THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Judge

Appellate Case No. 2017-001047

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.

REPLY TO RETURN TO 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 submit this reply to the return served by the Respondent (hereinafter "FV-I") to the Dolans' petition for a writ of certiorari.

ARGUMENT IN REPLY

I. To sustain the Court of Appeals' ruling or adopt FV-I's interpretation would eviscerate the business records exception to the hearsay rule.

FV-I contends that the Dolans seek a decision that would "'eviscerate' the very reason for the business [records] exception rule." (Return p. 7.) In truth, it is the Dolans who seek a decision from this Court that would preserve the integrity of the business records exception to the hearsay rule. To uphold the Court of Appeals' ruling or to adopt FV-I's interpretation of Rule 803(6), SCRE, and S.C. Code Ann. § 19-5-510 is what would gut this exception, making its several elements meaningless.

The plain language of Rule 803(6), SCRE, states 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 similarly states 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. At least before the Court of Appeals decided to take a different path, it was settled law in South Carolina 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). It had been well established that "[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 elements of the hearsay exception found in Rule 803(6), SCRE, and S.C. Code Ann. § 19-5-510 are as follows:

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

High v. High, 389 S.C. 226, 239, 697 S.E.2d 690, 696-97 (Ct. App. 2010) (citing Rule 803(6), SCRE). (Rule 803(6), SCRE, and S.C. Code Ann. § 19-5-510 have the same substantive requirements, as the language of the latter statute notes.)

The testimony of Loretta Poch, the sole witness for FV-I, did not establish these elements with respect to the document at issue, a loan history document created by a previous servicer of the subject loan. (Appx. p. 334 ln. 8-12, p. 335 ln. 16-18, p. 335 ln. 24 through p. 336 ln. 1, p. 348 ln. 10 through p. 377 ln. 17, pp. 475-88.) That much is plain, and neither FV-I's return nor the Court of Appeals' opinion contends otherwise. (Appx. pp. 1-6; Return.)

Despite that, the Court of Appeals upheld the trial court's decision to admit the document, finding bases to affirm that are at odds with the explicit requirements of this hearsay exception. (Appx. pp. 3-4.) There is an explicit requirement that the elements of the business records exception must be established through witness testimony, which is of course evidence outside the document in question, but the Court of Appeals found

certain 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 Rule 803(6), SCRE; S.C. Code Ann. § 19-5-510. The Court of Appeals' circular logic has implemented a business records exception that ignores what the exception's requirements actually are, transforming this hearsay exception into one under which virtually any document could be self-proving and admissible. It is the Court of Appeals' analysis that eviscerates the business records exception, because it treats the exception's requirements as though they are not mandatory.

FV-I's argument is and has been essentially that, since the document came to FV-I's current servicer from a previous servicer, it can come in under the business records exception *despite* the absence of evidence that the exception's requirements are met. FV-I's argument seems to be that it would just be too inconvenient to actually satisfy the requirements of the exception, so evidence that does not meet the terms of the exception should be allowed in under it anyway. Under the law, however, this exception's requirements have not been done away with. Rule 803(6), SCRE; S.C. Code Ann. § 19-5-510. To adopt FV-I's position would also gut the rule and turn its mandates into meaningless surplusage.

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 business records exception, 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 and is against the plain language of the Rule. Rules of evidence, "like statutes, should be given their plain meaning." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 61, 566 S.E.2d 863 (Ct. App. 2002).

FV-I argues that Midfirst Bank, SSB v. C.W. Haynes & Co., Inc., 893 F. Supp. 1304 (D.S.C. 1994), stands 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. That is not what the case stands for. Even if it did, however, that would not matter to the outcome of this petition for certiorari 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.

Midfirst Bank 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 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." Rice, 375 S.C. at 331. Under the law of this state, 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[.]" Rice, 375

S.C. 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, 314 S.C. at 192.

This Court's precedent in State v. McFarlane, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983), speaks to the very argument FV-I makes. There, this Court held that a sheriff's department's receipt of a record from another office "would not qualify the detective [witness who received the document] to testify to the identity and mode of preparation of the report or whether it was made in the regular course of business at or near the time of the accident" subject of the report. Id. It was the absence of evidence about the way the entity that created the report prepared it that drove this Court's holding in McFarlane. See id.

The interpretation of Midfirst Bank that FV-I argues is contrary to that precedent. In addition, FV-I's reading of Midfirst Bank may not be correct. 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. Midfirst Bank does not serve as strong persuasive authority (which is all it could ever be) for FV-I's position.

Contrary to what FV-I argues, 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 requires the testifying witness to have personally participated in the creation of the document or to know who actually recorded the information. They are saying, though, that the business records exception requires the witness who lays the foundation to be familiar with the record keeping system of the company that made the record and to provide testimony sufficient to establish each element of the exception. In the instant case, no such testimony was offered. (Appx. p. 334 ln. 8-12, p. 335 ln. 16-18, p. 335 ln. 24 through p. 336 ln. 1, p. 348 ln. 10 through p. 377 ln. 17, pp. 475-88.) The Dolans are not asking this Court to eviscerate the business records exception. They are asking this Court to apply it.

II. FV-I mischaracterizes the record and the Dolans' arguments.

As discussed immediately above, FV-I's return does not present an accurate picture about what the Dolans are arguing. The return further mischaracterizes the Dolans' arguments and the record in several respects.

FV-I writes that "[t]he main issue at trial was the interpretation of a letter dated September 22, 2011" and that "[t]he 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." (Return p. 2.) While the existence of this letter was certainly part of the facts adduced at trial, this characterization of the Dolans' argument misses the mark. Bryon 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 referred to "the $65,250 (revised amount due Saxon less the 3,750)[.]" (Appx. p. 531.) Saxon received the $65,250.00 payment on September 30, 2011. (Appx. p. 500.) It was only after that lump sum payment was made that Mr. Flanagan told the Dolans that FV-I claimed an additional $35,603.88 was needed to bring the loan current. (Appx. pp. 501-03.)

FV-I contends that "[s]ince 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." (Return p. 4.) The record, though, actually tends to show that FV-I was acting consistently with the Dolans' lump sum payment having brought the loan current. 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 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.)

It is easy to see why the Saxon loan history document, the only thing offered to support the contention that this additional $35,603.88 was needed to bring the loan current, was critical to the outcome of this trial. FV-I's characterizations are the result of either a mistake or a deflection with regard to what this case is about.

FV-I also argues that "the Dolans have failed to cite any case that conflicts with the decision of the Court of Appeals." (Return p. 6.) In concert with cases cited herein, the Dolans point out the cases cited in pages 12 through 18 of their petition with regard to the business records exception and pages 20 through 21 of the petition with regard to the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (hereinafter "UTPA").

III. FV-I relies on Loretta Poch's inadmissible testimony.

The Court of Appeals, quite correctly, found 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 erred in reckoning this error as harmless.) FV-I, however, relies heavily on Poch's inadmissible testimony in its return. (Return pp. 4, 5.)

It is telling that FV-I believes that, to oppose this Court granting certiorari, it has to make use of testimony that never should have been admitted in the first place.

IV. FV-I presents quotations from the Court of Appeals' Deep Keel decision out of context.

It is not exactly clear what FV-I is trying to establish by quoting the Court of Appeals' decision in Deep Keel, LLC v. Atl. Private Equity Group, LLC, 413 S.C. 58, 773 S.E.2d 607 (Ct. App. 2015). (Return p. 8.) FV-I may be trying to argue that in that case the Court of Appeals lessened the requirements of what makes a person a qualified witness for purposes of Rule 803(6), SCRE, and S.C. Code Ann. § 19-5-510.

Presented with its surrounding context, the quoted language is below. As the following illustrates, the passage from Deep Keel actually supports the Dolans' arguments:

> Deep Keel argues Bynum was a "qualified witness" under Rule 803(6) and section 19–5–510 and thus should have been permitted to testify to the calculations he made from the information contained in the records. Deep Keel relies on Twelfth RMA Partners, L.P. v. National Safe Corp., 335 S.C. 635, 518 S.E.2d 44 (Ct.App.1999), in which this court held 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. 335 S.C. at 642, 518 S.E.2d at 48. We held 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 this case, *Bynum appears to be a "qualified witness" under Twelfth RMA because he studied the manner in which Community First and CresCom Bank maintained the records* before he purchased the note. Thus, his testimony conveyed information from a person with knowledge at the time the records were created. 335 S.C. at 642, 518 S.E.2d at 48.
>
> However, establishing that a witness is qualified to testify about a business record does not automatically lead to admission of that record. *The qualified witness must then lay the foundation to meet the requirements of Rule 803(6) and section 19–5–510.* See State v. Davis, 371 S.C. 170, 178–79, 638 S.E.2d 57, 62 (2006) (stating

> the proponent of evidence has the burden of establishing that a record falls within a hearsay exception).

Deep Keel, 413 S.C. at 73-74 (emphasis added).

Loretta Poch did *not* study or otherwise acquaint herself with the manner in which Saxon prepared or maintained its records at all. (Appx. p. 334 ln. 8-12, p. 335 ln. 16-18, p. 335 ln. 24 through p. 336 ln. 1, p. 348 ln. 10 through p. 377 ln. 17.) She was not a qualified witness. Further, her testimony did not lay the foundation to meet the requirements of Rule 803(6), SCRE, and S.C. Code Ann. § 19-5-510. (Appx. p. 334 ln. 8-12, p. 335 ln. 16-18, p. 335 ln. 24 through p. 336 ln. 1, p. 348 ln. 10 through p. 377 ln. 17.) That is what the Dolans have been saying this whole time.

V. FV-I's argument illustrates the very reason why it is important for this Court to address the Court of Appeals' ruling on the Unfair Trade Practices claim.

FV-I writes in its return that "[t]he 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.*" (Return p. 11, emphasis added.)

It is well settled that 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. E.g., Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006). One of the elements is *not* potential for repetition. Id. There is certainly not an *additional* element of potential for repetition *as well as* impact on the public interest. Id. This simply illustrates the need for this Court to address the widespread misconceptions held by the bench and bar about what is required for a UTPA claim.

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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June 5, 2017

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PROOF OF SERVICE

I certify that I served the foregoing reply to return to 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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