIVED
JAN 26 2017
SC Court of Appeals

Re: FV-I, Inc., etc. v. Bryon J. Dolan, et al.
Appellate Case No.: 2014-0001384

Dear Ms. Kitchings:

Enclosed herewith for filing in the above-referenced case are an original and seven copies of a petition for rehearing or rehearing *en banc*, with attached proof of service thereof. Also enclosed is this firm's check in the amount of $25.00 as the motion fee.

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.