

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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**MAY 26 2017**

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

**S.C. SUPREME COURT**

R. Keith Kelly, Circuit Court Judge

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Civil Action No. 2012-CP-32-2816  
Unpublished Opinion No. 2017-UP-031 (S.C. Ct. App. filed Jan. 11, 2017)  
Appellate Case No. 2017-001047

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

vs.

Byron 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

Byron J. Dolan and Lisa S. Dolan, are..... Petitioners.

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**RETURN TO PETITION FOR A WRIT OF CERTIORARI**

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May 26, 2017

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Respondent FV-I, Inc., in trust for Morgan Stanley Mortgage Capital Holdings LLC (“FV-I”) opposes Petitioners Byron J. Dolan and Lisa S. Dolan’s (“Dolans”) Petition for a Writ of Certiorari on the following grounds:

### **QUESTIONS PRESENTED FOR REVIEW**

- I. Do any special and important reasons exist for the Court to issue a Writ of Certiorari?**
  
- II. Did the Court of Appeals err in affirming the trial Court’s ruling to admit into evidence the business records of the Respondent’s loan servicers and allowing the witness for the current loan servicer to testify about the business records?**
  
- III. Did the Court of Appeals err in affirming the trial Court’s ruling to grant a directed verdict in favor of the Respondent on the Petitioners’ cause of action for violation of the South Carolina Unfair Trade Practices Act claim?**

### **STATEMENT OF THE CASE**

This lawsuit arises out of the foreclosure of a residential real estate mortgage. FV-I, filed its Lis Pendens, Summons, and Complaint on July 9, 2012. (Appx. pp. 131-137). The Dolans filed an Answer and Counterclaim on August 10, 2012 asserting an equitable counterclaim for Accounting, and legal counterclaims for Breach of Contract and violation of the South Carolina Unfair Trade Practices Act (“SCUTPA”). (Appx. pp. 139-146).

By Order filed May 1, 2014, the Dolans and FV-I agreed and stipulated to bifurcate the action pursuant to Rule 42(b), SCRCF, thereby severing Petitioners’ legal counterclaims for Breach of Contract and SCUTPA from Respondent’s foreclosure claim and Petitioners’ equitable counterclaim for Accounting. As part of the May 1, 2014

Order, the equitable foreclosure claim and equitable counterclaim for Accounting were referred to the Lexington County Master-in-Equity. (Appx. pp. 113-114).

On April 17, 2014, the legal counterclaims were heard before a jury with the Honorable R. Keith Kelly presiding. A directed verdict was granted in favor of FV-I on the SCUTPA claim, and a jury verdict was returned in favor of FV-I on the Breach of Contract counterclaim. (Appx. p. 340, line 16 - p. 343, line 17; p. 104). Subsequently, Judge Kelly denied Petitioners' motion for a new trial and motion to reconsider the order. (Appx. pp. 105-106).

On June 25, 2014, the Dolans filed this appeal from the directed verdict and jury verdict on April 14, 2017. On January 11, 2017, the Court of Appeals entered an Order affirming the trial court on all issues raised in the Dolans' appeal. (Appx. pp. 1-6). On January 26, 2017, the Dolans filed a Petition for Rehearing or Rehearing *En Banc*. (Appx. pp. 7-19). By Order of March 30, 2017, the Court of Appeals denied the Dolans' Petition for Rehearing or Rehearing *En Banc*. (Appx. pp. 20-22).

The main issue at trial was the interpretation of a letter dated September 22, 2011 ("Letter"). (Appx. pp. 498-499). The Dolans' argument at trial was that the Letter created a contract whereby FV-I's loan Servicer at the time, Saxon Mortgage Services ("Saxon"), agreed to accept the sum of \$65,250 to bring the loan current and Respondent breached that agreement. (Appx. p. 216, line 17 – p. 217, line 4; p. 290, line 22 – p. 291, line 4). FV-I's position at trial was that the clear reading of the Letter created an agreement between the parties that 1) in exchange for \$65,250, Plaintiff would release its lien as to a 1,043 square foot section of the property to help facilitate the sale of the adjoining property and the \$65,250 would be applied to the loan per the terms of the loan

documents; 2) the Petitioners were required to attempt to sell their property and had until December 31, 2011 in order to do so; if the Petitioners were unable to sell the property, the time period could be extended for two months at Saxon's sole discretion in exchange for the Petitioners making two monthly payments of \$3,000; and 3) the Petitioners were given the option to submit a loan modification packet. (Appx. p. 222, line 20 – p. 224, line 23; p. 368, line 11 – p. 369, line 16; p. 370, lines 2-24).

In 1999, Mr. Dolan purchased a tract of land on Lake Murray in Lexington County. (Appx. p. 264, line 24 – p. 265, line 3). Around 2003, the tract was subdivided into two parcels: 540 Windward Point Court (the property that is the subject of this action) and 544 Windward Point Court (the adjacent property). (Appx. p. 266, line 7 – p. 267, line 12). Mr. Dolan built houses on each parcel and each parcel was secured by a separate note and mortgage. (Appx. p. 267, line 16 – p. 268, line 15). By 2009, both properties were in foreclosure. (Appx. p. 270, line 11 – p. 271, line 15). The foreclosure related to 544 Windward Point Court was completed in May 2011, and Branch Banking and Trust Company (“BB&T”) was the successful purchaser at the judicial sale. (Appx. p. 271, line 16-21; pp. 452-455).

In 2011, BB&T planned to sell 544 Windward Point Court. However, 544 Windward Point Court lacked a front yard, which made it very difficult to sell. Mr. Dolan learned of the potential purchase and thought the proposed sales price was too low and feared that the sale would negatively affect his property value. (Appx. p. 276, line 11 – p. 280, line 2).

Mr. Dolan contacted the Respondent's then loan servicer, Saxon, and proposed that he convey a strip of his property at 540 Windward Point Court to the purchaser of

544 Windward Point Court. (Appx. p. 276, line 7-10). Due to Respondent's Mortgage, Saxon needed to consent to the partial release. (Appx. p. 281, lines 2-11). In exchange for Saxon releasing the strip of land from its mortgage, it would receive a portion of the proceeds from the proposed sale. The proceeds would be applied towards the Dolan's arrearage. (Appx. p. 284, line 22 – p. 286, line 22; pp. 498-499). In addition, Mr. Dolan was given time to secure a buyer for 540 Windward Point Court. (Appx. p. 292, line 13 – p. 293, line 14; pp. 498-499).

Saxon received the \$65,250 in September 2011 and applied the proceeds to the loan. (Appx. p. 367 lines 10-23). However, the proceeds were not sufficient to bring the loan current. (Appx. p. 369, lines 13-16; pp. 475-488). After applying the proceeds from the September 2011 transaction, the loan remained in default and due for the March 2011 payment. (Appx. p. 369, lines 13-16). Since it would be difficult for the Dolans to sell their property with a pending judgment of foreclosure and sale attached, Saxon vacated its foreclosure judgment. (Appx. p. 274, line 15 – p. 275, line 2; p. 387, line 22 – p. 388, line 9).

Due to the uncured default, the subject foreclosure action related to 540 Windward Point Court was filed on July 9, 2012. (Appx. pp. 131-137).

On or about January 24, 2012, Specialized Loan Servicing (“SLS”) became the loan server for the Petitioners' loan. (Appx. p. 336, lines 9-11). In accordance with industry's standard procedures, the Petitioner's loan information, including the payment history, was transferred from Saxon to SLS. (Appx. p. 336, line 19 – p. 337, line 18; p. 353, line 18 – p. 354, line 13). It is customary in the mortgage industry for lenders to contract with loan servicers to handle the day to day managing of a loan and perform

such duties as collecting payments, paying escrow expenditures and engaging in loss mitigation efforts with borrowers. (Appx. p. 349, lines 2-18).

At the trial on April 17, 2014, the witness for the Respondent was Loretta Poch. At the trial, Ms. Poch testified about the Petitioners' account payment history and specifically testified about the application of the \$65,250 in proceeds from the partial release and how that amount was not sufficient to bring the loan current. (Appx. p. 367, lines 10-23; p. 369, lines 13-16). Ms. Poch also testified that SLS and the prior loan servicer fully complied with the agreement. (Appx. p. 372, lines 7-17).

## ARGUMENTS

### **I. No special and important reasons exist for the Court to issue a Writ of Certiorari.**

The Dolans' Petition does not meet the "special and important" standard required by Rule 242(b), SCACR. Reasons that may justify this Court's review of a decision of the Court of Appeals include the following: (1) where there is a dissent in the decision of the Court of Appeals; (2) where substantial constitutional issues are directly involved; (3) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court; (4) where there are novel questions of law; and (5) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court. Rule 242(b), SCACR.

None of the judges on the Court of Appeals issued a dissenting opinion. The Dolans' Petition does not involve any substantial constitutional issues or federal questions, and does not conflict with any decision of the United States Supreme Court.

The Dolans' Petition presents no novel questions of law. The questions presented to the Court are whether 1) the Court of Appeals erred in interpreting the business exception rule found in both the South Carolina Code at § 19-5-510 (1985) and Rule 803(6) of the South Carolina Rules of Evidence and 2) whether the conduct of FV-I violated the South Carolina Unfair Trade Practices Act ("SCUTPA"). The Court of Appeals' addressed each of these questions by interpreting the current case law that has addressed these issues on numerous occasions.

Finally, the Dolans have failed to cite any case that conflicts with the decision of the Court of Appeals.

Therefore, the Dolans' Petition fails to present any of the traditional special and important reasons that justify this Court's review of a decision of the Court of Appeals.

**II. The Court of Appeals did not err in affirming the trial Court's ruling to admit into evidence the business records of the Respondent's loan servicers and allowing the witness for the current loan servicer to testify about the business records.**

The Court of Appeals correctly affirmed the trial Court's ruling to admit into evidence the business records of FV-I's loan servicers and allowing the witness for the current loan servicer to testify about the business records because FV-I demonstrated the records properly met the requirements under the business records exception to the hearsay rule.

The Dolans' argument raised in their Petition asks the Court to require a witness from the prior servicer, Saxon, to testify about its business records because the witness for the current servicer, SLS, could not have personal knowledge about how the prior servicer's records were created without having been employed by the prior servicer.

Such a ruling would ‘eviscerate’ the very reason for the business exception rule. See Midfirst Bank, SSB v. C.W. Haynes & Co., Inc., 893 F. Supp. 1304, 1311 (D.S.C. 1994). Additionally, the Dolans’ argument that the content of the business records were the sole source to establish an element of business exception rule lacks merit.

“The business records exception is found in both the South Carolina Code at § 19-5-510 (1985) and Rule 803(6) of the South Carolina Rules of Evidence. Both exceptions require that the evidence be given by a ‘custodian or other qualified witness.’” Twelfth RMA Partners, L.P. v. National Safe Corp., 335 S.C. 635, 642, 518 S.E.2d 44, 48 (Ct.App.1999)

“A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness” is not excluded from evidence by the hearsay rule. Rule 803(6), SCRE. Further, “[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.” S.C. Code Ann. § 19-5-510 (“Uniform Business Records as Evidence Act”).

“[A] witness is qualified to testify about a business record, despite the fact he or she did not personally participate in the creation of the record and was not the custodian ‘at or near the time’ the record was made.” Deep Keel, LLC v. Atl. Private Equity Grp., LLC, 413 S.C. 58, 73, 773 S.E.2d 607, 615, (Ct.App.2015) “[A] person is a ‘qualified witness’ under the rule if the testimony conveys information from a person “with knowledge” at the time the records were created. Id.

In construing the business records exception under the comparable Federal Rules of Evidence, our federal court has found that “[b]usiness records of an entity are admissible even though another entity made the records, and the rule does not require an employee of the entity that prepared the record to lay the foundation.” Midfirst Bank, SSB v. C.W. Haynes & Co., Inc., 893 F. Supp. 1304, 1310 (D.S.C. 1994). “Moreover, Rule 803(6) does not require the testifying witness to have personally participated in the creation of the document or to know who actually recorded the information.” Id. at 1311. ‘Obviously, such a requirement would eviscerate the business records exception, since no document could be admitted unless the preparer (and possibly others involved in the information-gathering process) personally testified as to its creation.’ Id. (quoting United States v. Keplinger, 776 F.2d 678, 694 (7th Cir.1985)). “Rather, the business records exception requires the witness to be familiar with the record keeping system.” Id.

The testimony of FV-I’s witness established that the records of Saxon were incorporated into and became part of SLS’ business records; explained the rigorous review process when SLS begins servicing a loan after a service transfer; and that the witness was personally familiar with the Dolans’ loan records. (Appx. p. 349, line 19 – p. 350, line 9; p. 353, line 18 – 354, line 5; p. 354, lines 6-13; p. 336, line 19 – p. 337, line

18; p. 338, lines 1-6). The multiple entries in Saxon's loan payment history which showed numerous events and the dates those numerous events occurred only supported the SLS witness' credibility and knowledge as a qualified witness and was not the basis of her testimony.

Clearly the trial court found the witness for FV-I trustworthy and creditable in regards to how SLS reviewed and incorporated Saxons' business records. At trial the Dolans did not contest that the records were kept in the course of SLS's regularly conducted business activity and did not present any reason why the Court should question the trustworthiness of the documents other than Dolan's counsel's unsupported accusation and the argument that the witness never worked for the prior servicer.

For these reasons, the Court of Appeals did not err in affirming the trial Court's ruling to admit into evidence the business records of the Respondent's loan servicers and allowing the witness for the current loan servicer to testify about the business records.

**III. The Court of Appeals did not err in affirming the trial Court's ruling in granting a directed verdict in favor of the Respondent on the Petitioners' cause of action for violation of the South Carolina Unfair Trade Practices Act claim.**

The Court of Appeals correctly affirmed the trial Court's ruling in granting a directed verdict in favor of the Respondent on the Petitioners' cause of action for violation of the South Carolina Unfair Trade Practices Act claim because the Dolans failed to produce any evidence at trial that the alleged conduct of the Plaintiff had any effect on the public interest or had the potential for repetition.

The Dolans' argument that their claim in this case is a violation of the South Carolina Unfair Trade Practices Act ("SCUTPA") lacks merit based on the unique and unusual factual situation. The Dolans ask the Court to find that possible deception by a mortgage loan servicer against a borrower affects the public interest as defined under the SCUTPA. Such a broad ruling would bring nearly every action of a loan servicer under the SCUTPA and dilute the legislative purpose and scope of the statute to cover nearly every situation.

To recover under the SCUTPA, the Petitioners need to prove: "1) a violation of the Act [by the commission of an unfair or deceptive act in trade or commerce], 2) proximate cause, and 3) damages." Schnellmann v. Roettger, 368 S.C. 17, 23, 627 S.E.2d 742, 745-46 (Ct.App.2006), modified and affirmed, 373 S.C. 379, 645 S.E.2d 239 (2007). "To be associated with trade or commerce, a defendant's acts must impact the public interest." Id. "An impact on the public interest may be shown if the acts or practices have the potential for repetition." Id. "The potential for repetition may be shown by proving that the same kind of actions occurred in the past or by showing that the procedures employed by the defendant create a potential for repetition of the deceptive practices." Id.

A plaintiff bringing a private cause of action under the UTPA must allege and prove the defendant's actions adversely affected the public interest. Daisy Outdoor Adver. Co. v. Abbott, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (1996). "Therefore, conduct which only affects the parties to the transaction provides no basis for a UTPA claim." Robertson v. First Union Nat'l Bank, 350 S.C. 339, 350, 565 S.E.2d 309, 315 (Ct.App.2002) (quoting Jefferies v. Phillips, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct.App.1994)).

The case law is clear. In order to bring a claim under the SCUTPA the Dolans needed to show the conduct of FV-I had an impact on the public interest and the conduct had the potential for repetition.

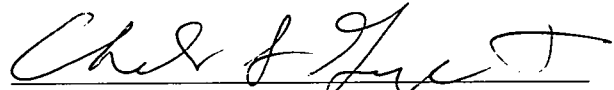
The Court of Appeals correctly ruled that the alleged conduct of FV-I in this case is rare and unlikely to repeat. This case involves a unique one of a kind private contract between the parties involving releasing 1,043 square feet of land to assist in the sale of a foreclosed property next door. The sale of the 1,043 square feet of land resulted from poor planning by Mr. Dolan in the construction of a house on both lots. Additionally, Mr. Dolan initiated the steps to create the agreement and fully participated in developing the terms and parameters of the agreement. The facts of this case are so unique that if the Petitioners were to be successful in their argument any contract between any parties would be subject to a violation of the SCUTPA.

For these reasons, the Court of Appeals did not err in affirming the trial Court's ruling in granting a directed verdict in favor of the Respondent on the Petitioners' cause of action for violation of the South Carolina Unfair Trade Practices Act claim.

## CONCLUSION

No special and important reasons exist for this Court to issue a Writ of Certiorari in this matter. Based on the foregoing, the Court must deny the Dolans' Petition for a Writ of Certiorari.

Respectfully submitted,



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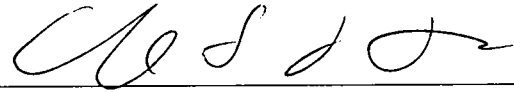
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I HEREBY CERTIFY that I have served the Return to Petition for a Writ of  
Certiorari on May 26, 2017, by depositing a copy of each in the United States Mail,  
postage prepaid, addressed to the each of following attorneys of record:

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