THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Judge

Appellate (Court of Appeals) 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.....Petitioners.

PETITION FOR WRIT OF CERTIORARI

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Petitioners Bryon J. Dolan and Lisa S. Dolan, who were the Appellants below and are hereinafter usually referred to as "the Dolans," hereby move and petition this Court, pursuant to Rule 242, SCACR, as well as all other applicable law, for the issuance of a writ of certiorari to review the final decision of the Court of Appeals in this case. Petitioners respectfully submit that this is a proper case for such review by this Court.

The decision of the Court of Appeals is at odds with the plain language of Rule 803(6), SCRE, S.C. Code Ann. § 19-5-510, and the purpose of that statute and rule. Rule 803(6), SCRE, and S.C. Code Ann. § 19-5-510 plainly state that the elements of the business records exception have to be shown through evidence that is extrinsic to the document in question, through the testimony of a witness qualified to offer that information. Here, the Court of Appeals did not look to extrinsic evidence in the record that showed the proper foundation had been laid; rather, the court looked to the content of the document in question for that evidence. The reasoning is circular – and unsound. Using the entries in a document as evidence of when and how those entries were made and the correctness of what they say is what the explicit witness testimony requirement in Rule 803(6), SCRE, and S.C. Code Ann. § 19-5-510 is designed to prevent. The flawed logic used by the Court of Appeals goes like this: "This entry says it was made on December 12 and says X event happened on December 12. How do we know that the entry was actually made on December 12 and accurately records what happened on December 12? Well, it's dated December 12, so it must have been made then, and it says X happened on December 12, so X must have happened then."

The Court of Appeals' opinion reveals an analytical departure by that court from longstanding, established, and logically sound South Carolina law about how a

trial court should analyze whether a proper foundation has been laid for the admission of a document under the business records exception to the rule against hearsay. This case presents an opportunity to prevent the Court of Appeals from making bad evidence law decisions in the future.

Further, and independently of the evidence law issues this case presents, this case also offers this Court an opportunity to make a much-needed clarification of what is meant by the requirement that a litigant suing under the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (hereinafter "UTPA") prove "adverse effect on the public interest" to prevail. Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21 (1998). For far too long now, the muddied state of jurisprudence about this element has led trial courts to make rulings based on the incorrect conclusion that *only* potential for repetition satisfies that requirement. That is an unsound conclusion that is inconsistent with the reason the UTPA created a private right of action: to make actionable what was previously inactionable unfair business conduct. The lack of clarity in this area has led courts to bar plaintiffs from having redress for the very sort of thing S.C. Code Ann. § 39-5-140 was enacted to give them redress for, simply because of the lack of evidence of an "element" of this claim that is not really an element of this claim.

CERTIFICATE OF COUNSEL

The Court of Appeals issued its opinion in this case on January 11, 2017. (Appx. p. 1.) Counsel for the Petitioners certifies that the petition for rehearing was served and filed 15 days later, on January 26, 2017, and was finally ruled on by the Court of Appeals by an order filed on March 30, 2017. (Appx. pp. 7, 19, 20.) This petition, served and filed on April 28, 2017, is timely.

QUESTIONS PRESENTED

The questions presented for review in this case, some of which closely relate and are discussed in detail below, may be succinctly stated as follows:

1) Did the Court of Appeals err in determining that the trial court was right to admit a document under the business records hearsay exception where no evidence of how the document was created or kept was ever adduced?

2) Did the Court of Appeals err in looking to the content of the document itself to find the foundation for the business records exception had been laid?

3) Did the Court of Appeals err in determining that the improper admission of inadmissible hearsay testimony was harmless as cumulative of properly admitted evidence?

4) Did the Court of Appeals err in determining that the Dolans offered no evidence tending to show that the Respondent (hereinafter "FV-I")'s conduct affected the public interest?

STATEMENT OF THE CASE

This is a case in which FV-I seeks mortgage foreclosure and the Dolans asserted both legal and equitable counterclaims. (Appx. pp. 133-45.) The Dolans' legal counterclaims were for FV-I's breach of contract and FV-I's violation of the UTPA. (Appx. pp. 141-45.)

This case was bifurcated by consent order on the cusp of the jury trial, with the Dolans' at-law counterclaims tried to a jury and the foreclosure claim and the Dolans' claim for an accounting referred to the master-in-equity to be tried later. (Appx. pp. 113-14.) 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. (Appx. p. 192 ln. 9 through p. 193 ln. 11.)

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, with two $3,000.00 payments to follow, 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. (Appx. pp. 215-25, p. 233 ln. 8 through p. 234 ln. 2, p. 252 ln. 5-11, p. 290 ln. 22 through p. 291 ln. 19, p. 298 ln. 4-7, p. 299 ln. 18-20, p. 317 ln. 17-23, p. 324 ln. 20-25, pp. 379-92, 498-99, 531-32.) 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. (Appx. p. 225 ln. 11 through p. 330 ln. 5, pp. 491-532.) 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 to bring the loan current. (Appx. p. 233 ln. 8 through p. 234 ln. 2, p. 252 ln. 5-11, p. 290 ln. 22 through p. 291 ln. 19, p. 298 ln. 4-7, p. 299 ln. 18-20, p. 324 ln. 20-25.) Mr. Dolan testified, as supported by emails exchanged between him and Mr. Flanagan, that Mr. Flanagan had originally presented the amount as $69,000.00, but that was changed to $65,250.00 plus

two payments of $3,000.00 in order to accommodate a junior lienor's partial payment when the mortgage release was done. (Appx. p. 290 ln. 22 through p. 291 ln. 4.) In an email, Mr. Flanagan refers to "the $65,250 (revised amount due Saxon less the 3,7500." (Appx. p. 531.) Saxon received the $65,250.00 payment on September 30, 2011. (Appx. p. 500.)

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. (Appx. pp. 501-03.) 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 p. 236 through p. 239 ln. 1, p. 240 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] (Appx. pp. 435-43.) Through its servicer, Saxon, FV-I had the foreclosure judgment in the then-pending foreclosure action undone and the case "closed" via a consent order it proposed, which 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[.]" (Appx. pp. 513-17, 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

[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. (Appx. p. 229 ln. 18 through p. 230 ln. 5, p. 335 ln. 2-9.) Though Saxon controlled the foreclosure action, BB&T continued to be listed as the plaintiff in the case. (Appx. pp. 513-17.)

CLOSED/RESOLVED" in a note dated four days before Saxon received the lump sum payment. (Appx. p. 508.) 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." (Appx. p. 509.) 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[.]" (Appx. p. 511.) 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[.]" (Appx. pp. 511-12.) When Saxon returned the Dolans' $3,000.00 payment, it sent a letter back to the Dolans with the check. (Appx. pp. 506-07.) 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." (Appx. p. 506.) 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." (Appx. pp. 520, 521.)

The Dolans also called the sole witness FV-I brought to the trial, Loretta Poch, in their case-in-chief. (R p. 333 ln. 3 through p. 339 ln. 20.) Ms. Poch is an employee of Specialized Loan Servicing, the present servicer of the subject loan. (Appx. p. 333 ln. 10-13.) Ms. Poch testified that she had never worked for either of the loan's two previous servicers, BB&T and Saxon. (Appx. p. 334 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. (Appx. p. 335 ln. 16-18.) Ms. Poch had never observed how Saxon implemented any of its procedures. (Appx. p. 335 ln. 24 through p. 336 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. (Appx. p. 336 ln. 2-5, p. 336 ln. 12 through p. 337 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. (Appx. p. 340 ln. 17 through p. 347 ln. 23.)

FV-I called Ms. Poch in its case. (Appx. p. 348 ln. 10 through p. 377 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. (Appx. p. 352 ln. 11 through p.

353 ln. 14, p. 354 ln. 6 through p. 355 ln. 2, p. 355 ln. 22 through p. 359 ln. 4, p. 366 ln. 3 through p. 373 ln. 6, p. 374 ln. 13 through p. 375 ln. 13.) This was over the Dolans' objections. (Appx. p. 354 ln. 20 through p. 355 ln. 19, p. 359 ln. 3 through p. 363 ln. 9.)

Though FV-I had offered no evidence of how Saxon's records were made or kept, the court admitted into evidence a *Saxon*-made loan history document, Plaintiff's Exhibit 12. (Appx. p. 363 ln. 10 through p. 365 ln. 22, p. 367 ln. 24 through p. 368 ln. 7, pp. 475-88.) This was also over the Dolans' objections. (Appx. p. 363 ln. 10 through p. 365 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 actually were insufficient to bring the loan current. (Appx. p. 336 ln. 2-5, p. 336 ln. 12 through p. 337 ln. 16, p. 348 ln. 16 through p. 377 ln. 24, pp. 475-88.)

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 UTPA). (Appx. pp. 104, 147-61.)

The Dolans moved for reconsideration of the order denying their motion for a new trial. (Appx. pp. 105, 162-73.) 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. (Appx. pp. 162-73.) The trial court denied that motion, and this appeal followed. (Appx. p. 106.)

The parties submitted their briefs, each submitted letters with supplemental citations to the opinion in Deep Keel, LLC v. Atl. Private Equity Group, LLC, 413 S.C. 58, 773 S.E.2d 607 (Ct. App. 2015), which was issued during the pendency of the appeal, and the Court of Appeals issued its decision without having oral argument. (Appx. pp. 2, 23-98.) At no point in FV-I's brief did FV-I ever contend that the content of the Saxon loan history document itself supplied evidence sufficient to meet any of the criteria for admission under the business records exception to the rule against hearsay. (Appx. pp. 53-76.)

The Court of Appeals affirmed. (Appx. pp. 1-6.) The Court of Appeals found "FV-I demonstrated the Saxon loan history met the requirements for the circuit court to admit it under the business records exception." (Appx. p. 3.) On the basis of the content of the very document itself, the Court of Appeals found "the Saxon loan history was made at or near the time of the events recorded." (Appx. p. 3.) The Court of Appeals also found "the Saxon loan history shows it was prepared in the regular course of business by Saxon employees with knowledge[,]" stating that

> [w]hile 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.

(Appx. pp. 3, 4.) Again, the Court of Appeals looked to the content of the document at issue for evidence about how that content was prepared. (Appx. pp. 3, 4.)

The Court of Appeals found "Poch was qualified to identify the Saxon Loan history and to testify regarding the mode of its preparation" – even though she did not know how Saxon prepared its documents and never testified about how Saxon prepared its documents. (Appx. p. 4, p. 335 ln. 24 through p. 336 ln. 1.) The Court of Appeals found "Poch's testimony regarding Saxon's conformance with industry standards" – which standards were never articulated – "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." (Appx. p. 4, p. 335 ln. 16-18.)

The Court of Appeals did find that the trial court "erred by allowing Poch to offer testimony regarding the Dolans' mortgage and the amount required to bring the mortgage current[,]" since her "testimony was hearsay, as she conceded at trial her only knowledge of the Dolans' mortgage was based on her review of the Saxon loan history." (Appx. p. 5.) The Court of Appeals concluded, "however, [that] because Poch's testimony was cumulative its admission did not prejudice the Dolans and therefore does not constitute reversible error." (Appx. p. 5.)

The Court of Appeals found that the directed verdict on the Dolans' UTPA claim was proper, finding that "the Dolans failed to show the second prong to recover under SCUTPA: FV-I's conduct affected the public interest." (Appx. p. 5.) The Court of Appeals found "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 again in the future"

and "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. Therefore, we find the Dolans failed to show FV-I's actions affected the public interest[.]" (Appx. p. 6.)

The Dolans petitioned for rehearing or rehearing *en banc*. (Appx. pp. 7-19.) The Court of Appeals denied that petition. (Appx. pp. 20-21.)

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 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. The Dolans' sole purpose in calling Ms. 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. The admission of the evidence at issue in this appeal prejudiced the Dolans, i.e. there was "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 conceded that, not even responding 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. (Appx. pp. 53-76); see First Union Nat. Bank v. FCVS Communications, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) (where respondent fails in its brief to respond to issue, court may treat failure to respond as concession that appellant is correct). That is why FV-I presented that evidence.

The Court of Appeals affirmed, but, to get there, it had to contort the proper analysis under the law and change it into something else. The way that it changed the analysis is dangerous. If the Court of Appeals is going to be analyzing business records exception issues this way, that is going to have problematic consequences for the state of the law in South Carolina and for the litigants in its courts who seek the correct application of the Rules of Evidence.

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." By saying *the content of the very document at issue* supplied the necessary foundation to show it met the requirements of the exception, the Court of Appeals parted ways with the South Carolina Rules of Evidence and longstanding, settled law.

To arrive at its decision to affirm, the Court of Appeals could not use the proper analysis under Rule 803(6), SCRE, and S.C. Code Ann. § 19-5-510 – so it didn't. In order to affirm, the Court of Appeals changed the way the analysis is done. This altered analysis circularly allows the use of the content of the very document at issue to supply evidence about how that content was created. In reality, this "test" tests nothing. Any document would pass it. Use of this flawed analysis is what the explicit witness

testimony requirement in Rule 803(6), SCRE, and S.C. Code Ann. § 19-5-510 is designed to prevent.

While the Court of Appeals' 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[.]" (Appx. p. 2.) This is despite the Court of Appeals' acknowledgement that Ms. 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[.]" (Appx. p. 4.) 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 the Court of Appeals 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. Decades of South Carolina case law have borne 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 of Appeals' opinion, however, decided "the Saxon loan history was made at or near the time of the events recorded" by looking to something other than Poch's testimony: the Saxon loan history document itself. (Appx. pp. 3-4.) 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.

(Appx. p. 3.)

The Court of Appeals fell victim to a logical fallacy, one known as a tautology or as circular logic. The court used the fact that the entries are dated as evidence that the entries were actually made on the dates given, 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 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 of Appeals 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.")

The explicit requirement that the elements of the business records exception must be established through witness testimony – evidence *outside the document* – means the Court of Appeals was wrong to find any of those elements established by content *inside* the document. 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. Otherwise, pretty much any document could be a self-proving, admissible one under this hearsay exception.

The analysis the Court of Appeals used is a dangerous one. If this is the path down which the Court of Appeals will be leading evidence law on this point, that is a danger for all of us.

II. Neither the trial court nor the Court of Appeals can allow substitutions for the necessary foundation being laid.

"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). The rule contains a "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 of Appeals' 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.
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> . . .
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> 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.

(Appx. p. 4, emphasis added.)

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. (Appx. p. 335 ln. 16-18.) "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." (Appx. p. 4.) 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? (Appx. p. 4.) 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." (Appx. p. 4.) The elements of the business records exception were never satisfied by the record in this case. Rule 803(6), SCRE; S.C. Code Ann. § 19-5-510.

Apples, meet oranges. The reasoning in the Court of Appeals' opinion in this case comes dangerously close to creating a new hearsay exception by allowing the substitution of other things for actual satisfaction of the elements needed to lay the foundation for that exception. This Court can and should step in to stop the business records exception, so incorrectly applied, from transforming into what is really a new hearsay exception.

Thirty-three years ago, the Court of Appeals issued a caution to the legal community in South Carolina. "Please do not craft from our decision yet another exception to the rule against hearsay . . . lest the exceptions to this complex rule become

literally innumerable." Bain v. Self Memorial Hosp., 281 S.C. 138, 153 n. 1, 314 S.E.2d 603 (Ct. App. 1984). 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, the Court of Appeals is creating a new, catch-all business document exception to the hearsay rule. That cannot lawfully happen, and it should not happen.

III. Poch's impermissible testimony was not cumulative.

The Court of Appeals 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[.]" (Appx. p. 5.) The 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." (Appx. p. 5.)

The 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.

(Appx. p. 5.)

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. (Appx. pp. 468-70, 501-03.) 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 what it said and demanded. 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) and Poch's testimony about the account's status and what would bring it current. FV-I offered Poch's testimony (and the hearsay Saxon loan history document) for the purpose of convincing 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 to any evidence properly admitted during the trial.

As to the opinion's statement that "the Dolans had a variety of options available to bring their loan current[,]" there is no evidence to this effect in the record. (Appx. p. 5.) 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." (Appx. p. 5.) 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. (The Dolans are not saying that FV-I *was* correct to demand this – just that this evidence was the only evidence offered to that effect.)

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. See Conner, 611 S.E.2d at 908. That is, after all, why FV-I offered it. It is why FV-I won the case.

IV. The Court of Appeals' opinion in this case illustrates a widespread misconception of the "impact on the public interest" element of an Unfair Trade Practices claim.

The Court of Appeals' 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." (Appx. p. 6.)

An civil action for violation of the UTPA lies where there is such a violation (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).

This 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 this Court has never held that showing potential for repetition is the *only* way to prove impact on the public interest. Crary, 329 S.C. at 388. This 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 this Court said that it is the exact situation at issue that must be capable of repetition for this element to be satisfied. Moreover, the element at issue is *not* potential for repetition; it is impact on the public interest. Id. This is widely misunderstood by the bench and bar, which have largely taken the principle that potential for repetition satisfies the public interest element to mean that *only* potential for repetition satisfies this element. There is no logical reason to think that, though. The text of the UTPA never says that potential for repetition is an element of this claim. S.C. Code Ann. § 39-5-140. The reason the UTPA created a private right of action was to make actionable what was previously inactionable unfair business conduct. The lack of clarity about this element, though, has led courts to bar plaintiffs from having redress for the very sort of thing S.C. Code Ann. § 39-5-140 was enacted to give them redress for – all because of the lack of evidence of an "element" of this claim that is not really an element of this claim – potential for repetition.

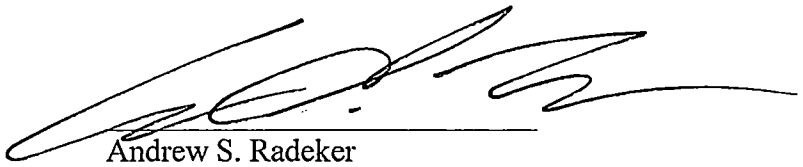
The public has an interest in mortgage servicers not deceiving borrowers about the status of their loans (think of how many Americans have mortgage loans) and 2) it was not necessary to show that the specific situation at issue here would be actually repeated. Potential for repetition in misrepresenting 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 of Appeals 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. (Appx. p. 6.)

This Court has an opportunity to put the direction of this state's jurisprudence back on the right track in this regard.

WHEREFORE, the Petitioners pray for an order granting a writ of certiorari to review the final decision of the Court of Appeals in this case.

Respectfully submitted,



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April 28, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Judge

Appellate (Court of Appeals) 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.....Petitioners.

PROOF OF SERVICE

I certify that I served the foregoing petition for writ of certiorari by depositing a copy of each of them on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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April 28, 2017

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