

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Judge

RECEIVED

APR 28 2017

S.C. SUPREME COURT

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.

APPENDIX – VOLUME I

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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

v.

Bryon J. Dolan; Lisa S. Dolan; First Citizens Bank and
Trust Company, Inc.; Wells Fargo Bank, N.A.; Branch
Banking and Trust Company, Defendants,

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

Appellate Case No. 2014-001384

Appeal From Lexington County
R. Keith Kelly, Circuit Court Judge

Unpublished Opinion No. 2017-UP-031
Submitted November 1, 2016 – Filed January 11, 2017

AFFIRMED

Andrew Sims Radeker, of Harrison & Radeker, P.A., of
Columbia, for Appellants.

Charles Stuart Gwynne, Jr. and Jason David Wyman,
both of Rogers Townsend & Thomas, PC, of Columbia
for Respondent.

PER CURIAM: Bryon J. Dolan and Lisa S. Dolan (collectively, the Dolans) appeal the circuit court order denying their motion for a new trial after the circuit court granted FV-I, Inc., in trust for Morgan Stanley Mortgage Holdings LLC's (FV-I's) motion for a directed verdict on the Dolans' claim under the South Carolina Unfair Trade Practices Act (SCUTPA), and the jury returned a verdict for FV-I on the Dolans' breach of contract claim. On appeal, the Dolans argue the circuit court erred by (1) admitting into evidence loan payment history from a previous mortgage servicer, Saxon Servicing Group (Saxon), under the business records exception to hearsay; (2) allowing FV-I's sole witness, Loretta Poch, to testify regarding the content of the Saxon loan payment history; and (3) granting FV-I's motion for a directed verdict as to the Dolans' SCUTPA claim. We affirm.¹

1. We find the circuit court did not abuse its discretion by admitting into evidence the Saxon loan payment history under the business records exception to hearsay. *See Menne v. Keowee Key Prop. Owners' Ass'n, Inc.*, 368 S.C. 557, 568, 629 S.E.2d 690, 696 (Ct. App. 2006) ("The admission or exclusion of evidence is within the sound discretion of the [circuit] court, whose ruling will not be reversed on appeal absent an abuse of discretion.").

We find the Saxon loan payment history was relevant in this matter because it tended to establish whether the Dolans remitted sufficient funds to reinstate their mortgage. *See* Rule 401, SCRE ("Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Because the Saxon loan history was offered to prove the amount owed on the Dolans' mortgage, it constituted hearsay; however, we find the loan history fit squarely within the business records exception, making it admissible in these proceedings. *See* Rule 801(c), SCRE ("Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by [the South Carolina Rules of Evidence] . . ."); Rule 803(6), SCRE ("A . . . record . . . made at or near the time by, or from information transmitted by,

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

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 . . . record . . . all as shown by the testimony of the custodian or other qualified witness, unless the source of the information or the method or circumstance of preparation indicate lack of trustworthiness . . .").

We find FV-I demonstrated the Saxon loan history met the requirements for the circuit court to admit it under the business records exception. *See Ex parte Dep't of Health & Env'tl. Control*, 350 S.C.243, 249-50, 565 S.E.2d 293, 297 (2002) ("Rule 803(6), SCRE, provides that memorandum, reports, records, etc. in any form, of acts, events, conditions, or diagnoses, are admissible as long as they are (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court.").

We find the Saxon loan history was made at or near the time of the events recorded. *See* Rule 803(6), SCRE; *Dep't of Health & Env'tl. Control*, 350 S.C. at 249-50, 565 S.E.2d at 297 (requiring business records be "prepared near the time of the event recorded" in order to be admissible under the business records exception). 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. *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.").

We also find the Saxon loan history shows it was prepared in the regular course of business by Saxon employees with knowledge. *See* Rule 803(6), SCRE (providing business records are admissible "if kept in the course of a regularly conducted business activity" and were "made at or near the time by . . . a person with knowledge"); *Dep't of Health & Env'tl. Control*, 350 S.C. at 249-50, 565 S.E.2d at 297 (requiring business records be "prepared by someone with or from information transmitted by a person with knowledge . . . in the regular course of business" in

order to be admissible under the business records exception). 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.

Further, we find Poch was qualified to identify the Saxon loan history and to testify regarding the mode of its preparation, even though she did not personally participate in creating the loan history and Saxon did not employ her. *See* Rule 803(6), SCRE (providing a record custodian or other qualified witness must testify the evidence to be submitted under the business records exception meets the requirements of Rule 803(6), SCRE); *Dep't of Health & Envtl. Control*, 350 S.C. at 249-50, 565 S.E.2d at 297 (requiring business records be "identified by a qualified witness who can testify regarding the mode of preparation of the record" in order to be admissible under the business records exception). We find Poch was not required to have personally participated in the creation of the Saxon loan history nor to have been the custodian of those records at the time they were created. *See Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 73, 773 S.E.2d 607, 615 (Ct. App. 2015) ("[A] witness is qualified to testify about a business record, despite the fact he or she did not personally participate in creating the record and was not the custodian 'at or near the time' the record was made."). Rather, to be considered a "qualified witness," Poch needed only to convey information from a person with knowledge. *See id.* ("[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."). 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.

Finally, we find the circuit court considered the Saxon loan history trustworthy. *See* Rule 803(6), SCRE (providing a business record is admissible under Rule 803(6), SCRE, unless the source of the information or method of preparation indicate the business record to be admitted is not trustworthy); *Dep't of Health & Envtl. Control*, 350 S.C. at 249-50, 565 S.E.2d at 297 (requiring the circuit court to find records submitted pursuant to the business records exception are trustworthy).

Accordingly, we find the circuit court did not abuse its discretion by admitting the Saxon loan history under the business records exception contained in Rule 803(6), SCRE.

2. We find the circuit court erred by allowing Poch to offer testimony regarding the Dolans' mortgage and the amount required to bring the mortgage current; however, because Poch's testimony was cumulative, its admission did not prejudice the Dolans and therefore does not constitute reversible error. *See Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 470, 494 S.E.2d 835, 846 (Ct. App. 1997) ("[T]he improper admission of hearsay is reversible error only when the admission causes prejudice."); *id.* ("Where the hearsay is merely cumulative to other evidence, its admission is harmless."). We find Poch's 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. *See Deep Keel*, 413 S.C. at 71, 773 S.E.2d at 614 ("By testifying to a conclusion based only on statements [witness] read in documents, [witness] necessarily testified to the truth of those statements [and] [h]is testimony, therefore, was offered to prove the truth of the statements and was hearsay."). Even though Poch's testimony regarding the Dolans' mortgage and the amount required to bring the loan current was hearsay, we 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.

3. We find the circuit court properly granted a directed verdict for FV-I on the Dolans' SCUTPA claim. *See Wright v. Craft*, 372 S.C. 1, 22, 640 S.E.2d 486, 498 (Ct. App. 2006) ("When the evidence yields only one inference, a directed verdict in favor of the nonmoving party is proper."); *Guffey v. Columbia/Colleton Reg'l Hosp., Inc.*, 364 S.C. 158, 163, 612 S.E.2d 695, 697 (2005) ("On review, [appellate courts] will affirm a directed verdict where there is no evidence on any one element of the alleged cause of action."). We find the Dolans failed to show the second prong to recover under SCUTPA: FV-I's conduct affected the public interest. *See Wright*, 372 S.C. at 23, 640 S.E.2d at 498 ("To recover in an action under [SCUTPA], the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected the public interest; and (3) the plaintiff suffered monetary or property

loss as a result of the defendant's unfair or deceptive act(s)."). Here, 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. *See Crary v. Djebelli*, 329 S.C. 385, 387, 496 S.E.2d 21, 23 (1998) ("Unfair or deceptive acts or practices have an impact upon the public interest if the acts or practices have the potential for repetition."); *id.* ("The potential for repetition may be shown in two ways: [(1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or [(2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts."); *id.* ("[Our supreme court] specifically declined . . . to hold that these are the only means for showing potential repetition and stated each case must be evaluated on its own merits."). 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. Therefore, we find the Dolans failed to show FV-I's actions affected the public interest, and the circuit court properly granted FV-I's motion for a directed verdict on the Dolans' SCUTPA claim.

AFFIRMED.

WILLIAMS, THOMAS, and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

RECEIVED

JAN 26 2017

R. Keith Kelly, Circuit Judge

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 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.

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.

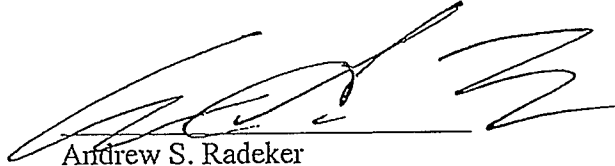
V. Rehearing *en banc* would be proper.

"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,

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

Andrew S. Radeker
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Attorney for Appellants

January 26, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Judge

Appellate Case No. 2014-001384

RECEIVED

JAN 26 2017

SC Court of Appeals

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

v.

Bryon J. Dolan; Lisa S. Dolan; First Citizens Bank and Trust Company, Inc.; Wells
Fargo Bank, N.A.; Branch Banking and Trust Company, Defendants,

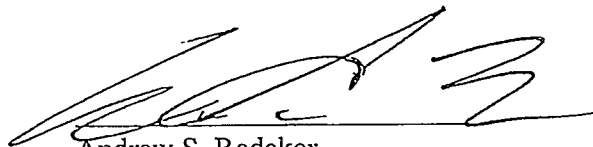
Of whom Bryon J. Dolan and Lisa S. Dolan are the.....Appellants.

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:

Charles S. Gwynne, Jr., Esq.
Jason D. Wyman, Esq.
Rogers Townsend & Thomas, PC
P.O. Box 100200
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January 26, 2017



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Attorney for Appellants

The South Carolina Court of Appeals

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

v.

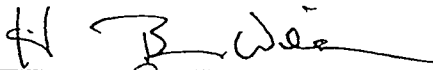
Bryon J. Dolan; Lisa S. Dolan; First Citizens Bank and Trust Company, Inc.; Wells Fargo Bank, N.A.; Branch Banking and Trust Company, Defendants,

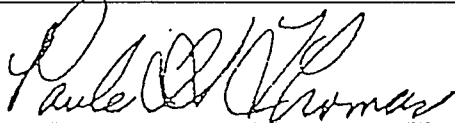
Of whom Bryon J. Dolan and Lisa S. Dolan are the Appellants.

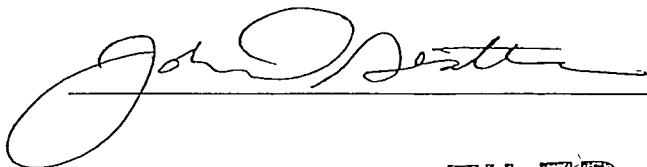
Appellate Case No. 2014-001384

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


_____ J.


_____ J.


_____ J.

Columbia, South Carolina

FILED

March 30, 2017 AS

cc:

Andrew Sims Radeker, Esquire

Charles Stuart Gwynne, Jr., Esquire

Jason David Wyman, Esquire



The South Carolina Court of Appeals

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March 30, 2017

Mr. Andrew Sims Radeker, Esquire
PO Box 50143
Columbia SC 29250

Re: FV-I, Inc. v. Bryon J. Dolan
Appellate Case No. 2014-001384

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Jenny A. Kitchings".

CLERK

cc: Charles Stuart Gwynne, Jr., Esquire
Jason David Wyman, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Judge

Appellate Case No.: 2014-0001384
Common Pleas Case No. 2012-CP-32-2816

RECEIVED
JUL 01 2015
SC Court of Appeals

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

v.

Bryon J. Dolan; Lisa S. Dolan; First Citizens Bank and Trust Company, Inc.; Wells
Fargo Bank, N.A.; Branch Banking and Trust Company, Defendants,

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

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES

- I. Especially when coupled with the improper admission of testimony by the Respondent's only witness, does the trial court's admission of a hearsay document – the linchpin of the Respondent's case – warrant a new trial and require reversal?
- II. Did the trial court commit reversible error by allowing the Respondent's sole witness to testify to the content of documents, particularly since those documents were either inadmissible or unadmitted?
- III. Did the trial court err in granting the Respondent's directed verdict motion as to the Appellants' claim for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, where there was evidence tending to show its violation by the Respondent?

STATEMENT OF THE CASE

This is a case in which the Respondent (hereinafter “FV-I”) seeks mortgage foreclosure and the Appellants (hereinafter “the Dolans”) asserted both legal and equitable counterclaims. (R. pp. 30-43.) The Dolans’ legal counterclaims were for FV-I’s breach of contract and FV-I’s violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (hereinafter “UTPA”). (R. pp. 38-42.)

FV-I moved to strike the Dolans’ jury demand, and the Honorable Edgar W. Dickson, in deciding that the Dolans’ breach of contract counterclaim is compulsory, ruled that “[i]f what the [Dolans] allege is true, then they are not in default of the note and mortgage, and [FV-I] thus cannot enforce the note or be granted foreclosure of the mortgage.” (R. pp. 7-8.) Judge Dickson ruled that the UTPA claim was not compulsory, but the parties later agreed to let that claim be tried to the jury as well. (R. pp. 8, 9, p. 82 ln. 19 through p. 83 ln. 10.)

This case was bifurcated by consent order on the cusp of the jury trial, with the Dolans’ at-law counterclaims tried to a jury before the Honorable R. Keith Kelly on April 17, 2014, and the foreclosure claim and the Dolans’ claim for an accounting referred to the Honorable James O. Spence, Master-in-Equity for Lexington County, to be tried later. (R. pp. 10-11.) 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. (R. p. 89 ln. 9 through p. 90 ln. 11.) The Dolans presented a memorandum of law concerning several matters anticipated to come up during the trial, among them matters subject of this appeal. (R. pp. 430-42.)

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 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. (R. pp. 112-22, p. 130 ln. 8 through p. 131 ln. 2, p. 149 ln. 5-11, p. 187 ln. 22 through p. 188 ln. 19, p. 195 ln. 4-7, p. 196 ln. 18-20, p. 221 ln. 20-25, pp. 276-89, 395-96, 428-29.) (This was in addition to two \$3,000.00 payments to follow. (R. p. 214 ln. 17-23.)) 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. (R. p. 122 ln. 11 through p. 227 ln. 5, pp. 388-429.) 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 with FV-I to bring the loan current. (R. p. 130 ln. 8 through p. 131 ln. 2, p. 149 ln. 5-11, p. 187 ln. 22 through p. 188 ln. 19, p. 195 ln. 4-7, p. 196 ln. 18-20, p. 221 ln. 20-25.) Mr. Dolan testified, in accordance with emails exchanged between him and Mr. Flanagan shown in Defendants' Exhibit 18, that Mr. Flanagan had originally presented the amount as \$69,000.00, but that was changed to \$65,250.00

plus two payments of in order to accommodate a junior lienor's partial payment when the mortgage release was done. (R. p. 187 ln. 22 through p. 188 ln. 4.) In an email, Mr. Flanagan refers to "the \$65,250 (revised amount due Saxon less the 3,7500." (R. p. 428.) Saxon received the \$65,250.00 payment on September 30, 2011. (R. p. 397.)

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. (R. pp. 398-400.) 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. 133 through p. 136 ln. 1, p. 137 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 (R. pp. 332-40.) Through its servicer, Saxon, FV-I had the foreclosure judgment in then-pending foreclosure action undone and the case "closed" via a consent order it proposed that 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[.]" (R. pp. 410-14 (emphasis added).) The Dolans introduced Saxon's servicing notes from the time

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 (R p 126 ln 18 through p. 127 ln 5, p. 232 ln. 2-9.) Though Saxon controlled the foreclosure action, BB&T continued to be listed as the plaintiff in the case. (R. pp. 410-14.)

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. (R. p. 405.) 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.” (R. p. 406.) 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[.]” (R. p. 408.) 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[.]” (R. pp. 408-09.) When Saxon returned the Dolans’ \$3,000.00 payment, it sent a letter back to the Dolans with the check. (R. pp. 403-04.) 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.” (R. p. 403.) 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.” (R. pp. 417, 418.)

The Dolans also called the sole witness FV-I brought to the trial, Lorretta Poch, in their case-in-chief. (R p. 230 ln. 3 through p. 236 ln. 20.) Ms. Poch is an employee of Specialized Loan Servicing, the present servicer of the subject loan. (R. p. 230 ln. 10-13.) Ms. Poch testified that she had never worked for either of the loan’s two previous servicers, BB&T and Saxon. (R. p. 231 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. (R. p. 232 ln. 16-18.) Ms. Poch had never observed how Saxon implemented any of its procedures. (R p. 232 ln. 24 through p. 233 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. (R. p. 233 ln. 2-5; p. 233 ln. 12 through p. 234 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. (R. p. 237 ln. 17 through p. 244 ln. 23.)

FV-I called Ms. Poch in its case. (R. p. 245 ln. 10 through p. 274 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. (R. p. 249 ln. 11 through p. 250 ln. 14, p. 251 ln. 6 through p. 252 ln. 2, p. 252 ln. 22 through p. 256 ln. 4, p. 263 ln. 3 through p. 270 ln. 6, p. 271 ln. 13 through p. 272 ln. 13.) This was over the Dolans' objections. (R. p. 251 ln. 20 through p. 252 ln. 19, p. 256 ln. 3 through p. 260 ln. 9.) Though Ms. Poch had not testified as to how Saxon's records were made or kept, the court permitted the introduction through her testimony of a *Saxon*-made loan history document, Plaintiff's Exhibit 12, into evidence. (R. p. 260 ln. 10 through p. 262 ln. 22, p. 264 ln. 24 through p. 265 ln. 7, pp. 372-85.) This was also over the Dolans' objections. (R. p. 260 ln. 10 through p. 262 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 were insufficient to bring the loan current. (R. p. 233 ln. 2-5, p. 233 ln. 12 through p. 234 ln. 16, p. 245 ln. 16 through p. 274 ln. 24, pp. 372-85.)

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). (R. pp. 1, 44-58.)

The Dolans moved for reconsideration of the order denying their motion for a new trial. (R. pp. 2, 59-70.) 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. (R. pp. 59-70.) The trial court denied that motion, and this appeal followed. (R. p. 3.)

STATEMENT OF FACTS

The Dolans’ sole purpose in calling Loretta 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.

STANDARD OF REVIEW

A trial court’s decision to admit or exclude evidence will not be disturbed on appeal unless that ruling was an abuse of discretion. Conner v. City of Forest Acres, 363 S.C. 460, 611 S.E.2d 905, 908 (2005). “An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support. To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, *i.e.*, there is a reasonable probability the jury’s verdict was influenced by the wrongly admitted or excluded evidence.” Id. (internal citations omitted).

“On appeal from a directed verdict, a court must view the evidence and all its reasonable inferences in the light most favorable to the nonmoving party. If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should be denied.” Shelton v. Oscar Mayer Foods Corp., 319 S.C. 81, 459 S.E.2d 851, 855 (Ct. App. 1995), *aff’d* 325 S.C. 248, 481 S.E.2d 706 (1997). “The trial court must eliminate from its consideration all evidence contrary to or in conflict with the evidence favorable to the nonmoving party and give to the nonmoving party every favorable inference that the facts reasonably suggest.” Small v. Pioneer Machinery, Inc., 316 S.C. 479, 482, 450 S.E.2d 609, 611 (Ct. App. 1994).

A motion for directed verdict goes to the entire case and may be granted only when the evidence raised no issue for the jury as to liability. When the evidence yields only one inference, a directed verdict in favor of the moving party is proper. The trial court must deny the motion when either the evidence yields more than one inference or its inference is in doubt.

When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. The issue must be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror. The appellate court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor. A directed verdict is warranted when the case presents only questions of law and should be allowed only if the evidence would not be legally sufficient to sustain a verdict for the opposite party.

If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury.

Estate of Haley ex rel. Haley v. Brown, 370 S.C. 240, 252-523, 634 S.E.2d 62, 68-69 (Ct. App. 2006) (internal citations omitted).

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 Plaintiff's Exhibit 12, 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.

I. The court's admission of a hearsay document – the linchpin of FV-I's defense – warrants a new trial and requires reversal.

"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. In the instant case, the trial court ignored this mandate and altogether swept aside necessary elements of the business records exception to the hearsay rule.

Over objection by the Dolans, the trial court admitted FV-I's Exhibit 12, a document that was generated by Saxon Mortgage Services, the preceding servicer of the subject loan. (R. p. 260 ln. 10 through p. 262 ln. 22, pp. 372-85.) No testimony about how this record was prepared or how any of Saxon's records were prepared was ever adduced at trial. (R. p. 245 ln. 10 through p. 274 ln. 17.) FV-I claimed that this document meets the elements of the business records exception to the hearsay rule.

(R. p. 260 ln. 18-24.) The trial court ruled that based on Loretta Poch, the Plaintiff's sole witness, being the custodian of records for this loan at Specialized Loan Servicing (the present servicer of the subject loan), the document met the business records exception and was admissible. (R. p. 256 ln. 16-20, p. 261 ln. 1-9, p. 164 ln. 20-22.) (The trial court also seemed to focus on the records being electronic in determining that they met the requirements of Rule 803(6), SCRE. (R. p. 256 ln. 24 through p. 257 ln. 2.)) This was despite Ms. Poch having testified that she had never worked at BB&T (the first servicer of the loan) or Saxon, despite her having testified that she had not observed how either of those companies created or maintained records, and despite no testimony at all being offered as to when, by whom, or how this record or any entry in it was made. (R. p. 231 ln. 8-12, p. 232 ln. 16 through p. 233 ln. 1, p. 245 ln. 10 through p. 274 ln. 17.) This was prejudicial error. This document was simply inadmissible hearsay. It was all that was offered to attempt to show that the purported escrow advances FV-I claimed as preventing the loan from being brought current with the \$65,520.00 payment had any particular transactions to back up those figures and the only document offered in an attempt to show that the status of the loan was what FV-I claimed it was. (R. p. 264 ln. 18 through p. 269 ln. 1, pp. 372-85.) Especially in light of the fact that the substantive testimony FV-I elicited from Ms. Poch about the subject account was all objectionable and should not have been admitted either, as discussed below, admission of this document prejudiced the Dolans.

At the root of the trial court's error in this regard is a misconception of what is known as the "business records exception" to the rule against the admission of

hearsay. “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801(c), SCRE. Hearsay is generally inadmissible. Rule 802, SCRE. One exception to the hearsay rule is usually called the “business records exception,” though merely whether the document involved is a record of a business is not what must be shown to satisfy the exception. Rule 803(6), SCRE; S.C. Code Ann. § 19-5-510. The elements of this hearsay exception 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:

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.

To authenticate a document as falling under the “business records” exception, a witness qualified to do so must provide sufficient testimony to establish *each*

element of the exception. Connelly v. Wometco Enters., Inc., 314 S.C. 188, 192, 442 S.E.2d 204, 206 (Ct. App. 1994). Otherwise, the document is simply inadmissible hearsay. Id. The rule refers to a custodian of records as an example of a person who often would be able to provide the information necessary to lay a foundation of all the elements of this hearsay exception; the rule is *not* that all the elements of the exception must be met unless the document is offered through a records custodian, in which case it becomes automatically admissible. The rule is not that its elements must be satisfied unless the records are electronic, in which case they become automatically admissible. It seems the trial court here believed that one or both of these erroneous premises was the law. Its ruling ignored that evidence tending to establish necessary elements of this hearsay exception was glaringly absent from the record adduced at trial.

As this court has observed, when a proponent of a purported business record offers it “without evidence about the manner in which it is prepared or the source of its information” that “does not meet the requirements in either section 19-5-510 or Rule 803(6), SCRE.” Rice, 375 S.C. at 331.

It is, of course, necessary that the witness have knowledge of how the record was prepared, or at least that some evidence show how the record was prepared. State v. Sarvis, 317 S.C. 102, 107, 450 S.E.2d 606, 609 (Ct. App. 1994). This evidence must be sufficient to establish that the document was “prepared by someone with or from information transmitted by a person with knowledge[.]” Rule 803(6)(2), SCRE. No evidence of who prepared Plaintiff’s Exhibit 12 or any entry in it was adduced in this case.

Further, “[b]usiness record entries must have been made at or near the time of the act to which they relate; the purpose of this mandate is to aid in establishing that the record was honestly and fairly kept.” Rice, 375 S.C. at 332. Accordingly, testimony must be adduced from the witness as to when the record entries were made. Id. No such evidence was adduced here.

The Supreme Court of Missouri has held that “a document that is prepared by one business cannot qualify for the business records exception *merely* based on another business’s records custodian testifying that it appears in the files of the business that did not create the record.” CACH, LLC v. Askew, 358 S.W.3d 58, 63 (Mo. 2012) (emphasis added). This is in accord with the law of other states as well, at least of Wisconsin, Texas, Pennsylvania, and New York (and probably others). Palisades Collection, LLC v. Kalal, 781 N.W.2d 503, 510 (Wis. Ct. App. 2010) (to authenticate under business records exception, witness “must have personal knowledge of how the account statements were prepared and that they were prepared in the ordinary course of [the original creditor’s] business”); Riddle v. Unifund CCR Partners, 298 S.W.3d 780, 782-83 (Tex. App. 2009) (“the witness must have personal knowledge of the manner in which the records were prepared”); Martinez v. Midland Credit Mgmt., Inc., 250 S.E.3d 481, 485 (Tex. App. 2008) (purported business records inadmissible where witness “does not provide any information that would indicate that he (or she) is qualified to testify as to the record-keeping practices of the ‘predecessor’”); Standard Textile Co. v. Nat’l. Equip. Rental, Ltd., 437 N.Y.S.2d 398, 398 (N.Y. App. Div. 1981) (plaintiff’s employee “was not a qualified witness to testify as to the record keeping of another entity” absent personal knowledge of the

document's creation); Commonwealth Financial Systems v. Smith, 2001 PA Super 30, *6 (Pa. Super Ct. 2011) (witness "could not say for certain whether [industry] requirements had actually been followed in the preparation and maintenance of those records because, simply put, he was never in a position to know").

It appears that South Carolina law is consistent with the law of these sister states on this point. Our Supreme Court has 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. State v. McFarlane, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983).

While FV-I argued that Twelfth RMA Partners, L.P. v. Nat. Safe Corp., 335 S.C. 635, 518 S.E.2d 44 (Ct. App. 1999), supports the admission of the Saxon loan history document (R. p. 260 ln. 18-23), Twelfth RMA Partners is readily distinguishable from the instant case. In Twelfth RMA Partners, the basis of the relevant argument on appeal was that the witness had not been the records custodian at or near the time the records were made (which is not a requirement of Rule 803(6), SCRE, or S.C. Code Ann. § 19-5-510), and the trial record apparently showed that the records were created by "a person 'with knowledge' at the time the records were created[.]" 335 S.C. at 642. In the instant case, no showing about who made the entries shown in the document was made at all.

Here, the court simply substituted a finding that Ms. Poch was the custodian of records and a finding that the records were electronic for the required findings that each element of the business records exception was satisfied. (R. p. 256 ln. 16

through p. 257 ln. 2, p. 261 ln. 1-9, p. 262 ln. 20-22.) Being a records custodian simply puts a person in a position to testify, if she can, about how a record was prepared. Here, Ms. Poch's own testimony showed that she was incapable of providing any testimony about the first three elements of the business records exception, nor was any testimony having any tendency to speak toward satisfaction of any of those three elements adduced. (R. p. 231 ln. 8-12, p. 232 ln. 16 through p. 233 ln. 1, p. 245 ln. 10 through p. 274 ln. 17.) (Also, no evidence was adduced that Ms. Poch was a custodian of any records – not that it matters.)

Erroneous evidentiary rulings based on conflating requirements of evidence law constitute abuses of discretion. See State v. Page, 406 S.C. 272, 287, 290, 750 S.E.2d 623, 631, 632 (Ct. App. 2013). The trial court either conflated the fourth requirement of the business records exception with the preceding three requirements or ignored those three requirements. (R. p. 256 ln. 16 through p. 257 ln. 2, p. 261 ln. 1-9, p. 262 ln. 20-22.) The jury received an inadmissible and objected-to hearsay document for use in its deliberations. (R. pp. 372-85.) It was the only document offered by FV-I to attempt to show that there was anything to back up its contention that the \$65,520.00 payment had not brought the loan current or been treated as having done so. (R. p. 264 ln. 18 through p. 269 ln. 1, pp. 372-85.) This was prejudicial error that warrants a new trial.

II. The trial court only compounded its error by letting Ms. Poch testify as to the content of inadmissible documents, most of which were not even offered into evidence by FV-I, much less admitted.

Ordinarily, a witness may not testify as to the contents of a writing. Rule 1004, SCRE; W.R. Grace & Co. v. La Munion, 245 S.C. 1, 138 S.E.2d 337 (1964);

Moore v. Postal Telegraph-Cable Co., 202 S.C. 225, 24 S.E.2d 361 (1943); Mayfield v. So. R. Co., 85 S.C. 165, 67 S.E. 132 (1910); Rose v. Winnsboro Nat'l. Bank, 41 S.C. 191, 18 S.E. 487 (1894). This rule is, for some reason, often called the “best evidence” rule, perhaps on the rationale that the writing is the best evidence of its contents.

Ms. Poch testified that her only knowledge of the subject loan came from reading written records of the loan’s servicers. (R. p. 233 ln. 2-5, p. 233 ln. 12 through p. 234 ln. 16.) All she knows is what the writings say. (R. p. 233 ln. 2-5, p. 233 ln. 12 through p. 234 ln. 16.) When the Dolans objected to her testimony about the substantive status of and history of the loan, the trial court overruled those objections and allowed her to give testimony that her own words establish violated the best evidence rule. (R. p. 251 ln. 20 through p. 252 ln. 19, p. 256 ln. 3 through p. 260 ln. 9.) This was the only testimony offered to contradict Mr. Dolan’s testimony and the only testimony offered for the purpose of convincing the jury that FV-I was right about the status of the account. (R. p. 233 ln. 2-5, p. 233 ln. 12 through p. 234 ln. 16, p. 245 ln. 16 through p. 274 ln. 24.) To admit this testimony was error, prejudiced the Dolans, and warrants a new trial.

A *witness* is exactly that: someone who, through what he or she has witnessed (i.e., has observed firsthand), has personal knowledge of a matter at issue in a case. Rule 602, SCRE; M. B. A. F. B. Fed. Credit Union v. Cumis Ins. Soc., Inc., 681 F.2d 930 (4th Cir. 1982); State v. Needs, 508 S.E.2d 857 (1998); State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996). Merely because a person occupies a certain position or status within a company is not sufficient to make that person a competent witness.

Englebert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 433 S.E.2d 871 (Ct. App. 1993). The trial court disagreed, ruling Ms. Poch was competent to offer testimony of the content of records because it found she was the custodian of the records. (R. p. 251 ln. 20 through p. 252 ln. 19, p. 256 ln. 3 through p. 260 ln. 9.)

As Ms. Poch testified, her only knowledge of the loan subject of this case comes from reading documents; everything she had to say about this loan was, necessarily, the content of a document. (R. p. 233 ln. 2-5, p. 233 ln. 12 through p. 234 ln. 16.) The following excerpts from Ms. Poch's testimony illustrate the error in allowing her to testify from apparent memory of what inadmissible and unadmitted documents stated:

Q: And how fair would it be to say that anything you know about what Saxon did concerning this loan or any loan just comes from looking at documents. Pretty fair?

A: That is fair, yes.

...

Q: ... So when did Specialized Loan Servicing become the servicer for this loan?

A: January 24, 2012.

Q: And so any information that Specialized Loan Servicing has about this loan from before that comes from some prior servicer's records, right?

A: That's right.

...

Q: And do you have personal knowledge of this loan based on your review of those records?

A: Yes, I do.

...

Q: Show you what's been marked as Exhibit 4. According to the complaint – which is a copy of the 2009 complaint – according to the complaint that was filed in paragraph 21, it states that the loan was due for December 2008. Do you see that?

A: Yes.

Q: Is that what the records show that you reviewed?

A: Yes.

...

Q: Did Saxon apply the \$65,250 pursuant to the terms of the loan documents?

A: Yes, they did.

...

Q: Was the \$65,250 enough to bring the loan current?

A: No, it wasn't. The funds were received in September of 2011 and it was sufficient to make payment through February of 2011. So the next payment was due March 2011.

...

Q: The reinstatement quote that been discussed dated October 12, 2011 that was attached to that e-mail states what the reinstatement amount would have been, correct?

A: Yes, it does.

Q: That's after the \$65,250 was applied to the loan; is that correct?

A: That's correct.

Q: . . . If Saxon's records are wrong, then that means what you know about this case because it's based on those records is also wrong, correct?

A: That would be correct.

(R. p. 233 ln. 2-5, p. 233 ln. 9-15, p. 247 ln. 7-9, p. 251 ln. 20 through p. 252 ln. 2, p. 264 ln. 18-20, p. 266 ln. 13-16, p. 268 ln. 20 through p. 269 ln. 1, p. 273 ln. 21-25.)

Ms. Poch gave no substantive testimony about the loan involved in this case that actually was admissible. Hers was the only testimony placed before the jury that had a tendency to indicate that FV-I was right about its factual contentions in this case. There is a reasonable probability the jury's verdict was influenced by this wrongly admitted evidence. For the court to allow this testimony was reversible error.

III. The trial court erred in granting FV-I's motion for a directed verdict as to the UTPA claim.

The trial court granted FV-I's motion for a directed verdict as to the Dolan's UTPA claim, apparently on the ground that there was not even a scintilla of evidence tending to show an impact on the public interest. (R. p. 237 ln. 17 through p. 240 ln. 17.) This was error.

An action for violation of the 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 has a South Carolina appellate court held that repetition or potential for repetition is a necessary element of a UTPA cause of action; rather, our courts have held that showing potential for repetition is *one way* in which a party can satisfy the public interest requirement. Id. As the trial court's ruling granting FV-I's directed verdict motion on this claim appears to have been based on the idea that what was at issue was a unique situation that was unlikely to be repeated, this is particularly important. (R. p. 239 ln. 20-23.) The 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; however, it was only necessary for the Dolans to adduce evidence of impact on the public

interest, not potential for repetition, in order to survive FV-I's directed verdict motion. (R. p. 238 ln. 4-20.)

FV-I argued that Robertson v. First Union National Bank, 350 S.C. 339, 565 S.E.2d 309 (Ct. App. 2002), stands for the proposition that a wrong by a mortgage lender to a mortgage borrower is merely a private wrong, apparently arguing that *as a matter of law*. (R. p. 237 ln. 20 through p. 238 ln. 1, p. 239 ln. 20 through p. 240 ln. 8.) Robertson does not stand for that proposition, however. Robertson contains no language to this effect. In Robertson, this court upheld a grant of summary judgment against a bank on a UTPA claim because the record contained no evidence of an unfair or deceptive act in the conduct of trade or commerce by the bank. Id. at 351 & n. 1. Robertson simply does not stand for the proposition of law that a wrong by a mortgage lender to a mortgage borrower cannot involve the public interest.

In a typical case where a contract is breached, there will be no effect on the public interest. The cases discussing a lack of liability under the UTPA for a mere breach of contract, even an intentional one, focus on the isolated nature of a breach of contract under typical circumstances, which makes potential for repetition or other impact on the public interest all but impossible. See Perry v. Green, 313 S.C. 250, 437 S.E.2d 150 (Ct. App. 1993); Columbia East Assocs. V. Bi-Lo, Inc., 299 S.C. 515, 522, 386 S.E.2d 259, 263 (Ct. App. 1989); S.C. Nat. Bank v. Silks, 295 S.C. 107, 111, 367 S.E.2d 421, 423 (Ct. App. 1988); Key Co., Inc. v. Fameco Distributors, Inc., 292 S.C. 524, 357 S.E.2d 476 (Ct. App. 1987). That does not, however, mean that the presence of a contractual relationship between the parties and a breach of that contract by one of them will rule out liability of the breaching party under the UTPA.

In a case against a group of landlords, the landlords tried to make that very argument, and this court rejected it. Burbach v. Investors Mgmt. Corp. Intl., 326 S.C. 492, 496-97, 484 S.E.2d 119, 121 (Ct. App. 1997).

When the “mere breach of contract”/“intentional breach of contract” cases discuss the principle at issue, they state that the UTPA “is not available to redress a private wrong *where the public interest is unaffected*” and that “a deliberate or intentional breach of a valid contract, *without more*, does not constitute a violation of the Unfair Trade Practices Act.” Columbia East Assocs., 299 S.C. at 522 (emphasis added). To prove the “more[,]” to prove that the public interest is affected, all one needs to show is potential – just *potential* – for repetition. Crary, 329 S.C. at 388.

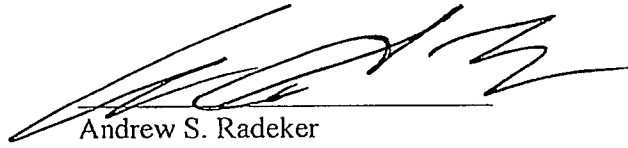
The Dolans showed that. FV-I could just as easily misrepresent to another borrower the amount to bring a loan current, and the public has an interest in mortgage servicers not deceiving borrowers about the status of their loans.

The trial court’s decision to grant a directed verdict on the UTPA cause of action was reversible error. A new trial on this claim is warranted.

CONCLUSION

The trial court made prejudicial and erroneous evidentiary rulings, essentially permitting FV-I to defend against the Dolans’ case almost entirely on the basis of inadmissible evidence. Further, the court erred in granting FV-I’s directed verdict on the Dolans’ UTPA claim. This court should reverse and remand this case for a new trial.

Respectfully submitted,

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

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July 1, 2015

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

RECEIVED

JUL 01 2015

R. Keith Kelly, Circuit Judge

SC Court of Appeals

Appellate Case No. 2014-001384
Common Pleas Case No. 2012-CP-32-2816

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

v.

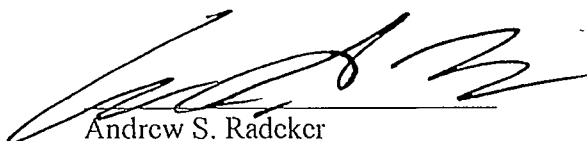
, Bryon J. Dolan; Lisa S. Dolan; First Citizens Bank and Trust Company, Inc.; Wells
Fargo Bank, N.A.; Branch Banking and Trust Company, Defendants,

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

CERTIFICATE OF COUNSEL

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

Respectfully submitted,



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July 1, 2015

THE STATE OF SOUTH CAROLINA
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APPEAL FROM LEXINGTON COUNTY
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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.....Appellants.

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July 1, 2015

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STATEMENT OF ISSUES ON APPEAL

- I. ARE THE APPELLANTS ENTITLED TO IMMEDIATELY APPEAL THE JURY VERDICT AND DIRECTED VERDICT OF THE LEGAL COUNTERCLAIMS PRIOR TO A TRIAL ON THE REMAINING EQUITABLE CLAIMS IN THE CASE?
- II. DID THE TRIAL COURT ERR IN ADMITTING INTO EVIDENCE THE BUSINESS RECORDS OF THE PLAINTIFF'S LOAN SERVICERS AND ALLOWING THE WITNESS FOR THE CURRENT LOAN SERVICER TO TESTIFY ABOUT THE BUSINESS RECORDS?
- III. DID THE TRIAL COURT ERR IN GRANTING A DIRECTED VERDICT IN FAVOR OF THE RESPONDENT ON THE APPELLANTS' 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. Respondent, FV-I, Inc., in trust for Morgan Stanley Mortgage Capital Holdings LLC, filed its Lis Pendens, Summons, and Complaint on July 9, 2012. (R. pp. 28-34). Appellants, Bryon J. Dolan and Lisa S. Dolan, filed an Answer and Counterclaim on August 10, 2012. Appellants asserted an equitable counterclaim for Accounting, and legal counterclaims for Breach of Contract and violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"). (R. pp. 36-43).

By Order filed May 1, 2014, Appellants and Respondent agreed and stipulated to bifurcate the action pursuant to Rule 42(b), SCRPC, thereby severing Appellants' legal counterclaims for Breach of Contract and SCUTPA from Respondent's foreclosure claim and Appellants' 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. (R. pp. 10-11).

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 Respondent on the SCUTPA claim, and a jury verdict was returned in favor of Respondent on the Breach of Contract counterclaim. (R. p. 237, line 16 - p. 240, line 17; p. 1). Subsequently, Judge Kelly denied Appellants' motion for a new trial and motion to reconsider the order. (R. pp. 2-3).

On June 25, 2014, Appellants' filed a Notice of Appeal to the South Carolina Court of Appeals indicating that they intend to appeal the orders of the Honorable R. Keith Kelly.

On July 14, 2014, Respondent filed a Motion to Dismiss Appellants' Appeal due to the fact that there has not been a final judgment on the equitable claims. (R. pp. 71-74). On August 25, 2014, the Court of Appeals issued an Order denying Respondent's Motion to Dismiss but did not address the underlying merits of the motion. The Court of Appeal's Order allowed the parties to address the appealability of the legal counterclaims in their briefs to the court. (R. pp. 25-26).

On March 16, 2015, Appellants' filed their Initial Brief and Designation of Matter to be Included in the Record on appeal.

STATEMENT OF THE FACTS

This appeal involves the outcome of the jury trial held on April 17, 2014 on the Appellants' two legal counterclaims for Breach of Contract and violation of the South Carolina Unfair Trade Practices Act ("SCUTPA").

The main issue at trial was the interpretation of a letter dated September 22, 2011 ("Letter"). (R. pp. 395-96). Appellants' argument at trial was that the Letter created a contract whereby the Plaintiff'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. (R. p. 113, line 17 – p. 114, line 4; p. 187, line 22 – p. 188, line 4). Respondent'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 Appellants were required to attempt to sell their property and had until

December 31, 2011 in order to do so; if the Appellants were unable to sell the property, the time period could be extended for 2 months at Saxon's sole discretion in exchange for the Appellants making two monthly payments of \$3,000; and 3) the Appellants were given the option to submit a loan modification packet. (R. p. 119, line 20 – p. 121, line 23; p. 265, line 11 – p. 266, line 16; p. 267, lines 2-24).

In 1999, Mr. Dolan purchased a tract of land on Lake Murray in Lexington County. (R. p. 161, line 24 – p. 162, 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). (R. p. 163, line 7 – p. 164, line 12). Mr. Dolan built houses on each parcel and each parcel was secured by a separate note and mortgage. (R. p. 164, line 16 – p. 165, line 15). By 2009, both properties were in foreclosure. (R. p. 167, line 11 – p. 168, 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. (R. p. 168, line 16-21; pp. 349-352).

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. (R. p. 173, line 11 – p. 177, 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. (R. p. 173, line 7-10). Due to Respondent's Mortgage,

Saxon needed to consent to the partial release. (R. p. 178, 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. (R. p. 181, line 22 – p. 183, line 22; pp. 395-96). In addition, Mr. Dolan was given time to secure a buyer for 540 Windward Point Court. (R. p. 189, line 13 – p. 190, line 14; pp. 395-96).

Saxon received the \$65,250 in September 2011 and applied the proceeds to the loan. (R. p. 264 lines 10-23). However, the proceeds were not sufficient to bring the loan current. (R. p. 266, lines 13-16; pp. 372-85). After applying the proceeds from the September 2011 transaction, the loan remained in default and due for the March 2011 payment. (R. p. 266, 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. (R. p. 171, line 15 – p. 172, line 2; p. 284, line 22 – p. 285, line 9).

Due to the uncured default, the subject foreclosure action related to 540 Windward Point Court was filed on July 9, 2012. (R. pp. 28-34).

On or about January 24, 2012, Specialized Loan Servicing ("SLS") became the loan server for the Appellants' loan. (R. p. 233, lines 9-11). In accordance with industry standard procedures, the Appellant's loan information, including the payment history, was transferred from Saxon to SLS. (R. p. 233, line 19 – p. 234, line 18; p. 250, line 18 – p. 251, 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. (R. p. 246, lines 2-18).

At the trial on April 17, 2014, the witness for the Respondent was Loretta Poch. At the trial, Ms. Poch testify about the Appellants' 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. (R. p. 264, lines 10-23; p. 266, lines 13-16). Ms. Poch also testified that SLS and the prior loan servicer fully complied with the agreement. (R. p. 269, lines 7-17).

STANDARD OF REVIEW

The Court may affirm for any ground appearing in the record. Rule 220(c), SCAR; see also I'On v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000)).

“The admission or exclusion of evidence is within the sound discretion of the trial court and the trial court's decision will not be disturbed on appeal absent an abuse of discretion. Conner v. City of Forest Acres, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005). “An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support.” Id. “To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence.” Id.

‘In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses no evidence that reasonably supports the jury's findings.’ Solanki v. Wal-Mart Store # 2806, 410 S.C.

229, 235, 763 S.E.2d 615, 618 (Ct.App.2014) (citing Wright v. Craft, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct.App.2006)).

“In ruling on a motion for a directed verdict, the trial court must view the evidence in the light most favorable to the nonmoving party. Hartfield V. The Getaway Lounge & Grill, Inc., 388 S.C. 407, 415, 697 S.E.2d 558, 562 (2010). “A motion for a directed verdict goes to the entire case and may be granted only when the evidence raises no issue for the jury as to liability.” Id. “This Court will reverse the trial court's rulings on directed verdict motions only where there is no evidence to support the rulings or where the rulings are controlled by an error of law.” Id.

ARGUMENTS

I. THE APPELLANTS ARE NOT ENTITLED TO IMMEDIATELY APPEAL THE JURY VERDICT AND DIRECTED VERDICT OF THE LEGAL COUNTERCLAIMS BECAUSE THERE HAS NOT BEEN A FULL TRIAL ON THE REMAINING EQUITABLE CLAIMS IN THE CASE

The equitable foreclosure claim and equitable counterclaim for Accounting have yet to be heard or decided by the Master-in-Equity, and thus, a final judgment in the case has yet to be rendered.

Barring some statutory exceptions not applicable here, South Carolina courts have repeatedly held that as a general rule, appeal may only be taken after a final judgment has been rendered. Ex parte Wilson, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005) (citing Culbertson v. Clemens, 332 S.C. 20, 23, 471 S.E.2d 163, 164 (1996). “Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final.” Id. (citing Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 336, 426 S.E.2d 777, 780 (1993)).

An order denying a motion to reconsider a verdict on the at-law counterclaims is interlocutory and not immediately appealable, when a judgment has not been rendered in the equitable foreclosure and accounting claims. There has not been a final order because the ruling on the at-law claims left some further act to be done by the court before the rights of the parties can be determined. In the present case, the Master-in-Equity must still decide whether the Respondents are entitled to foreclosure before the rights of the parties are determined. Thus, there has not been a final judgment and the order is interlocutory.

Appellants are seeking to stay the foreclosure claim and Accounting counterclaim before the Master-in-Equity until this appeal is decided. Appellants will argue that if the foreclosure action were to go forward before the Master-in-Equity, there is a substantial risk of inconsistent rulings, whereby one court renders a judgment of foreclosure, and the other determines that a new trial must be heard on the legal counterclaims, which could eventually, lead to a finding that the foreclosure must not be granted. However, Appellants are merely restating the rationale as to why an interlocutory appeal is improper at this time in the present case. It is for this very reason that Appellants, should they wish to appeal, must wait until the Master has rendered a judgment on the foreclosure claim and accounting counterclaim before an appeal may properly be taken.

Appellants wish to treat the legal and equitable claims in this case as one case when it suits their needs and separate when it does not. Appellants and Respondent agree that the legal counterclaims must be tried first. Now that the Appellants are dissatisfied with the portion of the case dealing with their legal counterclaims they want to argue that they are somehow allowed to treat the legal counterclaims as a distinct final judgment and continue to delay the equitable claims being heard. Based on the present procedural posture of the case, the Respondent's equitable foreclosure claim is subject to an indefinite stay. Even if the Appellants are successful in their appeal, the equitable claims would not be heard at the retrial of the jury claims and Appellants could appeal another unfavorable jury verdict. Respondent may never have its equitable foreclosure claims heard and never have its day in court, while the Appellants may file potentially endless appeals of their jury claims

The parties consented to bifurcate the claims in the interest of expediency and judicial economy. The Parties recognized that the Master-in-Equity was best suited to handle the foreclosure action and equitable counterclaim. As such, Respondent respectfully requests this Court dismiss the appeal and order that the Notice of Appeal filed by Appellants be canceled until such time as the Respondent's foreclosure claim and Appellants' accounting counterclaim are tried before the Master-in-Equity.

II. THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE BUSINESS RECORDS OF THE PLAINTIFF'S LOAN SERVICERS AND ALLOWING THE WITNESS FOR THE CURRENT LOAN SERVICER TO TESTIFY ABOUT THE BUSINESS RECORDS.

- i. **The trial court did not err in admitting into evidence the exhibits at trial that contain records from the prior loan servicer, Saxon, because the Respondent's exhibits at trial fall within the business records exception to hearsay.**

The trial court did not err in admitting the Plaintiff's business records into evidence and did not err in allowing the Plaintiff's records custodian to testify about the contents of those records. (R. p. 252, lines 3-19; p. 255, line 11 – p. 262, line 22).

"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”).

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, 1310¹(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.

In this case, Ms. Poch testified to lay the foundation for all the exhibits at issue and, as a record custodian for SLS, she meets Rule 803(6)'s authentication requirement.

Q. And are you authorized to testify on behalf of your company in today's trial?

A. Yes, I am.

Q. In the ordinary course of its business, does SLS maintain record for the loans that it services, including the Dolans' loan?

A. Yes, we do.

Q. As part of your job duties, are you familiar with those records?

A. Yes, I am.

Q. And have you reviewed the Dolans' record maintained by your company for today's trial?

A. Yes, I have.

Q. And do you have personal knowledge of this loan based on your review of those records?

A. Yes, I do.
(R. p. 246, line 19 – p. 247, line 9).

Q. When a loan is service transferred, can you explain typically what happens? I know you talked a little bit about it before, but do you have anything to add?

A. Basically that -- when it goes through this rigorous testing that I was talking about, they're looking at all the financial data to ensure that it matches all the written loan documents. And the quality control process is to ensure that nothing is missing or nothing is added that's inappropriate into the loan records.

Q. So do you know if in this particular case what you described about service transfer, did it occur?

A. Yes, it did, and there were no errors found in the servicing transfer. Everything matched.
(R. p. 250, line 18 – p. 251, line 5).

Q. So when SLS started servicing this loan, did it receive Saxon's and BB&T payment history?

A. Yes.

Q. Did it receive Saxon and BB&T's communication that would have been sent out?

- A. Yes.
- Q. Would it have received its servicing notes?
- A. Yes.
(R. p. 251, lines 6-13).
- Q. All right. Ma'am, where does any information that Specialized Loan Servicing has about this loan before it took over servicing of it come from?
- A. All the records are transferred electronically for servicer to servicer. We go through a lengthy process that spans 30 days before a loan goes live on our system where we receive data transfer of all the records, the payment history, the note history, and the loan documents. And it goes through a rigorous process to ensure accuracy in one group and then a second -- another entire group of people re-review all of that information to ensure accuracy again. Then -- this is 30 days prior. Then 15 days prior, we get updated financial figures, and then three days prior, we get updated financial figures again, and it goes through the same rigorous process through these two groups. Once it's passed all these reviews, then it's boarded -- we call it boarded, meaning loaded into our system and it goes into live data on the date we begin servicing transfer the loan. But it can't get to that point until we've ensured all the accuracy. Once it's boarded into our system, then the prior service records become our servicing records.
- Q. So you said they become your servicing records?
- A. That's correct.
(R. p. 233, line 19 -- p. 234, line 18).
- Q. So if there's something that's just not in the records, Specialized Loan Servicing, would they know about that?
- A. If everything didn't match these business rules, this rigorous testing, then it would become apparent something was missing.
(R. p. 235, lines 1-6).

At trial the Appellants did not contest that the records were kept in the course of SLS's regularly conducted business activity. The Appellant's did not present any reason

why the Court should question the trustworthiness of the documents other than Appellants' counsel's unsupported accusation.

The Appellants entire argument at trial was to attack Ms. Poch's ability to testify to the records of the prior servicer and mortgagees. The reasoning in the Midfirst Bank case makes clear that for documents to be admissible under the business records exception, they do not have to be actually created by the witness testifying to authenticate them, nor do they even have to be created by the entity by which the witness is employed. Rather, Rule 803(6) merely requires that documents be "made at or near the time by, *or from information transmitted by*, a person with knowledge." Rule 803(6), SCRE (emphasis added). Further, the witness does not have to have met the person who created the records or even know their existence or identity. Rule 803(6) merely requires, for records to be admissible as business records, the witness must be familiar with the company's record keeping system. Ms. Poch, as an employee of SLS, clearly meets that test. Her testimony established that she is familiar with how these records were obtained and reviewed for accuracy before becoming part of SLS's business records. Therefore, the Court did not err in allowing the exhibits offered by Respondent at the trial as admissible evidence under the business records exception to hearsay and S.C. Code Ann. § 19-5-510.

ii. Respondent's witness at trial was qualified to testify about the contents of properly admitted business records of the Respondent.

The best evidence rule, "in the law of evidence applies only to oral testimony tending to vary the terms of a Written Instrument..." W R. Grace & Co. (Davison

Chemical Co. Division) v. Lamunion, 245 S.C. 1, 8, 138 S.E.2d 337, 340 (1964).

As a records custodian, the Respondent's witness can properly testify about the contents of the business records. In their initial brief, the Appellants argue that the Respondent's witness, Ms. Poch, improperly testified about the "substantive status" of the loan history, thereby violating the best evidence rule. Appellants' argument misconstrues the meaning of the best evidence rule and leaves out an important part of how the rule functions. The best evidence rule only applies when the proffered testimony varies the terms of a written instrument. Here, to the contrary, Ms. Poch's testimony was based solely on the written instrument. Ms. Poch's testimony simply conveyed information contained in the business records to the jury. This type of testimony is certainly necessary and helpful to a jury when examining an exhibit such as a loan payment history and explaining the various entries.

In their initial brief, the Appellants also make the blanket argument that any witness at trial can only ever testify about what she observed first hand is without merit. Such a requirement would defeat the purpose of having a business records exception and would require a party to bring countless witnesses to trial to testify about every single entry or notation on a business record. (See Midfirst Bank, SSB v. C.W. Haynes & Co., Inc., 893 F. Supp. 1304, 1310 (D.S.C. 1994)).

III. THE TRIAL COURT DID NOT ERR IN GRANTING A DIRECTED VERDICT IN FAVOR OF THE RESPONDENT ON THE APPELLANTS' CAUSE OF ACTION FOR VIOLATION OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT CLAIM.

The trial court did not err in granting Respondent a directed verdict on the Appellants' Unfair Trade Practices Claim at the close of the Appellants' case. The

Appellants failed to produce any evidence that the alleged conduct of the Plaintiff had any effect on the public interest or had the potential for repetition.

To recover under the SCUTPA, the Appellants 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.” Jefferies v. Phillips, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct.App.1994).

Appellants argue in their initial brief that to survive a directed verdict motion on the SCUTPA claim the Appellants only needed to show the conduct of the Respondent had an impact on the public interest and it was not required that the Appellants show the conduct had the potential for repetition. In support of this position, the Appellants cite the case of Crary v. Djebelli, 329 S.C. 385, 496 S.E.2d 21 (1998). The Crary case not only does not stand for this position it directly contradicts this position.

In the Crary case, the South Carolina Supreme Court held that the potential for repetition element for a violation of the SCUTPA can be shown in multiple ways and it is not necessary for the Plaintiff to “[show] the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or ...by showing the company's procedures create a potential for repetition of the unfair and deceptive acts.” Id. at 388. However, the Supreme Court still required the Plaintiff to prove the Defendant's action had the potential for repetition, it could just be proven in a different way, the Crary case does not eliminate the repetition requirement.

Appellants' argue in their initial brief that Respondent's only alleged unfair or deceptive act was misrepresenting to the Appellants the amount of money required to bring their loan current. Appellants' claim “the public has an interest in mortgage servicers not deceiving borrowers about the status of their loans.” (Appellants Initial Brief, page 24). During the trial the Appellants offered no evidence to satisfy the public interest element by showing the conduct of the Respondent had the potential for repetition. Appellants produced no evidence that the alleged improper conduct by the Respondent occurred in the past or there is anything with regards to the company's procedures that create a potential for repetition. 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 the Appellant Bryon Dolan in the construction on both lots. Additionally, Appellant Bryon Dolan initiated the steps to create the agreement and fully participated in developing the terms and parameters of the agreement.

Appellants' argument for repetition is based on nothing more than a hypothetical argument that the Respondent could commit the same allegedly wrongful conduct towards another borrower. This argument however, is not in accordance with the law. The facts of this case are so unique that if the Appellants were to be successful in their argument any contract between any parties would be subject to a violation of the SCUTPA. Even if true, the alleged unfair or deceptive acts by the Respondent in this case only affected the Appellants personally, and no one else.

CONCLUSION

Respondent respectfully requests this Court dismiss the appeal and order that the Notice of Appeal filed by Appellants be canceled until such time as the Respondent's foreclosure claim and Appellant's Accounting counterclaim are tried before the Master-in-Equity.

In the alternative, based on the forgoing and any additional sustaining grounds appearing in the record, Respondent would respectfully submit that the trial court's directed verdict ruling in favor of the Respondent on the SCUTPA claim should be

affirmed and the jury verdict in favor of Respondent on the Breach of Contract counterclaim should be affirmed.

Respectfully submitted,

July 1, 2015



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CERTIFICATE OF COUNSEL

The undersigned counsel for Respondent FV-I, Inc., in trust for Morgan Stanley Mortgage Capital Holdings LLC certifies that the foregoing Respondent's Final Brief of Respondent complies with Rule 211(b), SCACR.



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July 1, 2015

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Judge

Appellate Case No.: 2014-0001384
Common Pleas Case No. 2012-CP-32-2816

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JUL 01 2015
SC Court of Appeals

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

v.

Bryon J. Dolan; Lisa S. Dolan; First Citizens Bank and Trust Company, Inc.; Wells
Fargo Bank, N.A.; Branch Banking and Trust Company, Defendants,

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

FINAL REPLY BRIEF OF APPELLANTS

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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

Appellate Case No.: 2014-0001384
Common Pleas Case No. 2012-CP-32-2816

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.

FINAL REPLY BRIEF OF APPELLANTS

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STATEMENT OF ISSUES

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Midfirst Bank is a federal district court case. It is not precedent in South Carolina state courts and has no binding effect upon this court. Blyth v. Marcus, 335 S.C. 363, 368 n. 3, 517 S.E.2d 433 (1999) (South Carolina federal district court decision “[o]f course . . . is not binding on this Court”). If it did stand for the proposition that FV-I claims – that no foundation for the satisfaction of the elements of the business records exception needs to be laid where the documents in question have been received by one loan servicer from another – that would be contrary to what is precedent in our state’s law. Under South Carolina law, “[a] business record without evidence about the manner in which it is prepared or the source of its information does not meet the requirements in either section 19-5-510 or Rule 803(6), SCRE.” State v. Rice, 375 S.C. 302, 331, 652 S.E.2d 409, 424 (Ct. App. 2007). Under our law, there is a “mandate” that, in order for them to be admissible under

Rule 803(6), SCRE, “[b]usiness record entries must have been made at or near the time of the act to which they relate[.]” Id. at 332. To authenticate a document as falling under the “business records” exception to the hearsay rule, a witness qualified to do so must provide sufficient testimony to establish *each* element of the exception. Connelly v. Wometco Enters., Inc., 314 S.C. 188, 192, 442 S.E.2d 204, 206 (Ct. App. 1994).

The Supreme Court of South Carolina held evidence was improperly admitted under the business records exception in State v. McFarlane, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983), stating that a sheriff’s department’s receipt of a record from another office “would not qualify the detective [witness who received the document] to testify to the identity and mode of preparation of the report or whether it was made in the regular course of business at or near the time of the accident” subject of the report. It is the absence of evidence about the way the report was prepared and about how it was maintained *by the entity that made the report* that drove the Supreme Court’s holding on this ground in the McFarlane decision. See id.

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

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

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

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

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

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

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

Id. at 8.

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

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

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

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

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

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

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

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

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

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

CONCLUSION

The trial court made prejudicial and erroneous evidentiary rulings, essentially permitting FV-I to defend against the Dolans' case almost entirely on the basis of inadmissible evidence. Further, the court erred in granting FV-I's directed verdict on the Dolans' UTPA claim. This court should reverse and remand this case for a new trial.

Respectfully submitted,

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

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July 1, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

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R. Keith Kelly, Circuit Judge

SC Court of Appeals

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

CERTIFICATE OF COUNSEL

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

Respectfully submitted,



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June 23, 2015

VIA HAND DELIVERY

The Hon. Jenny Abbott Kitchings
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JUN 23 2015

Re: FV-I, Inc., etc. v. Bryon J. Dolan, et al.
Common Pleas Case No.: 2012-CP-32-2816
Appellate Case No.: 2014-0001384

SC Court of Appeals

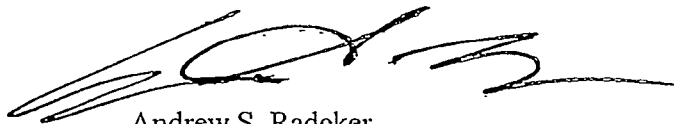
Dear Ms. Kitchings:

I write pursuant to Rule 208(b)(7), SCACR, concerning Deep Keel, LLC v. Atlantic Private Equity Group, LLC, Op. No. 5320 (S.C. Ct. App. filed June 17, 2015) (Shearouse Adv. Sh. No. 23 at 42). The appellants submit this case as a supplemental citation in support of our arguments as to the issues listed as I and II in our appellants' brief, argument about which is set forth on pages 11-21 of our initial appellants' brief, and in support of our arguments listed as II and III in our reply brief, argument about which is set forth on pages 6-10 of our initial reply brief. Section III of the Deep Keel opinion supports the appellants' arguments in our above-referenced appeal concerning the application of the business records exception to the hearsay rule and the admission of Ms. Poch's testimony concerning the content of documents.

Thank you for your attention in this matter. 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

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App. 97

LICENSED IN SOUTH CAROLINA



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SC Court of Appeals

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals Clerk of Court
1220 Senate Street
Columbia, South Carolina 29201

RE: FV-I, Inc. in trust for Morgan Stanley Mortgage Capital Holdings LLC v. Bryon J. Dolan; Lisa S. Dolan, First Citizens Bank, Wells Fargo Bank, N.A., Branch Banking and Trust Company
C/A No.: 12-CP-32-2816
Our file: 511792.00355
Appellate Case No.: 2014-001384

Dear Ms. Kitchings:

I write pursuant to Rule 208(b)(7), SCACR, concerning Deep Keel, LLC v. Atlantic Private Equity Group, LLC, Op. No. 5320 (SC Ct. App. file June 17, 2015) (Shearouse Adv. Sh. No. 23 at 42). The Respondent submits this case as a supplemental citation in support of its arguments as to the issues listed as Section II(i) and (ii) of its initial brief which is set forth on pages 14 to 19. Sections II and II of the Deep Keel opinion support the Respondent's appeal concerning the admissibility of the business records of the Respondent and the ability of Respondent's witness to testify about the contents of those business records.

Thank you for your assistance in this matter.

With kind personal regards, I am

Sincerely yours,

Charles S. Gwynne Jr.

/dm

Enclosures as stated

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RECORD ON APPEAL

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COPY

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
FV-I, Inc., in trust for Morgan Stanley)
Mortgage Capital Holdings LLC,)
Plaintiff,)
v.)
Bryon J. Dolan; Lisa Dolan; First Citizens)
Bank and Trust Company, Inc.; Wells)
Fargo Bank, N.A.; Branch Banking and)
Trust Company,)
Defendant.)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

C/A No.: 2012-CP-32-2816

VERDICT

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

2014 APR 18 A 8:39

FILED

The jury must unanimously agree on the verdict. Once you have completed this form, the foreperson of the jury should sign and date the form.

Question 1: Did the Dolans prove by a preponderance of the evidence that FV-I, Inc. breached the contract?

Yes

No

If your answer to Question 1 was "Yes", then please set forth the amount of the actual damages.
\$

If your answer to Question 1 was "No", then the forelady should sign and date this verdict form.

April 17, 2014

Kennedy-Forbes
Foreperson

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-32-2816

ORIGINAL

FILED

FV-I, Inc. etc.,

2014 MAY 16 P 1:22

Bryon J. Dolan, et al.,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Andrew S. Radeker (per direction of Court)

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

Attorney for : ☐ Plaintiff ☒ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order ☒ Statement of Judgment by the Court:

The Dolan Defendants' motion for a new trial is hereby denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	N/A
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

A. Scott Kelly
Circuit Court Judge

2165
Judge Code

8 May 2014
Date

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-32-2816

ORIGINAL

FV-I, Inc. etc.,

2014 JUN 19 P 12:20

Bryon J. Dolan, et al.,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Andrew S. Radeker (per direction of Court)

Attorney for : ☐ Plaintiff ☒ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order ☒ Statement of Judgment by the Court:

The Dolan Defendants' motion to reconsider the order denying their motion for a new trial is hereby denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	N/A
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

A. Keith Kelly
Circuit Court Judge

2165
Judge Code

13 June 2014
Date

SCRPC Form 4C (10/2011)

Page 1 of 2

Record on Appeal 3

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

Case No. 2012-CP-32-2816

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

Plaintiff,

vs.

Bryon J. Dolan; Lisa S. Dolan; First
Citizens Bank and Trust Company, Inc.;
Wells Fargo Bank, N.A.; Branch Banking
and Trust Company;

Defendants.

ORDER ON PLAINTIFF'S MOTION
TO STRIKE JURY DEMAND AND
REFER CASE

This matter came before me at a hearing on July 16, 2013, of the Plaintiff's motion to strike the jury demand of Defendants Bryon J. Dolan and Lisa S. Dolan (hereinafter "the Defendants") and to refer this case to the Lexington County Master-in-Equity. Charles S. Gwynne, Jr., Esquire, argued the motion for the Plaintiff, and Andrew S. Radeker, Esquire, did so for the Defendants. After due consideration, the Court denies the motion to refer the case to the Master-in-Equity and denies in part and grants in part the motion to strike the Defendants' jury demand.

This is a mortgage foreclosure action which the Defendants have asserted defenses and counterclaims. The Defendants pled three counterclaims: 1) for an accounting, 2) for violation of the South Carolina Unfair Trade Practices Act, and 3) for breach of contract. The Plaintiff and the Defendants agree that the claims for foreclosure and for an accounting sound in equity and, thus, that neither party has the right to a jury trial on those claims. The Plaintiff's motion thus concerns the at-law counterclaims, which are those for breach of contract and violation of the Unfair Trade Practices Act.

1/6 

In Johnson v. S.C. Natl. Bank, our Supreme Court set out "the proper analysis for determining the trial of legal and equitable issues in complaints and counterclaims" as follows:

(1) If both the complaint and the counterclaim are in equity, the entire matter is triable by the court.

(2) If both are at law, the issues are triable by a jury.

(3) If the complaint is equitable and the counterclaim is legal and permissive, the defendant waives his right to a jury trial.

(4) If the complaint is equitable and the counterclaim legal and compulsory, the plaintiff or the defendant has a right to a jury trial on the counterclaim. In that case, the proper procedure is as follows:

(a) The trial judge may, pursuant to Rule 42(b), order separate trials of the legal and equitable claims, or may order the claims tried in a single proceeding.

(b) If separate trials are ordered, the judge must determine which issues are to be tried first. If there are factual issues common to both claims, absent the "most imperative circumstances," Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S. Ct. 948, 3 L.Ed.2d 988 (1959), the "at law" claim must be tried first. If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first.

(c) If the claims are to be tried in a single proceeding and there are factual issues common to both claims, the jury shall first determine the legal issues. The court may then determine the equitable claims, but the jury's determination of common factual issues shall be binding upon the court.

292 S.C. 51, 55-56, 354 S.E.2d 895, 897 (1987).

Accordingly, the Court's analysis for each of the two counterclaims at issue turns on whether the counterclaim is compulsory. As discussed below, the Court determines that the breach of contract counterclaim is compulsory and the Unfair Trade Practices Act claim is not.

2/6 

In June of 2012, the Court of Appeals in Wells Fargo Bank, N.A. v. Smith addressed whether three counterclaims at issue there – common law unconscionability, statutory unconscionability, and violation of the attorney preference statute – were compulsory counterclaims in a mortgage foreclosure action. 398 S.C. 487, 493-99, 730 S.E.2d 328, 331-35 (Ct. App. 2012). The Court of Appeals discussed the test for determining whether a counterclaim is compulsory as follows:

“By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party’s claim.” First-Citizens Bank & Trust Co. of S.C. v. Hucks, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991); see also Rule 13(a), SCRCF. The test for determining if a counterclaim is compulsory is whether there is a “logical relationship” between the claim and the counterclaim. Mullinax v. Bates, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995). In N.C. Fed. Sav. & Loan Ass’n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), our supreme court adopted the “logical relationship” test and held DAV’s counterclaim was compulsory because “there [was] a logical relationship between the enforceability of the note which [was] the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note by the joint venture.” In essence, the “logical relationship” determination is made by asking whether the counterclaim would affect the lender’s right to enforce the note and foreclose the mortgage. Advance Intern., Inc. v. N.C. Nat’l Bank of S.C., 316 S.C. 266, 269-70, 449 S.E.2d 580, 582 (Ct.App.1994), aff’d in part, vacated in part, 320 S.C. 532, 466 S.E.2d 367 (1996). Here, there is a “logical relationship” between the enforceability of the Note, which is the subject of the foreclosure action, and the allegation that the Mortgage between Wells Fargo and Smith is unconscionable. If Smith prevails on his unconscionability claim, it will affect Wells Fargo’s right to enforce the Note and foreclose the Mortgage. Therefore, Smith’s common law unconscionability counterclaim is compulsory under the “logical relationship” test.

Id. at 495-96.

The Wells Fargo v. Smith court determined that Smith’s claim based on violation of the attorney preference statute – which apparently only sought relief under subsection (A) of S.C.

3/6 

Code Ann. § 37-10-105 – was an at-law claim but was not compulsory because the “counterclaim has no ‘logical relationship’ to the enforceability of the Note and Mortgage[,]” since, if he prevailed on the claim, “Smith would only be entitled to actual damages and a possible penalty between \$1,500 and \$7,500” and would not be entitled to “rescission of the Note and Mortgage[.]” Wells Fargo, 398 S.C. at 499.

The Defendants argue that, to the extent that the Court of Appeals stated in Wells Fargo v. Smith that a counterclaim in a mortgage foreclosure action is compulsory *only* if “the counterclaim would affect the lender’s right to enforce the note and foreclose the mortgage[,]” the Court of Appeals departed from precedent and is wrong. The Defendants argue the correct test is whether the counterclaims arises out of the same transactions or occurrences as the Plaintiff’s claim. Regardless of the merits of the Defendants’ argument on that point, however, this Court is constrained by precedent to follow Wells Fargo v. Smith, which holds that a counterclaim in a mortgage foreclosure action is compulsory only if it has a logical relationship to the enforceability of the note and mortgage. In other words, under the Wells Fargo v. Smith test, if success on the counterclaim would mean that the plaintiff *cannot* prevail on its foreclosure claim, then the counterclaim is compulsory.

The Defendants’ breach of contract claim is compulsory. The gist of the claim is that the Plaintiff or a predecessor in interest entered into a settlement or modification of the loan at issue, that the Defendants performed their duties under that arrangement (until the Plaintiff prevented them from performing further), and that the Plaintiff breached its contractual duties to the Defendants under the note and mortgage as modified by the settlement. If what the Defendants allege is true, then they are not in default of the note and mortgage, and the Plaintiff thus cannot

4/6 

enforce the note or be granted foreclosure of the mortgage. This is the essence of a compulsory counterclaim.

The Defendants argue that their Unfair Trade Practices Act claim is compulsory because it arises out of the same set of facts (i.e., transactions and occurrences) as do several of their defenses to the foreclosure claim, and because it arises out of the same set of facts as their compulsory breach of contract claim. They also argue that the claim is compulsory because it arises out of the administration of the loan, which is necessarily a part of the Plaintiff's case. The Court disagrees. Under the Wells Fargo v. Smith test, this counterclaim would be compulsory only if it would necessarily affect the Plaintiff's right to enforce the note and foreclose the mortgage. If the Defendants prevail on their Unfair Trade Practices Act claim, that will not necessarily mean that the Defendants have proven a set of facts that makes it impossible for the Plaintiff to succeed on its foreclosure claim. It would be possible both for the Defendants to prevail on this counterclaim and also for the Plaintiff to prevail on its claim at the same trial. Accordingly, the Defendants' Unfair Trade Practices Act counterclaim is permissive.

As the master-in-equity cannot conduct a jury trial, the entire case cannot be referred to the master-in-equity, which is what the Plaintiff sought in its motion. The Defendants noted at the hearing that they would not oppose this case being bifurcated, with the foreclosure claim being tried by the master-in-equity, so long as the jury issues are tried first. Therefore, the Plaintiff has until 45 days after the entry of this Order (to give time for any appeal) to elect that this case be bifurcated in that manner if it chooses to do so.

It is therefore hereby ORDERED as follows:

1. The Plaintiff's motion to refer this case to the master-in-equity is denied;

5/6 

2. The Plaintiff's motion to strike the Defendants' jury demand as to their breach of contract counterclaim is denied, and this counterclaim claim shall be tried by a jury;
3. The Plaintiff's motion to strike the Defendants' jury demand as to their Unfair Trade Practices Act counterclaim is granted, and this counterclaim shall be tried by the Court; and
4. The Plaintiff has until 45 days from the entry of this Order to elect that this case be bifurcated, with the foreclosure claim being tried by the master-in-equity, so long as the jury issues are tried first.

AND IT IS SO ORDERED.



The Honorable Edgar W. Dickson
Circuit Judge

September 26, 2013



STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

FILED

DOCKET No. 2012-CP-32-2816

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

2014 MAY -1 P 3:49

vs.

Plaintiff,
BETH A. CARRIGG
CLERK OF COURT
LEXINGTONFOR BIFURCATING ACTION AND
REFERRING FORECLOSURE CLAIM
TO MASTER-IN-EQUITYBryon J. Dolan; Lisa S. Dolan; First Citizens
Bank and Trust Company, Inc.; Wells Fargo
Bank, N.A.; Branch Banking and Trust
Company,

Defendants.

(511792.355 CSG)

WHEREAS, Plaintiff FV-I, Inc., in trust for Morgan Stanley Mortgage Capital Holdings LLC ("Plaintiff") brought this action to foreclosure a mortgage lien on property more fully described in the Complaint;

WHEREAS, Defendants Bryon J. Dolan and Lisa S. Dolan ("Defendants") filed and Answer and Counterclaim against Plaintiff;

WHEREAS, the answering parties hereto have agreed and stipulated to bifurcate this action pursuant to Rule 42(b), SCRPC; and

WHEREAS, it appearing that pursuant to Rule 53 of the South Carolina Rules of Civil Procedure, that the answering parties hereto have agreed and stipulated that the Plaintiff's foreclosure claim and equitable counterclaim for Accounting be referred to The Honorable James O. Spence, as Master in Equity for Lexington County.

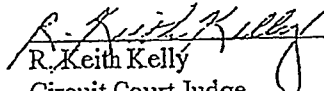
NOW, THEREFORE, by consent of the parties in accordance with their agreement,

IT IS HEREBY ORDERED THAT:

1. This action is hereby bifurcated, the Defendants' counterclaims for Breach of Contract and Unfair Trade Practices are severed from Plaintiff's foreclosure action, and that Defendants may proceed on these counterclaims in a separate trial;
2. Plaintiff's foreclosure claim and equitable counterclaim for Accounting is referred to The Honorable James O. Spence, Master in Equity for Lexington County to take testimony and to direct entry of final judgment in this action under Rule 53(b), SCRPC, and all matters arising from or reasonably related to such action. The Master in Equity shall retain jurisdiction to

perform all necessary acts incident to this foreclosure action including issuance of a writ of assistance or issuance of any rule to show cause including but not limited to any rule to show cause why a party should not be bound by the judgment of foreclosure. Further, the Master in Equity shall retain jurisdiction to hear any action contesting the validity of the foreclosure action or sale or any motions pursuant to the South Carolina Rules of Civil Procedure including but not limited to Rule 60(b). Pursuant to Rule 53(e), SCRPC, any appeal from the final judgment entered by the Master in Equity shall be to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules.

AND IT IS SO ORDERED!


R. Keith Kelly
Circuit Court Judge

Lexington, South Carolina

17 April, 2014

COPY

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

Case No. 2012-CP-32-2816

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

Plaintiff,

vs.

Bryon J. Dolan; Lisa S. Dolan; First
Citizens Bank and Trust Company, Inc.;
Wells Fargo Bank, N.A.; Branch Banking
and Trust Company;

Defendants.

ORDER ON PLAINTIFF'S MOTION
TO PROCEED WITH TRIAL AND ON
APPEAL BOND ISSUESFILED
JUN 21 A 9:25
CLERK OF COURT
LEXINGTON, SC

This matter comes before me upon the Plaintiff's motion that the trial of the equitable claims in this case proceed while an appeal of the denial of Defendants Bryon J. Dolan and Lisa S. Dolan (hereinafter "the Defendants")'s motion for a new trial as to their at-law counterclaims is pending. For the reasons discussed below, the court denies the motion and declines to set any bond conditions for the Defendants to meet in order for the appellate stay to remain in effect.

PROCEDURAL HISTORY

This is a case in which the Plaintiff seeks mortgage foreclosure and the Defendant asserted both legal and equitable counterclaims. This case was bifurcated by consent order on the cusp of trial, with the Defendants' at-law counterclaims tried to a jury on April 17, 2014, and the foreclosure claim and the Defendants' claim for an accounting referred to the undersigned master-in-equity to be tried later. The jury returned a verdict for the Plaintiff on the at-law counterclaims, and the Defendants moved for an order granting them a new trial as to the claims subject of the jury trial (the Defendants' counterclaims for breach of contract and violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*).

The Defendants moved for reconsideration of the order denying their motion for a new trial. That motion was denied, and the Defendants appealed the orders denying the motion for a new trial and motion to reconsider. The Plaintiff moved the Court of Appeals to dismiss the appeal, arguing that the orders were not immediately appealable. The Court of Appeals denied that motion to dismiss, but did grant leave to the parties to address the appealability of the legal counterclaims in their respective briefs.

APPEALABILITY OF APPEALED ORDERS

The Plaintiff takes the position that because this case was bifurcated and the trial on some claims has not already occurred, the order denying the Defendants' motion for a new trial as to the claims that have been tried to a directed verdict and a jury verdict in this case is not appealable. The Plaintiff takes the position that the directed verdict and jury verdict were not final judgments in this case, arguing that only after the equitable claims have been tried would any appeal lie in this case. Accordingly, the Plaintiff argues, the Defendants' appeal does not stay anything, since it is an improper appeal of an unappealable order.

South Carolina law states that "[a]n order that grants or refuses a new trial affects a substantial right and is immediately appealable" pursuant to S.C. Code Ann. § 14-3-330(2)(b). Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 97 (2d ed. 2002) (citing S.C. Code Ann. § 14-3-330(2)(b) and S.C. State Hwy. Dept. v. Clarkson, 267 S.C. 121, 126-27, 226 S.E.2d 696, 697 (1976)). The statute that speaks generally to the appealability of orders, S.C. Code Ann. § 14-3-330, specifically lists an order that "grants or refuses a new trial" as appealable. S.C. Code Ann. § 14-3-330(2)(b). The order denying the Defendants' motion for a new trial that is subject of this appeal is immediately appealable because it is an order that refuses a new trial. Id.

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

The Supreme Court of South Carolina has held that an order that ends one of several claims in a case but leaves the other claims pending is an immediately appealable order, ruling against the argument that an aggrieved party must wait until all the causes of action have been finally determined in order to appeal. Link v. Sch. Dist. of Pickens County, 302 S.C. 1, 4 fn. 2, 393 S.E.2d 176, 178 fn. 2 (1990) (overruling Plaza Dev. Services v. Joe Harden Builder, Inc., 296 S.C. 115, 370 S.E.2d 893 (Ct. App. 1988), “to the extent that it holds that one may not appeal the granting of a 12(b)(6) motion under § 14-3-330 if the ruling affects some but not all of a party’s causes of action”); Lebovitz v. Mudd, 289 S.C. 476, 479, 347 S.E.2d 94, 96 (1986) (“order granting a Rule 12(b) motion as to one of multiple claims is directly appealable under § 14-3-330(2) because it affects a substantial right and strikes out part of a pleading”; rejecting argument that circuit court had to make Rule 54(b) certification to make an order appealable where it is already appealable under S.C. Code Ann. § 14-3-330). The Plaintiff’s argument that the Defendants’ appeal is improper because there has been no final judgment in this case is against this precedent and fails.

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

If a case is bifurcated into a jury trial on at-law claims and a bench trial on equitable claims, that does not mean that the result of the jury trial is not a final judgment. See Rule 54(a), SCRCF. The jury trial is no less a trial simply because it occurs before the bench trial. The verdict in the jury trial is the final judgment as to the at-law claims subject of that trial; otherwise, it would not be true that in a bifurcated case "the jury's determination of common factual issues shall be *binding* upon the court" in the following bench trial. Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 330, 755 S.E.2d 437, 442 (2014) (emphasis added). The fact that the equitable claims remain pending does not affect the finality of the at-law claims' verdict, nor does it affect appealability with regard to post-trial motions directed at that verdict. S.C. Code Ann. § 14-3-330(1)&(2)(b); Rule 54(a), SCRCF; Capital U-Drive-It, 369 S.C. at 7; Link, 302 S.C. at 4 fn. 2; Lebovitz, 289 S.C. at 479.

The Plaintiff cannot prevail on its argument that, because the appealed orders are not appealable, there is no appellate stay in effect. While it appears that the Plaintiff would be

correct if the orders at issue were indeed not appealable, that is not the situation that this case presents.

EFFECT OF THE APPELLATE STAY

Rule 205, SCACR, states as follows:

Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

Rule 241, SCACR (formerly numbered as Rule 225), entitled "Stay and Supersedeas in Civil Actions," provides in pertinent part as follows:

(a) **General Rule.** As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

(b) **Exceptions.** The exceptions to the general rule are found in statutes, court rules, and case law. Where specific conditions must be met before the exception applies, those conditions must be strictly complied with. A list of some, but not all, of the exceptions to the general rule is:

- (1) Money judgments as provided in S.C. Code Ann. § 18-9-130.
- (2) Judgments directing the assignment or delivery of documents or personal property as provided in S.C. Code Ann. § 18-9-150.
- (3) Judgments directing the execution of conveyances or other instruments as provided in S.C. Code Ann. § 18-9-160.

- (4) Judgments directing the sale or delivery of possession of real property as provided in S.C. Code Ann. § 18-9-170.
- (5) Judgments directing the sale of perishable property as provided in S.C. Code Ann. § 18-9-220.
- (6) Family court orders regarding a child or requiring payment of support for a spouse or child as provided in S.C. Code Ann. § 63-3-630.
- (7) Worker's compensation awards as provided in S.C. Code Ann. § 42-17-60.
- (8) An appeal from an order granting an injunction or temporary restraining order.
- (9) Family court orders awarding temporary suit costs or attorney's fees as provided in S.C. Code Ann. § 63-3-530(A)(2).
- (10) Ejectment orders as provided in S.C. Code Ann. § 27-37-130 and S.C. Code Ann. § 27-40-800.
- (11) Appeals from administrative tribunals as provided in S.C. Code Ann. § 1-23-380(A)(2) and § 1-23-600(G)(5).

Discussing the appellate stay, S.C. Code Ann. § 18-9-220 provides that:

In cases not provided for in Sections 18-9-130 and 18-9-150 to 18-9-180, the notice of appeal shall stay proceedings in the court below upon the judgment appealed from, except that when it directs the sale of perishable property, the court below may order the property to be sold and the proceeds of the property to be deposited or invested in bonds of this State or of the United States, to abide the judgment of the appellate court.

The appeal at issue here does not fall within any of the exceptions to the general rule that service of a notice of appeal stays further proceedings at the trial level as to matters that are affected by the appeal (as the parties appear to agree). No perishable property is at issue here. Therefore, the stay is in effect. What the court must determine is whether trial of the equitable claims in this case falls within the scope of what is affected by the appeal. As discussed below, the court determines that it does.

As noted above, in a bifurcated case involving equitable claims and at-law claims to be tried in different trials, with the at-law claims to be tried to a jury, “[i]f there are factual issues common to both claims, absent the most imperative circumstances, the at law claim must be tried first.” Blackburn, 407 S.C. at 330. That is because, in a case in which a jury tries the at-law claims and the court tries the equitable claims, “the jury’s determination of common factual issues shall be binding upon the court.” Id.

Here, there are factual issues common to the Defendants’ breach of contract claim and the Plaintiff’s foreclosure claim. In a previous order in this case that denied the Plaintiff’s motion to strike the Defendants’ jury demand, which the Plaintiff did not appeal¹, the Honorable Edgar W. Dickson, in deciding that the Defendants’ breach of contract counterclaim is compulsory, ruled that “[i]f what the Defendants allege is true, then they are not in default of the note and mortgage, and the Plaintiff thus cannot enforce the note or be granted foreclosure of the mortgage.” (Order filed Oct. 10, 2013.) That ruling is the law of the case. Ulmer v. Ulmer, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006); Cherry v. Myers Timber Co., Inc., 404 S.C. 596, 598 n. 3, 745 S.E.2d 405, 406 n. 3 (Ct. App. 2013).

An examination of the analysis used in Wayne Smith Const. Co., Inc. v. Wolman, Duberstein, and Thompson, 294 S.C. 140, 363 S.E.2d 115 (Ct. App. 1987), is instructive. In that case, there were multiple appeals. Id. The defendant partnership in Smith Construction initially appealed an order denying its motion to quash notices of deposition, and that appeal was dismissed, as the order was not immediately appealable. Id. at 148. The defendant partnership lost at the trial of the case and appealed that order. Id. The trial court then awarded the plaintiff attorney’s fees concerning the first, then-dismissed appeal of the order denying the motion to

¹ The *Defendants* appealed a different aspect of this order, but the parties resolved that issue, and that appeal was dismissed.

quash the deposition notices. Id. The defendant then appealed the order awarding attorney's fees, arguing that the court lacked jurisdiction because of the appeal from the order that rendered judgment for the plaintiff on the substantive case. Id. The Court of Appeals noted the rule that service of a notice of appeal does not prevent the lower court from proceeding with matters that are not affected by the appeal and stated that "Smith Construction's right to be awarded an attorney's fee as costs did not depend upon the success of the partnership's appeal of the trial court's order awarding Smith Construction judgment." Id. at 149. The Court of Appeals held that the lower court had jurisdiction to issue the order awarding attorney's fees. Id.

Here, unlike in Smith Construction, what the Plaintiff seeks to have happen during the pendency of the Defendants' appeal – the trial of the plaintiff's foreclosure claim and the issuance of a judgment on that claim – *does* depend on the success of the Defendants' appeal. If the Defendants succeed on appeal, the jury trial at which the Defendants lost on their at-law counterclaims will be of no effect, there will be no verdict finding against them on those claims, and the parties will be headed to a new jury trial, the result of which will be binding upon the master-in-equity as fact-finder with respect to the foreclosure claim. See Blackburn, 407 S.C. at 330. Whether it has been finally determined in this case that the facts underlying the counterclaims do not provide the Defendants with a defense to the foreclosure claim is very much a "matter[] decided in the order, judgment, decree or decision on appeal[.]" Rule 241(a), SCACR.

Because the trial of the equitable claims in this case would necessarily entail trial of the Plaintiff's foreclosure claim, trial of the equitable claims is a matter affected by the appeal. The appellate stay, accordingly, prevents the occurrence of that trial as long as the stay remains in effect.

ISSUES REGARDING BOND

At the hearing of the instant motion, the court requested that the parties submit memoranda on the issue of whether the court should require the Defendants to meet bond conditions to prevent the trial of the equitable claims while the appeal is pending and, if so, what those bond conditions should be. For the reasons discussed below, the court declines to impose any bond conditions on the Defendants.

“After service of notice of appeal, any party may move for an order lifting the automatic stay in cases which involve the general rule.” Rule 241(c)(1), SCACR. The Appellate Court Rules appear to provide that the court’s primary consideration in determining whether to lift the appellate stay is “whether such an order is necessary to preserve jurisdiction of the appeal” – which is more likely to be a consideration in determining whether to impose a supersedeas where one would otherwise not exist – “or to prevent a contested issue from becoming moot.” Rule 241(c)(2), SCACR.

Rule 241(c)(3), SCACR, provides as follows:

The granting of supersedeas or the lifting of the automatic stay under this Rule may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking, as the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may deem appropriate. Further, where it appears that the granting or lifting of a stay, or the issuance of a writ of supersedeas is insufficient to afford complete relief, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may order other affirmative relief upon such terms as are deemed appropriate.

Where a judgment in a mortgage foreclosure action directs the sale of real estate, the sale pursuant to that judgment is not automatically stayed while appellate proceedings are pending, unless the appellant (usually the mortgagor defendant) gives an undertaking as set forth in S.C. Code Ann. § 18-9-170 or a cash deposit as provided in S.C. Code Ann. § 15-1-250.

The Code section that sets out the undertaking conditions prescribes two slightly different undertakings, one given to stay the sale of real property to a specific party or delivery of possession of real property to a specific party while an appeal is pending, and one given to stay "the sale of land, to satisfy a mortgage thereon or other lien[.]" S.C. Code Ann. § 18-9-170. The purpose of the former is to provide the party entitled to ownership of the property with compensation for the loss of the land's possession during the time of the appeal, while the purpose of the undertaking in a mortgage foreclosure appeal is to protect the foreclosure plaintiff from impairment of the full payment of the adjudged debt caused by the property lessening in value during the pendency of the appeal. See id.; Gerald v. Gerald, 30 S.C. 348, 9 S.E. 274, 275 (1889).

The requirements of the undertaking to stay a mortgage foreclosure sale of improved land on appeal are as follows:

- 1) The undertaking must be in writing;
- 2) The undertaking must be executed by the appellant;
- 3) Two sureties must agree to be liable on the undertaking by sufficient affidavit (the sureties so doing on the undertaking document itself or in separate instruments);
- 4) The undertaking must provide that the appellant shall pay to the respondent money per the undertaking if:
 - a. The judgment is affirmed; and
 - b. The land is finally sold for less than the judgment debt and costs.
- 5) The undertaking must state that the appellant shall pay the amount payable to the respondent thereunder if the sale is affirmed and there is a deficiency, which amount is measured as follows:

- a. The appellant shall pay for any waste he commits or suffers to be committed on the premises from the time of the execution of the undertaking to the time of the sale;
- b. The appellant shall pay a reasonable rental value for the use and occupation of the land from the time of the execution of the undertaking to the time of the sale; and
- c. The amount payable per the undertaking shall not exceed the amount of the deficiency in the sale proceeds to satisfy the debt and costs.

S.C. Code Ann. § 18-9-170; Gerald, 30 S.C. 348, 9 S.E. at 275-77; see generally S.C. Code Ann. Title 18, Ch. 9. As an alternative to giving the undertaking, the appellant may make a cash deposit in lieu thereof. S.C. Code Ann. § 15-1-250.

The “manifest object of the undertaking required for the purpose of staying a sale pending an appeal is to protect the respondent, as far as practicable, from any damage which may ensue from the delay caused by the appeal, in enforcing his claim[,]” because the respondent, the foreclosure judgment creditor in that situation, has already been determined by a court to be entitled to the sale directed by the judgment. Gerald, 30 S.C. 348, 9 S.E. at 275. As it appears that Plaintiff’s counsel agreed at the hearing on this motion, S.C. Code Ann. § 18-9-170 would be applicable in this case only if there had already been a foreclosure judgment rendered. None has been.

Since the justification for imposing such conditions in order to stay the operation of the judgment directing the sale is that the court has already determined that the Plaintiff is *entitled* to the sale, the instant situation is materially different from that subject of S.C. Code Ann. § 18-9-170. The Plaintiff has never been determined by any court to be entitled to the relief it seeks in

this case, and it is by no means a foregone conclusion that the Plaintiff will be determined to be entitled to that relief, whether the Defendants succeed on appeal or not. This situation is not one which the Defendants have anything to bond off, nor is it analogous to such a situation. Nothing before the court indicates that an order lifting the appellate stay "is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR.

The court declines to impose any bond conditions on the Defendants in order for the appellate stay to remain in effect. If Plaintiff has legitimate concerns that waste is occurring on the property, Plaintiff may petition the court under the mortgage loan documents and/or applicable waste case law. /

TO PROCEED WITH THE FORECLOSURE TRIAL POSES POTENTIAL PROBLEMS

If the appellate stay were lifted, the court would be faced with the specter of this scenario: While the appeal is pending, the court goes forward with the trial of the foreclosure claim. That trial is held with the court being bound to the jury's verdict that decided the Defendants are not entitled to relief on their breach of contract counterclaim. The court finds for the Plaintiff on the foreclosure claim, a judgment of foreclosure is rendered, and the property subject of this case is sold. Afterward, the Defendants prevail on their appeal, and the Court of Appeals directs that a new jury trial be held. At that trial, the Defendants prevail on their breach of contract counterclaim, which necessarily decides, as Judge Dickson ruled, that the Defendants "are not in default of the note and mortgage, and the Plaintiff thus cannot enforce the note or be granted foreclosure of the mortgage." (Order filed Oct. 10, 2013.) This would result in judgments that are irreconcilable with one another. It is safer and more efficient to leave the stay

in effect and have the trial of the foreclosure claim only if and when it is appropriate following the conclusion of the appeal.

CONCLUSION

For the reasons discussed above, IT IS THEREFORE HEREBY ORDERED that the Plaintiff's motion to proceed with the trial of the equitable claims during the pendency of the appeal is hereby denied, and the court declines to impose any bond conditions on the Defendants in order for the appellate stay to remain in effect.

And IT IS SO ORDERED.

James O. Spence

The Honorable James O. Spence
Master-in-Equity for Lexington County

Lexington, South Carolina

October 31, 2014

FILED
2014 NOV 21 A 9:25
SETH A. CARRIG
CLERK OF COURT
LEXINGTON CO.



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COLUMBIA, SC 29201

The South Carolina Court of Appeals

FV-I, Inc., in trust of 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., and Branch Banking and Trust Company, Defendants,

Of whom Byron and Lisa S. Dolan are the Appellants.

Appellate Case No. 2014-001384

ORDER

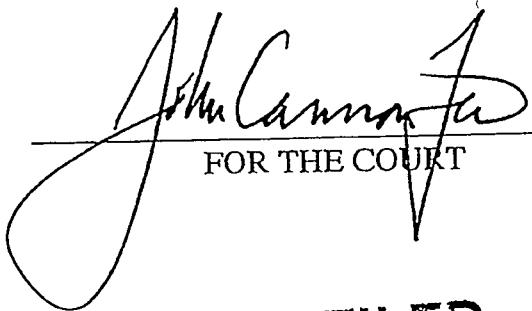
Respondent filed an action in circuit court seeking foreclosure of a mortgage on Appellants' real estate. Appellants filed an answer, asserting two legal counterclaims and one equitable counterclaim against Respondent. The legal counterclaims were for breach of contract and unfair trade practices; the equitable counterclaim was for an accounting. Appellants and Respondent agreed to bifurcate the action pursuant to Rule 42(c), SCRCF, and sever the legal counterclaims from the foreclosure claim and the equitable counterclaim. Thus, the circuit judge held a jury trial on the two legal counterclaims, and referred the foreclosure claim and equitable counterclaim for an accounting to a master-in-equity.

After the jury trial on the legal counterclaims, the circuit judge directed a verdict for Respondent on the unfair trade practices counterclaim, and the jury returned a verdict for Respondent on the breach of contract counterclaim. The circuit judge issued two orders, one denying Appellants' motion for a new trial and one denying Appellants' motion for reconsideration. Appellants appealed both those orders.¹

¹ The foreclosure claim and the equitable counterclaim for an accounting are still pending before the master-in-equity.

Respondent has now filed a motion to dismiss, arguing the two orders are not immediately appealable because the foreclosure claim and the equitable counterclaim for an accounting are still pending before the master-in-equity. Appellants have filed a return, contending the two orders are immediately appealable despite the fact the master-in-equity has not yet rendered a final judgment.

Having carefully considered the motion and return, this court denies Respondent's motion to dismiss. However, the parties may address appealability in their briefs.


FOR THE COURT

Columbia, South Carolina

cc: Andrew Sims Radeker, Esquire
Charles Stuart Gwynne, Jr., Esquire
Jason David Wyman, Esquire

FILED

8-25-14 

The South Carolina Court of Appeals

FV-I, Inc., in trust of Morgan Stanley Mortgage Capital Holdings, LLC, Appellant,

v.

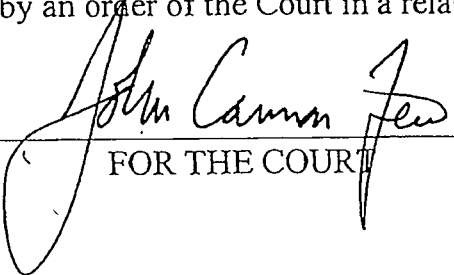
Bryon J. Dolan, Lisa S. Dolan, First Citizens Bank and Trust Company, Inc., Wells Fargo Bank, N.A., Branch Banking and Trust Company, Defendants,

Of whom Byron and Lisa S. Dolan are the Respondents.

Appellate Case No. 2014-002710

ORDER

Because the underlying order is not immediately appealable and because the issue of the stay has already been addressed by an order of the Court in a related case¹, this appeal is dismissed.


FOR THE COURT

Columbia, South Carolina

FILED

cc:

Charles Stuart Gwynne, Jr, Esquire
Andrew Sims Radeker, Esquire
The Honorable James O. Spence

2-13-15 AS

¹ Appellate Case No. 2014-001384.

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

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

Plaintiff,

v.

Bryon J. Dolan; Lisa S. Dolan; First Citizens Bank
and Trust Company, Inc.; Wells Fargo Bank,
N.A.; Branch Banking and Trust Company;

Defendant(s).

(011792-00355)

IN THE COURT OF COMMON PLEAS

DOCKET NO.

FILED
2012 JUL 24 P 11:00

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

SUMMONS
(NON-JURY)
FORECLOSURE OF REAL ESTATE
MORTGAGE
Deficiency Judgment Demanded

2012 CP 32028-16

TO THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to appear and defend by answering the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer on the subscribers at their offices, 220 Executive Center Drive, Suite 109, Post Office Box 100200, Columbia, South Carolina 29202, within thirty (30) days after the service hereof, exclusive of the day of such service, except that the United States of America, if named, shall have sixty (60) days to answer after the service hereof, exclusive of the day of such service; and if you fail to do so, judgment by default will be rendered against you for the relief demanded in the Complaint.

YOU WILL ALSO TAKE NOTICE that Plaintiff will move for an order of reference or that the Court may issue a general order of reference of this action to a master in equity/special referee, pursuant to Rule 53, of the South Carolina Rules of Civil Procedure.

TO MINOR(S) OVER FOURTEEN YEARS OF AGE, AND/OR TO MINOR(S) UNDER FOURTEEN YEARS OF AGE AND THE PERSON WITH WHOM THE MINOR(S) RESIDES, AND/OR TO PERSONS UNDER SOME LEGAL DISABILITY:

YOU ARE FURTHER SUMMONED AND NOTIFIED to apply for the appointment of a guardian ad litem within thirty (30) days after the service of this Summons and Notice upon you. If you fail to do so, application for such appointment will be made by FV-I, Inc. in trust for Morgan Stanley Mortgage Capital Holdings LLC.

Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

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Columbia, South Carolina
July 6, 2012

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

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

Plaintiff,

v.

Bryon J. Dolan; Lisa S. Dolan; First Citizens Bank
and Trust Company, Inc.; Wells Fargo Bank,
N.A.; Branch Banking and Trust Company;

Defendant(s).

(011792-00355)

IN THE COURT OF COMMON PLEAS

DOCKET NO.

FILED
2012 JUL 8 P 11:00

COMPLAINT

(NON-JURY)

FORECLOSURE OF REAL ESTATE
MORTGAGE
Deficiency Judgment DemandedBETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

2012 CP 3202816

Plaintiff alleges:

1. This is an action for the foreclosure of a mortgage upon certain real estate in Lexington County, South Carolina.
2. Pursuant to S.C. Code Section 33-15-101(b)(8) Plaintiff is a corporation or other legal entity collecting debts and / or enforcing mortgages, security interests or other rights in property securing debts.
3. Plaintiff has the legal right to enforce the negotiable instrument secured by the Mortgage and is the real party in interest as defined by Rule 17(a) of the South Carolina Rules of Civil Procedure.
4. The Plaintiff's servicing agent for the mortgage loan described in this foreclosure action is participating in the Home Affordable Modification Program ("HMP"), but the subject loan is not eligible for modification because the borrower's request is incomplete.
5. Some lien on or interest in the real estate, the subject of this action, may be claimed by the Defendant(s) herein.
6. The Defendant(s) herein described as judgment creditors have by filing said judgments designated their attorney entering the judgment as their agent for service of process under the provisions of South Carolina Code Section 15-35-840.

7. Heretofore, on or about March 28, 2005, Bryon J. Dolan made, executed and delivered a certain Adjustable Rate Note ("Note") in the principal sum of \$721,000.00, payable in monthly installments.

8. In order to secure the payment of the Note according to the terms and conditions thereof, Bryon J. Dolan and Lisa S. Dolan made, executed and delivered unto Mortgage Electronic Registration Systems, Inc. as nominee for Branch Banking and Trust Company of South Carolina, its successors and assigns (MIN# 100159966122742991) a certain real estate mortgage ("Mortgage") covering the following described property and any and all improvements to the property, including but not limited to a mobile/manufactured home:

ALL that certain piece, parcel or lot of land, with the improvements thereon, if any, situate, lying and being in the County of Lexington, State of South Carolina, being shown and delineated as Lot 5 (but sometimes known as Lot 5B or Parcel B), fronting on Winward Point Ct. on a plat prepared for Bryon J. and Lisa Dolan by Withworth & Associates, Inc., dated December 4, 2002 and recorded in the Office of the ROD for Lexington County in Book R7757 at Page 154, and having such metes and bounds as shown on said plat.

Also: A non-exclusive Easement for ingress/egress to Lot 5 (a/k/a Lot 5-B) over, through and across Lot 5-A (a/k/a Parcel A) as shown and delineated upon that certain Plat prepared for Norris L. Bowen and Jo Ann Bowen by Survey & Mapping Services dated September 14, 2011, recorded in the Office of Deeds for Lexington County and being more particularly described as "New Ingress/Egress Easement to 540 Windward Point Ct." shown as a small triangular shaped portion of Lot 5-A having an area of (206.25 square feet, more or less) located at the North-East line between Windward Point Court and Lot 5-A.

Less and Except: All that certain piece, parcel, or lot of land, with the improvements thereon, situate, located, lying and being in the County of Lexington, State of South Carolina, the same being shown and delineated as Parcel B-2 containing (1,043 square feet, more or less) more or less, as shown and delineated upon a Plat prepared for Norris L. Bowen and Jo Ann Bowen by Survey & Mapping Services, dated September 14, 2011, recorded in the Office of Deeds for Lexington County in Book R15084 at Page 258; and having such boundaries and measurements as shown thereon, more or less.

This being a portion of the property conveyed to Bryon J. Dolan by deed of James L. Casterline, Jr. and Dorothy C. Casterline dated September 30, 1999 and recorded October 15, 1999 in Book R5490 at Page 159; subsequently, Bryon J. Dolan conveyed a one half undivided interest in the subject property to Lisa S. Dolan by deed dated August 22, 2000 and recorded August 24, 2000 in Book R5936 at Page 326. Also, property conveyed to Bryon J. Dolan and Lisa S. Dolan by deed of South Carolina Electric & Gas Company dated February 4, 2002 and recorded February 5, 2002 in Book R6978 at Page 27.

Property Address: 540 Windward Pt Ct
Columbia, SC 29212

TMS# 002621-01-011

9. The Mortgage was signed, witnessed and probated March 28, 2005; thereafter the Mortgage was recorded in the Office of the RMC/ROD for Lexington County on March 31, 2005, in Mortgage Book R10015 at Page 280. This Mortgage was subsequently assigned to Branch Banking and

Trust Company by deed of September 25, 2009 and recorded October 12, 2009 in Book R13894 at Page 6; subsequently assigned to the Plaintiff herein by assignment dated July 8, 2011 and recorded July 8, 2011 in Book R14959 at Page 331 and by assignment dated September 30, 2011 and recorded October 3, 2011 in Book R15087 at Page 321. This Mortgage is subject to a Mortgage Modification dated September 29, 2011 and recorded September 30, 2011 in Book R15084 at Page 266. Also subject to a Partial Release of Real Estate Mortgage dated October 5, 2011 and recorded October 17, 2011 in Book R15110 at Page 3.

10. The Mortgage evidences and secures the repayment of money advanced by Plaintiff or its predecessor in interest to, or on behalf of, the mortgagor(s) and constitutes a R10015 at Page 280 lien on the mortgaged premises.

11. After all payments received by the Plaintiff have been credited to the subject loan, the loan is in default and due for March 1, 2011, and the conditions of the Note and Mortgage have been broken. Plaintiff elects to and does declare the entire balance of said indebtedness due and payable, and that there is due on the Note and Mortgage as of March 1, 2011, the principal sum of \$721,000.00, with interest from February 1, 2011, advances, late charges, and also for the costs and disbursements of this action, including attorney's fees.

12. Pursuant to South Carolina Code Sections 29-3-650 and 29-3-660, Plaintiff specifically demands or reserves its right to a personal or deficiency judgment, unless heretofore or hereafter released, against the Notemaker(s) hereby obligated for the above-described debt.

13. Pursuant to the terms of the Mortgage, Plaintiff has employed counsel to prosecute this action and a reasonable value of services of counsel in this action is the sum as the Court may find appropriate.

14. Plaintiff may be forced to pay sums for taxes and insurance and costs for securing the property, which sums, according to the terms of the Mortgage, should be added to the amount of the debt.

15. Pursuant to the terms of the Mortgage and applicable state law, Plaintiff requests the mortgage be foreclosed and that the property be sold at public auction in accordance with law, subject to any liens for taxes, special assessments of record against such property, and existing easements or restrictions of record.

16. The hereinafter named Defendant(s) may have some interest in or lien upon the premises covered by the Mortgage set forth above, or some part thereof, but that such interests or liens are junior and subsequent to the lien of Plaintiff's Mortgage or, if specified below, have been paid in full and either should be satisfied of record or the lien released from the subject real estate. Said liens or interests are of record in the Office of the RMC or Clerk of Court of the aforesaid county and are described as follows:

A. First Citizens Bank and Trust Company, Inc., by virtue of a mortgage given by Bryon Dolan a/k/a Bryon J. Dolan and Lisa S. Dolan in the amount of \$250,000.00, dated December 29, 2006, and recorded January 4, 2007 in Book R11662 at Page 69 Also including any other liens they may have. This Mortgage is subject to a Mortgage Modification dated September 29, 2011 and recorded September 30, 2011 in Book R15084 at Page 264. Also subject to a Partial Release of Mortgage Lien recorded October 17, 2011 in Book R15110 at Page 1.

B. Wells Fargo Bank, N.A., by virtue of a judgment against Bryon Dolan in the amount of \$12,319.11, dated June 17, 2010 and recorded on June 17, 2010 in Judgment Roll No. 09-CP-32-05583 Also including any other liens they may have.

C. Branch Banking and Trust Company, by virtue of a judgment against Bryon J. Dolan in the amount of \$80,483.74, dated April 25, 2011 and recorded on May 31, 2011 in Judgment Roll No. 09-CP-32-2811 Also including any other liens they may have.

17. A previous action for Foreclosure of this mortgage resulted in a Judgment of Foreclosure & Sale in the action Branch Banking and Trust Company v. Bryon J. Dolan, et al., in 09-CP-32-2263, filed May 26, 2010. That judgment included, in addition to Foreclosure of Plaintiff's mortgage: 1) Reformation of Plaintiff's mortgage to accurately described the property encumbered by Plaintiff's mortgage.

18. Plaintiff subsequently dismissed that Judgment of Foreclosure and Sale in as much as it pertained to foreclosure of Plaintiff's mortgage and released the Mortgagors from that portion of the judgment which pertained to foreclosure of Plaintiff's mortgage, but Plaintiff specifically preserved the Reformation, leaving this provision in full force and effect.

WHEREFORE, having fully set forth its Complaint, Plaintiff prays that this Honorable Court inquire into the matters as set forth herein and:

(1) Under the direction of this Court, ascertain and determine the amount due upon the Note and Mortgage held by Plaintiff together with attorney's fees and costs of this action.

(2) Declare Plaintiff's Mortgage a R10015 at Page 280 lien and render judgment of foreclosure for the amount so found to be due and owing thereon, together with any ad valorem taxes, or insurance premiums, and any other expenses which may be due and have been advanced by Plaintiff, with reasonable attorney's fees, and for the costs of this action.

(3) Order the reimbursement of all costs for inspecting and securing the property incurred by the Plaintiff as a result of the delinquency.

(4) Appoint a Receiver to collect the rents, issues, profits or designated sums from the mortgagor(s), and/or the grantee(s) of the mortgagor(s), and/or tenant(s) occupying or

exercising control over the mortgaged premises and hold the same subject to the further order of this Court.

(5) Under the direction of this Court, sell the mortgaged premises, bar any equity of redemption, and apply the proceeds of sale as follows:

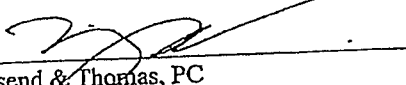
First, to the costs and expenses of the within action and sale;

Second, to the payment and discharge of the amount due on Plaintiff's Note and Mortgage, together with attorney's fees as aforesaid; and

Third, to the distribution of any surplus pursuant to Rule 71, of the South Carolina Rules of Civil Procedure;

(6) Issue an order directing the Sheriff of Lexington County, South Carolina, to place the successful purchaser at said foreclosure sale in possession of the property should the same become necessary;

(7) Order such other and further relief as may be just and proper.


Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958)
Reginald P. Corley (SC Bar #69453)
Ellie C. Floyd (SC Bar #68635)
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Columbia, South Carolina
July 6, 2012

COPY

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

Case No. 2012-CP-32-2816

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

Plaintiff,

vs.

Bryon J. Dolan; Lisa S. Dolan; First
Citizens Bank and Trust Company, Inc.;
Wells Fargo Bank, N.A.; Branch Banking
and Trust Company;

Defendants.

ANSWER AND COUNTERCLAIM
(JURY TRIAL DEMANDED)

Defendants Bryon J. Dolan and Lisa S. Dolan (hereinafter "the Defendants") in answer to the Plaintiff's Complaint and as counterclaim, answers and alleges as follows:

FOR A FIRST DEFENSE

1. Any allegation of the Complaint not herein admitted, qualified, or explained is denied. Any allegations of the Complaint subject of qualified admissions made herein are denied insofar as the allegations are not qualifiedly admitted, and any allegations of the Complaint subject of any other qualifications or explanations herein are denied insofar as they are not otherwise qualified or explained.

2. Answering the allegations of paragraph 1 of the Complaint, the Defendants admit the same to the extent that the Complaint states a cause of action for mortgage foreclosure.

3. Answering the allegations of paragraphs 2 and 3 of the Complaint, the Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the same.

4. Answering the allegations of paragraph 4 of the Complaint, the Defendants admit that the Plaintiff or its servicing agent is a participant in the Home Affordable Modification Program (hereinafter "HAMP"), but the Defendants deny the remaining allegations of the paragraph.

5. Answering the allegations of paragraph 5 of the Complaint, the Defendants admit the same as it pertains to Defendants Bryon J. Dolan and Lisa S. Dolan.

6. Answering the allegations of paragraph 6 of the Complaint, the Defendants admit the same.

7. Answering the allegations of paragraph 7 of the Complaint, the Defendants admit that Defendant Bryon J. Dolan signed a note, which note reads as it reads.

8. Answering the allegations of paragraph 8 of the Complaint, the Defendants admit Defendants Bryon J. Dolan and Lisa S. Dolan signed a mortgage, which document reads as it reads.

9. Answering the allegations of paragraph 9 of the Complaint, the Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the same.

10. Answering the allegations of paragraph 10 of the Complaint, the Defendants deny the same.

11. Answering the allegations of paragraph 11 of the Complaint, the Defendants deny the same.

12. Answering the allegations of paragraph 12 of the Complaint, the Defendants admit the Plaintiff demands what it demands, but the Defendants deny the Plaintiff is entitled to what it demands.

13. Answering the allegations of paragraph 13 of the Complaint, the Defendants deny the same.

14. Answering the allegations of paragraph 14 of the Complaint, the Defendants deny the same.

15. Answering the allegations of paragraph 15 of the Complaint, the Defendants admit that the Plaintiff requests what it requests but deny the Plaintiff is entitled to what it requests.

16. Answering the allegations of paragraph 16 of the Complaint, the Defendants lack sufficient knowledge or information to form a belief as to the truth or falsity of the same.

17. Answering the allegations of paragraph 17 of the Complaint, the Defendants admit upon information and belief that a judgment was previously rendered in the referenced suit but deny that the judgment rendered any relief in favor of the Plaintiff. The judgment reads as it reads.

18. Answering the allegations of paragraph 18 of the Complaint, the Defendants deny the same as written.

19. No answer to the prayer in the Complaint is required.

FOR A SECOND DEFENSE

20. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

21. The Plaintiff's predecessor in interest settled with the Defendants the matters subject of the Plaintiff's foreclosure claims.

22. The Defendants performed under the settlement until agents of the Plaintiff and its predecessor in interest told them not to continue to perform under the settlement.

23. The Plaintiff's predecessor in interest modified the terms of the subject note and mortgage through an agreement with the Defendants.

24. The Plaintiff has knowingly, intelligently, and voluntarily relinquished any right it may have had to bring this foreclosure case.

25. This is a waiver of any right the Plaintiff may have had to bring this foreclosure case.

FOR A THIRD DEFENSE

26. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

27. The Plaintiff and its predecessors, if any, themselves and/or by and through their agents and servants, have engaged in such conduct with respect to the loan subject of this action as to make the Plaintiff's hands unclean with regard to the matters subject of this action.

28. This conduct includes, but is not necessarily limited to, representing to the Defendants that the matters subject of the Plaintiff's foreclosure claim were settled.

29. This conduct relates directly to the subject matter of this action.

30. The said conduct has proximately caused the Defendants prejudice and injury.

FOR A FOURTH DEFENSE

31. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

32. The Plaintiff and its predecessors, if any, themselves and/or by and through their agents and servants, have engaged in conduct that was calculated to convey the impression to the Defendants that the matters subject of the Plaintiff's foreclosure claim were settled.

33. The Plaintiff and its predecessors, if any, themselves and/or by and through their agents and servants, intended, or at least expected or desired, that the Defendants would rely upon the impressions conveyed by this conduct.

34. The Plaintiff or its predecessor in interest knew that the status of the matters subject of this action could not be both as it represented to the Defendants and as it claims in this action.

35. The Defendants lacked the means to determine the true status of these matters.

36. The Defendants accordingly relied on these representations to their prejudice.

FOR A FIFTH DEFENSE

37. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

38. The Plaintiff has no standing to bring this case.

39. The Plaintiff, upon information and belief, does not own the note subject of this case.

40. At most, the Plaintiff acquired from Mortgage Electronic Registration Systems, Inc. (or assignees thereof) its nominee status with respect to the loan at issue.

FOR A SIXTH DEFENSE AND AS COUNTERCLAIM

41. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

42. There is need in this action for discovery of the exact manner in which the Plaintiff has assessed charges and applied payments with regard to the debt subject of this action.

43. The Defendants are entitled to an accounting with regard to the same.

FOR A SEVENTH DEFENSE

44. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

45. The note and mortgage at issue were created through a process designed to deprive registers of deeds (and, here, the Lexington County Register of Deeds) of their lawful fees for the recording of mortgage assignments.

46. The note and mortgage are void for illegality.

FOR AN EIGHTH DEFENSE AND AS COUNTERCLAIM

47. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

48. Actions of the Plaintiff and its predecessors, if any, themselves and/or by and through their agents and servants, such actions including, but not necessarily being limited to, those stated in this pleading, constitute violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*

49. The Plaintiff knew or should have known that the said actions were violations of the Unfair Trade Practices Act and were unfair and deceptive acts in trade or commerce.

50. These actions are capable of repetition, including, but not necessarily limited to, in that the Plaintiff and its predecessors, if any, is a lender and mortgage servicer that engages in collection practices and brings and directs mortgage foreclosure actions and in that the Plaintiff is a participant in the Home Affordable Modification Program.

51. The Defendants have suffered damages as a result of the said actions.

52. The Defendants are entitled to treble damages, reasonable attorney's fees, and costs.

FOR A NINTH DEFENSE AND AS COUNTERCLAIM

53. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

54. The Plaintiff has breached the modified terms of the note and mortgage.

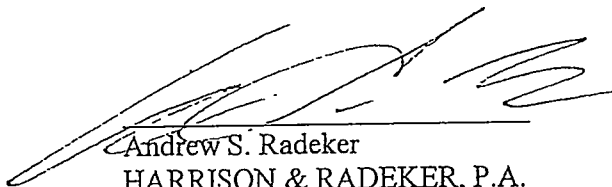
55. The Plaintiffs' aforesaid breach or breaches proximately caused damage to the Defendants.

56. The Defendant is entitled to recover damages from the Defendant.

WHEREFORE, the Defendant prays for the Court to:

- (a) Issue an Order dismissing the Complaint with prejudice;
- (b) Deny the Plaintiff the relief it seeks in this action;
- (c) Specifically enforce the modification agreement;
- (d) Award the Defendant actual damages, punitive damages, treble damages, and all applicable statutory penalties;
- (e) Award the Defendant reasonable attorney's fees;
- (f) Award the Defendant the costs and expenses of this action; and
- (g) Grant the Defendant such other and further relief as the court deems just and proper.

Respectfully submitted,



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ATTORNEY FOR DEFENDANTS
BRYON J. DOLAN AND LISA S. DOLAN

Columbia, South Carolina
August 8, 2012

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

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

Plaintiff,

vs.

Bryon J. Dolan; Lisa S. Dolan; First
Citizens Bank and Trust Company, Inc.;
Wells Fargo Bank, N.A.; Branch Banking
and Trust Company;

Defendants.

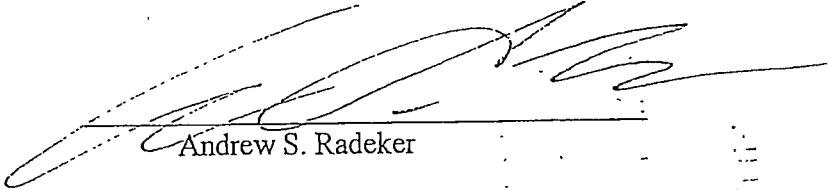
IN THE COURT OF COMMON PLEAS

Case No. 2012-CP-32-2816

CERTIFICATE OF SERVICE

I, Andrew S. Radeker, an attorney with the law firm of Harrison & Radeker, P.A.,
Attorneys for Defendants Bryon J. Dolan and Lisa S. Dolan, do hereby certify that I, on the 8th
day of August, 2012, served the foregoing document in the above-captioned action by depositing
the same in the U.S. Mail, first class, postage prepaid, with the return address clearly noted,
addressed as follows:

Mary R. Powers, Esq.
Rogers Townsend & Thomas, PC
P.O. Box 100200
Columbia, SC 29202



Andrew S. Radeker

STATE OF SOUTH CAROLINA

FILED

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

2014 APR 28 P 4:39 Case No. 2012-CP-32-2816

FV-I, Inc., in trust for Morgan Stanley
Mortgage Capital Holdings LLC,BETH A. CARRIG
CLERK OF COURT
LEXINGTON

MOTION FOR NEW TRIAL

Plaintiff,

vs.

Bryon J. Dolan; Lisa S. Dolan; First
Citizens Bank and Trust Company, Inc.;
Wells Fargo Bank, N.A.; Branch Banking
and Trust Company;

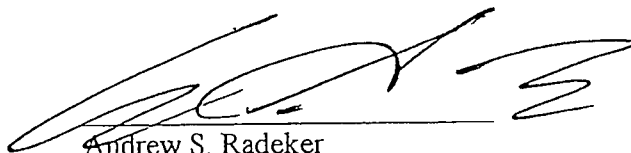
Defendants.

YOU WILL PLEASE TAKE NOTICE that Defendants Bryon J. Dolan and Lisa S. Dolan (hereinafter "the Defendants") hereby move pursuant to Rules 50 and 59, SCRPC, as well as all other applicable law, for an Order that grants them a new trial on their counterclaims in the above-captioned action.

The grounds for this motion are as is shown in the attached memorandum, which is incorporated herein as if her set forth verbatim.

Consultation with opposing counsel in advance of the making of this motion would have served no useful purpose.

Respectfully submitted,



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ATTORNEY FOR DEFENDANTS
BRYON J DOLAN AND LISA S DOLAN

Columbia, South Carolina
April 27, 2014

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

FILED

IN THE COURT OF COMMON PLEAS

2014 APR 28 P 4: 30

Case No. 2012-CP-32-2816

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

Plaintiff,

vs.

Bryon J. Dolan; Lisa S. Dolan; First
Citizens Bank and Trust Company, Inc.;
Wells Fargo Bank, N.A.; Branch Banking
and Trust Company;

Defendants.

SETH A. CARRICO
CLERK OF COURT
LEXINGTON

**MEMORANDUM IN SUPPORT OF
MOTION FOR NEW TRIAL**

Defendants Bryon J. Dolan and Lisa S. Dolan (hereinafter "the Defendants" or "the Dolans") respectfully submit this memorandum in support of their motion for a new trial on their counterclaims in the above-captioned action. Arguments made in this memorandum in support of one ground that also support another ground are made in favor of all grounds for a new trial which they support. Further, the Defendants hereby incorporate by reference their arguments made orally in opposition to the Plaintiff (hereinafter, sometimes, "FV-I")'s direct verdict motion.

ADMISSION OF PLAINTIFF'S EXHIBIT 12 WARRANTS A NEW TRIAL

Over objection by the Dolans, the Court admitted FV-I's Exhibit 12, a document that was generated by Saxon Mortgage Services, the preceding servicer of the subject loan. FV-I claimed that this document meets the elements of the business records exception to the hearsay rule. The Court ruled that based on Loretta Poch, the Plaintiff's sole witness, being the custodian of records for this loan at Specialized Loan Servicing (the present servicer of the subject loan), the document met the business records exception and was admissible. This was despite Ms. Poch having testified that she had never worked at BB&T (the first servicer of the loan) or Saxon,

despite her having testified that she had no knowledge of the procedures of either of those companies, and despite no testimony at all being offered as to when, by whom, or how this record or any entry in it was made. This was prejudicial error and warrants a new trial. This document was simply inadmissible hearsay. It was all that was offered to attempt to show that the purported escrow arrearages FV-I claimed as preventing the loan from being brought current with the \$65,520.00 payment had any particular transactions to back up those figures. Particularly in light of the fact that the substantive testimony FV-I elicited from Ms. Poch about the subject account was all objectionable and should not have been admitted either, admission of this document prejudiced the Dolans.

“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801(c), SCRE. Hearsay is generally inadmissible. Rule 802, SCRE. One exception to the hearsay rule is usually called the “business records exception,” though whether the document involved is a record of a business is not what must be shown to satisfy the exception. Rule 803(6), SCRE; S.C. Code Ann. § 19-5-510. The elements of this hearsay exception 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:

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.

To authenticate a document as falling under the “business records” exception, a witness qualified to do so must provide sufficient testimony to establish each element of the exception. Connelly v. Wometco Enters., Inc., 314 S.C. 188, 192, 442 S.E.2d 204, 206 (Ct. App. 1994). Otherwise, the document is simply inadmissible hearsay. Id. “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)

It is, of course, necessary that the witness have knowledge of how the record was prepared. State v. Sarvis, 317 S.C. 102, 107, 450 S.E.2d 606, 609 (Ct. App. 1994). This includes testimony sufficient to establish that the document was “prepared by someone with or from information transmitted by a person with knowledge[.]” Rule 803(6)(2), SCRE.

Further, “[b]usiness record entries must have been made at or near the time of the act to which they relate; the purpose of this mandate is to aid in establishing that the record was honestly and fairly kept.” Rice, 375 S.C. at 332. Accordingly, testimony must be adduced from the witness as to when the record entries were made. Id.

The Supreme Court of Missouri has held that “a document that is prepared by one business cannot qualify for the business records exception merely based on another business’s

records custodian testifying that it appears in the files of the business that did not create the record.” CACH, LLC v. Askew, 358 S.W.3d 58, 63 (Mo. 2012). This is in accord with the law of other states as well, at least of Wisconsin, Texas, Pennsylvania, and New York (and probably others). Palisades Collection, LLC v. Kalal, 781 N.W.2d 503, 510 (Wis. Ct. App. 2010) (to authenticate under business records exception, witness “must have personal knowledge of how the account statements were prepared and that they were prepared in the ordinary course of [the original creditor’s] business”); Riddle v. Unifund CCR Partners, 298 S.W.3d 780, 782-83 (Tex. App. 2009) (“the witness must have personal knowledge of the manner in which the records were prepared”); Martinez v. Midland Credit Mgmt., Inc., 250 S.E.3d 481, 485 (Tex. App. 2008) (purported business records inadmissible where witness “does not provide any information that would indicate that he (or she) is qualified to testify as to the record-keeping practices of the ‘predecessor’”); Standard Textile Co. v. Nat’l. Equip. Rental, Ltd., 437 N.Y.S.2d 398, 398 (N.Y. App. Div. 1981) (plaintiff’s employee “was not a qualified witness to testify as to the record keeping of another entity” absent personal knowledge of the document’s creation”); Commonwealth Financial Systems v. Smith, 2001 PA Super 30, *6 (Pa. Super Ct. 2011) (witness “could not say for certain whether [industry] requirements had actually been followed in the preparation and maintenance of those records because, simply put, he was never in a position to know”).

It appears that South Carolina law is consistent with the law of these sister states on this point. Our Supreme Court has 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. State v. McFarlane, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983)

Here, the Court simply substituted a finding that Ms. Poch was the custodian of records for the necessary findings that each element of the business records exception was satisfied. Being a records custodian simply puts a person in a position to testify, if she can, about how a record was prepared. Here, Ms. Poch’s own testimony showed that she was incapable of providing any testimony about the first three elements of the business records exception, nor was any testimony having any tendency to speak toward satisfaction of any of those three elements adduced.

Erroneous evidentiary rulings based on conflating requirements of evidence law constitute abuses of discretion. State v. Page, 406 S.C. 272, 287, 290, 750 S.E.2d 623, 631, 632 (Ct. App. 2013). The Court either conflated the fourth requirement of the business records exception with the preceding three requirements or ignored those three requirements. The jury received an inadmissible and objected-to hearsay document for use in its deliberations. This was prejudicial error that warrants a new trial.

RULINGS AS TO MS. POCH’S TESTIMONY WARRANT A NEW TRIAL

Ordinarily, a witness may not testify as to the contents of a writing Rule 1004, SCRE; W.R. Grace & Co. v. La Munion, 245 S.C. 1, 138 S.E.2d 337 (1964); Moore v. Postal Telegraph-Cable Co., 202 S.C. 225, 24 S.E.2d 361 (1943), Mayfield v. So. R. Co., 85 S.C. 165, 67 S.E. 132 (1910), Rose v. Winnsboro Nat’l. Bank, 41 S.C. 191, 18 S.E. 487 (1894). This rule is, for some reason, often called the “best evidence” rule, perhaps on the rationale that the writing is the best evidence of its contents

Ms. Poch testified that her only knowledge of the subject loan came from reading written records of the loan’s servicers. All she knows is what the writings say. When the Dolans

objected to her testimony about the substantive status of and history of the loan, the Court overruled those objections and allowed her to give testimony that her own words establish violated the best evidence rule. This was the only testimony offered to contradict Mr. Dolan's testimony and the only testimony offered for the purpose of convincing the jury that FV-I was right about the status of the account. To admits this testimony was prejudicial error that warrants a new trial.

A *witness* is exactly that: someone who, through what he or she has witnessed (i.e., has observed firsthand), has personal knowledge of a matter at issue in a case. Rule 602, SCRE; M. B. A. F. B. Fed. Credit Union v. Cumis Ins. Soc., Inc., 681 F.2d 930 (4th Cir. 1982); State v. Needs, 508 S.E.2d 857 (1998); State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996). A person's position or status within a company is insufficient to make that person a competent witness. Englebert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 433 S.E.2d 871 (Ct. App. 1993).

Further, the Court permitted Ms. Poch to testify directly to the legal conclusion of whether the note and mortgage's terms were breached (as well as permitting cross-examination of Mr. Dolan with such questions, which was also prejudicial error). Testimony that is composed of a legal conclusion is inadmissible. E.g., Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003). To permit FV-I to adduce testimony from lay witnesses as to one of the very issues at the heart of this case was prejudicial error

**A NEW TRIAL SHOULD BE GRANTED ON THE
UNFAIR TRADE PRACTICES ACT CLAIM**

"When ruling on a directed verdict the trial court must view the evidence and the inferences which reasonably can be drawn therefrom in the light most favorable to the party opposing the motion. In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence . . . When considering

directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. The issue must be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of the reasonable juror. A directed verdict is warranted when there is warranted only if evidence would not be legally sufficient to sustain a verdict for the opposite party. If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury.” Estate of Haley ex rel. Haley v. Brown, 370 S.C. 240, 252-523, 634 S.E.2d 62, 68-69 (Ct. App. 2006).

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 plaintiff. 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 plaintiff must show: (1) the defendant 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 plaintiff 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. Diebelli, 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 has a South Carolina appellate court held that repetition or potential for repetition is a necessary element of a UTPA cause of action; rather, our courts have held that showing potential for repetition is *one way* in which a party can satisfy the public interest requirement. Id. As the Court's ruling granting FV-I's directed verdict motion on this claim appears to have been based on the idea that what was at issue was a unique situation that was unlikely to be repeated, this is particularly important. The 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; however, it was only necessary for the Dolans to adduce evidence of impact on the public interest, not potential for repetition, in order to survive FV-I's directed verdict motion.

The Court's decision to grant a directed verdict on the UTPA cause of action was error. A new trial on this claim is warranted

RULINGS ON TESTIMONY OF BRYON DOLAN WARRANT A NEW TRIAL

Testimony about negotiations. The Court erroneously barred Bryon Dolan from testifying about his negotiations leading up to the execution of a September 22, 2011, letter agreement with FV-I through its servicer, based on the parol evidence rule. This affected the Defendants' trial strategy and ability to present their case; the Plaintiff then turned around and adduced cross-examination testimony in violation of this ruling for most of the time Mr. Dolan spent being cross-examined. Excluding such testimony at all, however, was error

The parol evidence rule is a poorly named rule of law, since it is not a rule of evidence at all but, rather, one of the substantive law of contract construction. “The parol evidence rule has been held inapplicable to tort causes of action (including negligent misrepresentation) since the rule is one of *substantive contract law*.” Redwend Ltd. Partnership v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003) (emphasis added). The rule is applicable in cases where a party argues that the terms of a contract are *different from* what is contained in an integrated writing. E.g., Crafton v. Brown, 346 S.C. 347, 550 S.E.2d 904 (Ct. App. 2001) (“Where the terms of [a] written guaranty are clear and complete, extrinsic evidence of agreements or understandings contemporaneous with or prior to its execution cannot be used to contradict, explain, or vary its terms, in the absence of fraud, accident, or mistake in its procurement”). “When a contract is *silent* as to a particular matter, parol evidence is admissible to reveal the parties’ true intent.” Keith v. River Consulting, Inc., 365 S.C. 500, 506, 618 S.E.2d 302, 305 (Ct. App. 2005) (emphasis added).

Here, the September 22, 2011, agreement document is silent as to whether the funds paid under it will be sufficient to bring the loan current or have been agreed to be sufficient to bring the loan current. Indeed, determining what amount is sufficient to bring a defaulted note current will almost always depend upon matters that are not contained in the terms of the documents – the date of default, how much had already been paid on the loan, the existence and amount of expenses properly chargeable to the debt at issue.

Also, if a contract’s language is ambiguous, parol evidence may be admitted to show the intention of the parties, which is a question of fact. S.C. Dept. of Natural Resources v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). The Dolans’ primary contention is that the terms of the writing at issue are silent as to whether the funds being

“applied to the loan” will bring the loan current, and parol evidence is admissible on that point for that reason. If the Court, however, determines that the words “applied to the loan” do speak to this point, they are ambiguous. Applied to the loan *how*? And producing what result? These questions are unanswered by the language of this document.

“A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation. It is a question of law for the court whether the language of a contract is ambiguous. Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. The determination of the parties’ intent is then a question of fact.” S.C. Dept. of Natural Resources, 345 S.C. at 623.

It is well settled that ambiguous language in a contract document should be interpreted strongly in favor of the party who did not draft the document and against the party who did. E.g., So. Atlantic Financial Servs., Inc. v. Middleton, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003); Mid-Continent Refrigerator Co. v. Way, 263 S.C. 101, 109, 208 S.E.2d 31, 35 (1974). Any conflict between clauses in a contract must be resolved in favor of the non-drafting party. Mid-Continent Refrigerator, 263 S.C. at 109.

“The conduct of the parties is entitled to great weight in interpreting an ambiguous contract.” Langston v Niles, 265 S.C. 445, 458, 219 S.E.2d 829, 834 (1975). In cases of doubt, the interpretation of a contract that the evidence shows was shared by both parties to it is determinative. Kitchens v. Lee, 221 S.C. 59, 66, 69 S.E.2d 67, 69 (1952). The behavior of the parties to the contract in carrying it out is evidence that may speak to their mutual interpretation of the contract terms. Langston, 265 S.C. at 458 (in interpreting ambiguous terms, noting behavior of parties after agreement struck), Kitchens, 221 S.C. at 66 (same).

Where, as here, the contract is ambiguous, at most, on the point at issue and the parties' post-performance conduct has tendencies to support one party's interpretation thereof, testimony about the contractual negotiations should be allowed to explain the ambiguity. The failure to allow such testimony was prejudicial error.

Andrew Farmer phone call testimony. Citing Marshall v. Thomason, 241 S.C. 84, 127 S.E.2d 177 (1962), the Court refused to allow Mr. Dolan to testify to the content of a phone conversation he had with Andrew Farmer of Saxon Mortgage Services in which Mr. Farmer told him not to make more payments on this loan, apparently on the grounds that there was no evidence that he was authorized to speak on such a matter. Marshall is inapposite.

In Marshall, there was absolutely no evidence having any tendency to show that the truck driver at issue was authorized to speak on the company's behalf about the accident involved in that case. Id. at 90-92. Here, however, testimony had already been adduced, without objection, that Mr. Farmer was who had responded on behalf of the Plaintiff to Mr. Dolan's previous inquiry about where to send a payment; then, later, that same person, Andrew Farmer, called and told Mr. Dolan not to make any more payments. His previous call is evidence that he was authorized to speak on such a matter. The relatively more recent case of Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997), speaks relevantly to this issue. The question is what the evidence indicates about what kind of tasks the person performed for the principal; in Jackson, the issue of whether the employee spoke for the defendants was analyzed by noting that "[a]s a car salesman for [them], [the employee] was an agent authorized to speak for them about this vehicle." Id. at 305. Here, the evidence indicates Mr. Farmer was an employee authorized to speak about making payments – or, as the case may be, not making them. This testimony was critical to the Dolans presenting a case that they had been told not to make further payments and

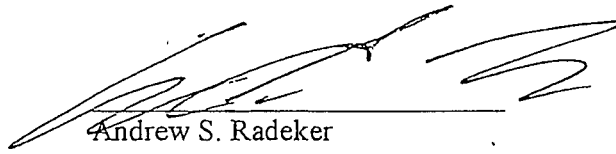
that the Plaintiff had thus brought on itself the breach of the note and mortgage. The failure to admit this testimony was prejudicial error that warrants a new trial.

NEW TRIAL UNDER THE THIRTEENTH JUROR DOCTRINE

“The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict. . . . The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitate on the basis of the facts in the case. Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge’s finding that justice has not prevailed. Similarly, the judge may grant a new trial if the verdict is inconsistent and reflects the jury’s confusion.” Vinson v. Hartley, 324 S.C. 389, 403-04, 477 S.E.2d 715 (Ct. App. 1996) (internal citations omitted). This “has also been termed granting a new trial upon the facts. The effect is the same as if the jury failed to reach a verdict. The judge as the thirteenth juror ‘hangs’ the jury.” Folkens v. Hunt, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990) (internal citations omitted).

The facts of this case warrant a new trial under the thirteenth juror doctrine. Here, the evidence does not justify the verdict. The Plaintiff’s servicer took repeated actions showing that it was acting under the impression that the loan was reinstated; the jury apparently ignored them. It is in the interest of justice to grant a new trial.

Respectfully submitted,

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

Andrew S. Radeker
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(803) 779-2211
(803) 779-6700 (facsimile)
drew@harrisonfirm.com (email)

ATTORNEY FOR DEFENDANTS
BRYON J. DOLAN AND LISA S. DOLAN

Columbia, South Carolina
April 27, 2014

STATE OF SOUTH CAROLINA **FILED** IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

Case No. 2012-CP-32-2816

FV-I, Inc., in trust for Morgan Stanley

Mortgage Capital Holdings LLC, **BETH A. CARRICO**

Plaintiff,

CERTIFICATE OF SERVICE

vs.

Bryon J. Dolan; Lisa S. Dolan; First
Citizens Bank and Trust Company, Inc.;
Wells Fargo Bank, N.A.; Branch Banking
and Trust Company;

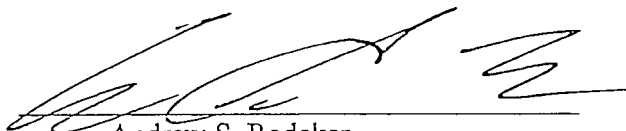
Defendants.

I, Andrew S. Radeker, an attorney with the law firm of Harrison & Radeker, P.A., Attorneys for Defendants Bryon J. Dolan and Lisa S. Dolan, do hereby certify that I, on the 27th day of April, 2014, served the foregoing document in the above-captioned action by depositing the same in the U.S. Mail, first class, postage prepaid, with the return address clearly noted, addressed as follows:

The Hon. R. Keith Kelly
Circuit Judge
125 E. Floyd Baker Blvd.
Gaffney, SC 29340

Charles S. Gwynne, Jr., Esq.
Rogers Townsend & Thomas, PC
P.O. Box 100200
Columbia, SC 29202

Adam H. Schanz, Esq.
Crawford & von Keller, LLC
P.O. Box 4216
Columbia, SC 29204


 Andrew S Radeker

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

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

Plaintiff,

vs.

Bryon J. Dolan; Lisa S. Dolan; First
Citizens Bank and Trust Company, Inc.;
Wells Fargo Bank, N.A.; Branch Banking
and Trust Company;

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2012-CP-32-2816

MOTION TO RECONSIDER

FILED
2014 JUN -5 PM 2:51

YOU WILL PLEASE TAKE NOTICE that the Defendants Byron J. Dolan and Lisa S. Dolan (hereinafter "Defendants") move before this Court pursuant to Rules 52 and 59, SCRCP, as well as pursuant to all other applicable law, for an order reconsidering, altering, clarifying, or amending the order of the Honorable R. Keith Kelly that denied the Defendants' motion for a new trial¹ in the above-captioned action, and the Defendants ask that a new trial be granted, on the following grounds:

1. For the arguments and reasons noted in the memorandum supporting and served as a part of the Defendants' motion for a new trial, which memorandum is incorporated herein by reference as if here set forth verbatim, the Defendants are entitled to an order reconsidering, altering, clarifying, or amending the judgment rendered in the order denying the motion for a new trial and are also entitled to a new trial.
2. The facts concerning whether the business records exception to the hearsay rule was met with respect to documentary evidence admitted over the Defendants' objection in this

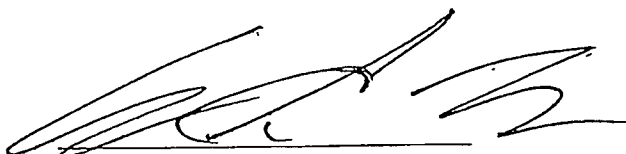
¹ The Defendants have not received written notice of the *entry* of this order. As shown by Exhibit A hereto, on June 2, 2014, the Defendants received written notice that this order has been sent to the Lexington County Clerk of Court to be entered

case and with respect to the application of the best evidence rule to testimony allowed over the Defendants' objection in this case are markedly similar to the relevant facts of CACH, LLC v. Megan Moran, Case No. 2012-CP-10-5181, in which the court ruled the documentary evidence and testimony there at issue to be inadmissible for reasons the Court in the instant case should have sustained the Defendants' objections in this case. A copy of the final order in the CACH v. Moran case is attached hereto as Exhibit B.

3. Arguments made in the aforesaid memorandum in support of one ground that also support another ground are made in favor of all grounds that they support.
4. This motion is also based upon all other applicable law, the record, and any further memoranda that the Defendants may submit.

Pursuant to Rule 11, SCRCP, there is no duty of consultation prior to this motion, as this is a motion to reconsider and such consultation would have served no useful purpose.

Respectfully submitted,



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(803) 779-6700 (facsimile)
drew@harrisonfirm.com (email)
ATTORNEY FOR DEFENDANTS

Columbia, South Carolina
June 5, 2014

Drew Radeker

From: Kelly, R. Keith Law Clerk (Joseph T. Odom) <kkellylc@sccourts.org>
Sent: Monday, June 02, 2014 8:56 AM
To: Charlie Gwynne
Cc: Drew Radeker
Subject: RE: FV-I v. Dolan

Charlie,

He signed it, and we mailed it to the Lex Clerk of Court. Let me know if you need anything further. Thanks.

Sincerely,

Trey Odom

From: Charlie Gwynne [mailto:CHARLIE.GWYNNE@rtt-law.com]
Sent: Friday, May 30, 2014 4:03 PM
To: Kelly, R. Keith Law Clerk (Joseph T. Odom)
Cc: Drew Radeker
Subject: RE: FV-I v. Dolan

Mr. Odom,

Could you please let us know if Judge Kelly has had a chance to sign the attached from 4 order?

Thank you,
Charlie



Charlie Gwynne
Shareholder

Direct 803.744.1933
Fax 803.343.7017

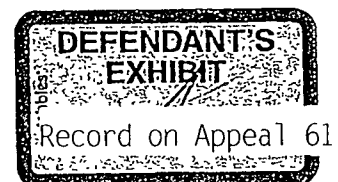
Rogers Townsend & Thomas, PC
220 Executive Center Dr.
Columbia, SC 29210

Main 803.771.7900
Visit rtt-law.com

From: Drew Radeker [mailto:Drew@harrisonfirm.com]
Sent: Friday, May 02, 2014 12:07 PM
To: Kelly, R. Keith Law Clerk (Joseph T. Odom); Charlie Gwynne; Jason Wyman
Subject: RE: FV-I v. Dolan

Mr. Odom:

Just so the record is clear, I've attached a Form 4 that would deny the motion.



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
CASE NO. 2012-CP-10-5181

CACH, LLC,

Plaintiff,

vs.

Megan Moran,

Defendant.

ORDER

FILED
2014 APR 25 PM 12:10
JULIE J. ARYSTROFF
CLERK OF COURT

This matter came before me upon the trial of the above-captioned action, held on March 20, 2014, at the Charleston County Courthouse. The Court instructed counsel to submit proposed orders within 10 days of trial.¹ The Court held in abeyance the decision of whether to admit the Plaintiff's sole proffered exhibit at trial.

For the reasons set forth below, the Court denies the Plaintiff the relief it seeks and grants the Defendant's motion for an involuntary nonsuit.

The Plaintiff, CACH, LLC, filed this action on August 8, 2012, and served the summons and complaint on August 12, 2012. In the complaint, the Plaintiff alleges that "[c]redit was extended to Defendant on a revolving line of credit on an open account by Bank of America Corporation, one of its subsidiaries, or a bank to which it is a successor in interest." Neither the complaint nor the "verified statement of account" attached to it provides more identification of the credit-providing entity with which the account was supposedly opened. The complaint alleges that the "Defendant defaulted on the obligation to make the required payments on the account." The complaint does not allege what any of the terms of the account are. It alleges that "there is now due and owing on this account the principal sum of \$12,859.25, plus interest

¹ Because March 30, 2014, was a Sunday, the submission deadline was March 31, 2014. Both parties complied with the deadline.

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thereon from July 26, 2011 at the legal rate of 8.75% per annum as shown by the Verified Statement of Account attached hereto and incorporated herein by reference.” The “verified statement of account” attached to the complaint simply says that this is the amount owing according to “business records” of the original creditor.

The Defendant, Megan Moran, served an answer on September 6, 2012, admitting that she lives in Charleston County and that this Court has jurisdiction but answering that she lacks sufficient knowledge or information to form a belief as to the truth or falsity of the Plaintiff’s remaining allegations. She further pled that the complaint fails to state facts sufficient to constitute a cause of action.

The parties exchanged discovery, and the Plaintiff moved for summary judgment. The Honorable J. C. Nicholson, Jr. heard and denied the Plaintiff’s motion for summary judgment. While the Defendant had initially demanded a jury trial, she waived that demand, with the consent of the Plaintiff, and the case was tried non-jury to the undersigned.

At the beginning of the trial, the Defendant moved to exclude the Plaintiff’s sole witness, Victoria Mason, on the grounds that the Plaintiff’s discovery responses indicated that Ms. Mason had no personal knowledge of the matter. The Court denied the motion and the Plaintiff presented its case.

The Plaintiff called Ms. Mason as a witness. She testified that she works at a company called Square Two Financial and that Square Two Financial is the records custodian for the Plaintiff. She testified that she had received training about how Bank of America maintains its records. She did not testify about when she received the training. She testified that certain records were received from Bank of America concerning this case, that those are now part of the Plaintiff’s records, and that those records concern the account subject of this case. She identified what appear to be account statements labeled with “Bank of America” and “Megan Moran” in

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their top left-hand corners, dated from May of 2010 to May of 2011. Ms. Mason testified that these statements were computer-generated on a monthly basis from information in Bank of America's "system" for the duration of the account. Ms. Mason offered no testimony about when or by whom the data entries that comprise the information in the statements were made into Bank of America's system. Ms. Mason testified that the account at issue was opened in the year 2000, and it is plain from looking at the statements that the statements do not reveal what makes up a "previous balance" of \$11,960.10 shown on the May-June 2010 statement. No testimony was offered by Ms. Mason about what had happened to the statements that were older than May of 2010.

The Defendant objected to the statements on the grounds that the statements are inadmissible hearsay (and did not meet the requirements of Rule 803(6), SCRE), because their admission would violate the rule of completeness, and because the statements are summaries of documents that were not made available to the Defendant by the Plaintiff. The Plaintiff argued that the statements met the requirements of Rule 803(6), SCRE, and that an unidentified federal regulation promulgated pursuant to the Truth-in-Lending Act provides that banks do not have to keep such account records for more than two years. The Court marked the statements as a court exhibit and reserved ruling on the admission of the statements.

On cross-examination, Ms. Mason testified that she assumes that the "previous balance" of \$11,960.10 shown on the May-June 2010 statement includes some component of interest, though she does not know what the component parts of that figure or their amounts are. She testified that that "previous balance" figure most likely reflects the content of entries that would be shown on older statements. She testified that \$12,815.90, the amount on which the Plaintiff seeks to recover pre-judgment interest in this case, itself contains a component that is interest, though how much of it is interest is unknown to Ms. Mason. She testified that the Plaintiff is

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seeking to collect interest on any interest that is a component of that \$12,815.90 amount. She testified that the assignment to the Plaintiff that she referenced on direct examination was done in writing, but that writing was not offered into evidence. Ms. Mason testified that everything she knows about the subject account comes from reading the contents of writings (paper and computerized written records) that, other than the statements discussed above, were not offered into evidence. Counsel for the Defendant moved to strike her testimony on that basis, noting what is known as the best evidence rule. The Court did not rule on that motion at the time. After cross-examination, the Plaintiff rested its case, and the Court heard argument from the parties, including on the Defendant's motion for an involuntary nonsuit.

At no time did Ms. Mason offer any testimony about who the purported original creditor on the subject account was. The Plaintiff produced no copy of the account contract or other evidence of what the terms are of the account contract upon which the Plaintiff bases its claim.

FINDINGS OF FACT

The terms of the purported account agreement are unknown. The identity of the original creditor under that agreement is unknown. Ms. Mason testified that the account was assigned to the Plaintiff, but she did not testify about from what entity it was assigned; thus, this is unknown as well. The components and amounts of the components of the claimed debt the Plaintiff seeks to recover are similarly unknown.

The Plaintiff has not shown that the statements for which it sought admission were prepared by someone with or from information transmitted by a person with knowledge of the items of information contained in the statements. According to the only witness to testify at trial, the statements were computer-generated from information in Bank of America's "system." No information was adduced at trial about who made the data entries that comprise the information within the statements. Each statement does appear to contain a summary – the "previous

balance” – of the entries made on the statements that precede it. What has happened to the statements that predate May of 2010 is not known. No evidence was adduced to the effect that they were lost or destroyed.

Also, as further discussed below, no cognizable evidence of assignment to the Plaintiff of the account was placed into the record, through testimony or exhibit, at trial.

CONCLUSIONS OF LAW

To prevail at trial, one of the things the Plaintiff was required to establish is what the material terms of the claimed account agreement are. “It is elemental, and requires no citation of authority for the proposition that before a party can recover for the breach of a contract, that he must allege and prove by competent, relevant testimony each one of the material elements of the contract sued on.” Rabon v. State Finance Corp., 203 S.C. 183, 185, 26 S.E.2d 501, 502 (1943); accord Ringer v. Graham, 293 S.C. 238, 359 S.E.2d 523 (Ct. App. 1987) (burden on plaintiff to prove all terms essential to creation of a contract).

To recover for breach of contract, a claimant must prove that there was a binding contract entered into by the parties, the other party breached the contract, and damage as a proximate result. See Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 124 S.E.2d 602, 610 (1962). Since the Plaintiff has not proven the terms of the claimed agreement or even with whom the Defendant made the agreement, the Plaintiff is unable to establish a breach of the agreement. The Plaintiff cannot point to any act or omission that constitutes a breach of a term of the account agreement, as the terms of that agreement are unknown. This alone would be dispositive of the Plaintiff’s case and entitle the Defendant to prevail.

The Plaintiff’s only argument that the account statements were not inadmissible hearsay was that the testimony adduced showed the statements to meet the requirements of Rule 803(6),

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SCRE. The testimony did not show this, and the statements also appear to be summaries that are inadmissible for failure to satisfy the requirements of Rule 1006, SCRE.

“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801(c), SCRE. The account statements are hearsay. Hearsay is generally inadmissible. Rule 802, SCRE. One exception to the hearsay rule is usually called the “business records exception,” though whether the document involved is a record of a business is not what must be shown to satisfy the exception. Rule 803(6), SCRE; S.C. Code Ann. § 19-5-510. The elements of this hearsay exception 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:

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.

To admit a document as falling under the “business records” exception, a witness qualified to do so must provide sufficient testimony to establish each element of the exception. Connelly v. Wometco Enters., Inc., 314 S.C. 188, 192, 442 S.E.2d 204, 206 (Ct. App. 1994).

Here, the testimony and the contents of the statements fail to establish two of the required five elements of the business records exception. Ms. Mason testified that the accounts were simply computer-generated from information in Bank of America’s “system,” not that they were prepared by someone with knowledge. No testimony was given about who made the data entries that comprise the information within the statements; thus, no foundation was laid that they were prepared from information transmitted by a person with knowledge.

In addition, the statements are summaries, but, as discussed above, they are incomplete summaries, because they contain no information about what the components of the beginning “previous balance” are. Particularly since it appears that some or all of this previous balance is reflected in the balance given on each succeeding statement, these statements are not trustworthy, as they assume the correctness of an unexplained figure. Further, summaries of documents are only admissible where the underlying documents have been made available for the other party’s inspection at a reasonable time and place. Rule 1006, SCRE. This was never done with regard to the statements for months before May of 2010.

The Court sustains the Defendant’s objection to the admission of the statements and declines to admit them.²

The Court also grants the Defendant’s motion to strike insofar as it sought to strike Ms. Mason’s substantive testimony about the subject account. Ordinarily, a witness may not testify

² Should this Court find that the documents were admissible under the business records exception to hearsay, it is important to note other problems and inquiries related to the admissibility of the documents would not automatically be absolved. While Ms. Mason, the witness responsible for maintaining the records in question, may serve as a records custodian to authenticate the documents, she may not discuss information contained in the records—in an attempt to explain the contents of the records to a fact finder—absent a demonstration of personal knowledge of the contents of the document; a sponsoring witness would instead be necessary for such discussion.

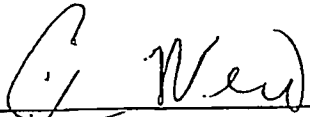
as to the contents of a writing. Rule 1004, SCRE; Moore v. Postal Telegraph-Cable Co., 202 S.C. 225, 24 S.E.2d 361 (1943); Rose v. Winnsboro Nat'l. Bank, 41 S.C. 191, 18 S.E. 487 (1894). An exception exists where the writing has been lost or destroyed, Rule 1004(1), SCRE, but Ms. Mason's testimony did not establish that. It did, rather, indicate the writings from which she said she received all of her information about the subject account do exist within the Plaintiff's possession. With the exception of the statements discussed above, these writings were never offered into evidence.

"After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." Rule 41(b), SCRCPP. A motion under this Rule, usually called a motion for an involuntary nonsuit, is the proper motion for a defendant to make to challenge the sufficiency of the plaintiff's evidence at the close of the plaintiff's case in an action tried without a jury. Hinton v. Designer Ensembles, Inc., 335 S.C. 305, 516 S.E.2d 665, 671 n. 3 (Ct. App. 1999). The Defendant is entitled to prevail on her motion for an involuntary nonsuit here. As discussed above, the Plaintiff did not adduce evidence tending to show the existence of required elements of its claim, in particular the existence of a binding contract and breach thereof. See Fuller, 124 S.E.2d at 610; Rabon, 203 S.C. at 185; Ringer, 293 S.C. at 238.

RESULT ORDERED

It is therefore hereby ORDERED that the Defendant's motion for involuntary nonsuit is granted and the Plaintiff's claim is dismissed with prejudice.

AND IT IS SO ORDERED.



Clifton Newman
Circuit Judge

Orangeburg, South Carolina
April 15, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2014-001384

RECEIVED

JUL 14 2014

SC Court of Appeals

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 Appellants.

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JUL 14 2014

SC Court of Appeals

**RESPONDENT'S MOTION TO DISMISS APPEAL AND
MEMORANDUM OF LAW**

FV-I, Inc., in trust for Morgan Stanley Mortgage Capital Holdings LLC ("Respondent") hereby moves to dismiss the appeal of Byron J. Dolan and Lisa S. Dolan ("Appellants") on the grounds that the appeal is an impermissible interlocutory appeal.

This is an appeal from the order of the Honorable R. Keith Kelly that denied Appellants' motion for a new trial filed May 16, 2014, and the order of the Honorable R. Keith Kelly that denied Appellants' motion to reconsider that order filed on June 19, 2014. (See Exhibits A and B attached hereto). Respondent filed its Lis Pendens, Summons, and Complaint on July 9, 2012

seeking foreclosure of a certain mortgage of real estate given by Appellants dated March 28, 2005, and subsequently assigned to Respondents July 8, 2011. (See Exhibit C attached hereto). Appellants filed an Answer and Counterclaim on or about August 8, 2012. (See Exhibit D attached hereto). In their Counterclaims, Appellants sought an Accounting, as well as monetary judgments on causes of action for breach of contract and violation of the South Carolina Unfair Trade Practices Act ("SCUTPA").

By order signed April 17, 2014 and filed May 1, 2014, Respondent and Appellants agreed and stipulated to bifurcate the action pursuant to Rule 42(b), SCRCP, thereby severing the Appellants' legal claims for Breach of Contract and SCUTPA from Respondent's foreclosure claim and Appellants' equitable counterclaim for Accounting. The foreclosure claim and counterclaim for Accounting were referred to The Honorable James O. Spence, Master-in-Equity, for a separate trial. The legal counterclaims were heard before a jury with The Honorable R. Keith Kelly presiding on April 17, 2014. A directed verdict was granted in favor of Respondent on the SCUTPA claim, and a jury verdict was returned in favor of Respondents on the Breach of Contract counterclaim. (See Exhibit E and F attached hereto). Subsequently, Judge Kelly denied Appellants' motion for a new trial and motion to reconsider the order.

The foreclosure claim and counterclaim for Accounting have yet to be heard or decided by the Master-in-Equity, and thus, a final judgment in the case has yet to be rendered. Nonetheless, Appellants filed a Notice of Appeal with the South Carolina Court of Appeals on June 25, 2014.

Barring some statutory exceptions not applicable here, South Carolina courts have repeatedly held that as a general rule, appeal may only be taken after a final judgment has been rendered. Ex parte Wilson, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005) (citing Culbertson v.

Clemens, 332 S.C. 20, 23, 471 S.E.2d 163, 164 (1996). “Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final.” Id. (citing Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 336, 426 S.E.2d 777, 780 (1993)).

An order denying a motion to reconsider a verdict on the at-law counterclaims is interlocutory and not immediately appealable, when a judgment has not been rendered in the equitable foreclosure and Accounting claims. There has not been a final order because the ruling on the at-law claims left some further act to be done by the court before the rights of the parties can be determined. See id.; see also Land v. Land, 201 N.C. App. 672, 687 S.E.2d 511 (2010) (dismissing appeal made after denial of a motion for a new trial in a bifurcated lawsuit because it was a “non-appealable, interlocutory order”). In the present case, the Master-in-Equity must still decide whether the Respondents are entitled to foreclosure before the rights of the parties are determined. Thus, there has not been a final judgment and the order is interlocutory.

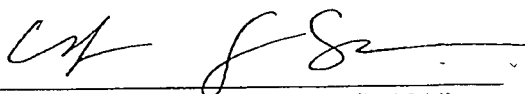
Appellants are seeking to stay the foreclosure claim and Accounting counterclaim before the Master-in-Equity until this appeal is decided. Appellants will likely argue that if the foreclosure action were to go forward before the Master-in-Equity, there is a substantial risk of inconsistent rulings, whereby one court renders a judgment of foreclosure, and the other determines that a new trial must be heard on the legal counterclaims, which could eventually, lead to a finding that the foreclosure must not be granted. However, Appellants are merely restating the rationale as to why an interlocutory appeal is improper at this time in the present case. It is for this very reason that Appellants, should they wish to appeal, must wait until the Master has rendered a judgment on the foreclosure claim and Accounting counterclaim before an appeal may properly be taken.

Appellants wish to treat the legal and equitable claims in this case as one case when it suits their needs and separate when it does not. Appellants and Respondent agreed that the legal counterclaims must be tried first, thus staying the equitable foreclosure claim. Now that the Appellants are dissatisfied with the portion of the case dealing with their legal counterclaims they want to argue that they are somehow allowed to treat the legal counterclaims as a distinct final judgment and continue to delay the equitable claims being heard.

The parties consented to bifurcate the claims in the interest of expediency and judicial economy. The Parties recognized that the Master-in-Equity was best suited to handle the foreclosure action and equitable counterclaim. While the consent to bifurcation did separate the case into separate trials, it did not divide the case into two completely distinct lawsuits. Therefore, to appeal the order denying Appellants motion for a new trial and motion to reconsider that order is an impermissible interlocutory appeal. As such, Respondent respectfully requests this Court to dismiss the appeal and order that the Notice of Appeal filed by Appellants Byron J. Dolan and Lisa S. Dolan be canceled until such time as the Respondent's foreclosure claim and Appellant's Accounting counterclaim are tried before the Master-in-Equity.

Respectfully submitted,

July 10, 2014



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State of South Carolina
County of Lexington

Court of Common Pleas

FV-I, Inc., etc.

Plaintiff,

v.

Bryon J. Dolan, et al.

Defendant.)

Transcript of Record
2012-CP-32-2816

April 16, 2014
Lexington, South Carolina

B E F O R E:

The Honorable R. Keith Kelly, Judge.

A P P E A R A N C E' S:

Jason Wyman, Esquire
Charles Gwynne, Esquire
Attorneys for the Plaintiff

Andrew S. Radeker, Esquire
Attorney for the Defendant

Bethanie K. Patterson
Circuit Court Reporter

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1 (The following proceedings were held on April
2 16, 2014.)

3 THE COURT: All right. Whose motion?

4 MR. WYMAN: Thank you, Your Honor. Jason Wyman
5 here on behalf of the plaintiff. We have a Motion
6 in Limine seeking to bar any testimony based on the
7 Parol Evidence Rule and the Statute of Frauds
8 regarding the September 2011 agreement. It's
9 attached as Exhibit C to your motion there.

10 Basically, Your Honor, the very simple motion
11 is that the terms of the September 2011 agreement
12 are clear and unambiguous. And based on the South
13 Carolina case law, parol evidence would not be
14 allowed to alter, modify or explain the terms in
15 there.

16 The main point of contention from the
17 defendants is that applied to the loan, as stated in
18 paragraph 2, is ambiguous. They contend that the
19 purpose of the apply for the loan is silent as to
20 what -- exactly what happened with the money that
21 was received from the result of the sale, a portion
22 of the mortgaged property.

23 Just for a little bit of background, Your
24 Honor, basically the -- the first mortgage holder,
25 or the plaintiff in this case, agreed to release a

1 small tract of land from the mortgage in exchange
2 for a certain payment from the defendants as part of
3 the closing. And as consideration for that release,
4 the funds were to be applied to the loan. The
5 defendants contend that that meant that the loan was
6 to be brought current. However, if you look at the
7 full context of the agreement, and looking at it in
8 entirety as required to under South Carolina law,
9 it's clear that the loan was not brought current by
10 the \$65,250 payment from the sale of the small strip
11 of land.

12 Specifically, Your Honor, we'd argue that
13 singling out this applied-to-the-loan phrase is
14 trying to create an ambiguity when there's not one
15 there. It would not make sense for the bank to
16 require the Dolans to deep their property on the
17 market if the loan was current. The banks do not
18 tell people to sell their houses if the loan is
19 current.

20 Secondly, Your Honor, the Dolans would not have
21 had that opportunity to apply for a loan
22 modification if, in fact, the loan was current. So
23 we'd argue, Your Honor, that the September 2011
24 agreement is clear and unambiguous and any parol
25 evidence about any discussions leading up to that

1 point in time must be barred.

2 THE COURT: Okay.

3 Yes, sir?

4 MR. RADEKER: Thank you, Your Honor. I take
5 issue a little bit with the characterization of what
6 our position is here. I'd say, first of all, this
7 agreement document is silent as to the particular
8 matter at issue because it does not speak to what
9 the amount is that is necessary to bring the loan
10 current in any way. It's totally silent as to that.

11 And there's law in South Carolina, that *Keith*
12 *vs. River Consulting* case that we've cited in our
13 memorandum, that says: When a contract is silent as
14 to a particular matter, parol evidence is admissible
15 to reveal the party's true intent. So we'd note
16 that that's the case. And that's our primary
17 contention, is parol evidence about whether the
18 payment of money reinstated the loan is just not
19 covered by this document at all, and so the parol
20 evidence is inadmissible on that point.

21 If Your Honor finds that this
22 applied-to-the-loan language does speak to that,
23 well, it is ambiguous. Applied to the loan how and
24 producing what result? It's not clear from the
25 document. The documents were written by the

1 plaintiff's servicing agent so as to be construed
2 against them. But it is ambiguous. And if -- and
3 on that secondary point, because it's ambiguous,
4 we'd be allowed to offer parol evidence as to that.

5 In any event, the question of what the amount
6 is that's necessary to bring the loan current is
7 almost always, in the case of a note, going to
8 depend on evidence that is outside the terms of the
9 document. It's going to depend on things like the
10 date of default, how much had already been paid on
11 the loan, the existence and the amount of expenses
12 that are properly chargeable to the debt at issue.
13 And those facts aren't contained in the text of the
14 document, what the amounts of those things are, in
15 any event.

16 The plaintiff argues that this *Wyndham vs.*
17 *Honeycutt* and *Connor vs. Jager* cases support their
18 position, but they seem to assume that the Statute
19 of Frauds applies to this document. It doesn't. In
20 the *Carter vs. McCall* case, our Supreme Court made
21 clear that as to the -- the only provision is
22 Statute of Frauds that could possibly be at issue,
23 the one concerning a contract to charge any person
24 upon any contract or sale of lands, tenements or
25 hereditaments or any interest and/or concerning

1 them. Our Supreme Court held in that case that it
2 can only be applied to contracts which had in view
3 the transfer of an interest in or concerning lands,
4 and this isn't that. The only transferring that
5 happened here was pursuant to a different contract
6 when the Dolans sold a portion of their yard to
7 their neighbors. They didn't transfer anything to
8 FV-I, they didn't get anything, FV-I didn't transfer
9 anything to them.

10 So we'd note that that section is to be very
11 narrowly construed. Also, got another claim in this
12 case, Unfair Trade Practices Act claim, and there's
13 absolutely zero indication that the Statute of
14 Frauds would bar the introduction of any parol
15 evidence in connection with an Unfair Trade
16 Practices Act claim anyway. And so we'd note that
17 it would be proper for the Court to deny this and
18 certainly to deny it as a Motion in Limine.

19 THE COURT: Well, the Unfair Trade Practices is
20 not before the Court. It's a matter for the jury at
21 this time; right?

22 MR. RADEKER: It is. We agreed to let our
23 appeal get dismissed and they agreed that it be
24 tried by the jury.

25 THE COURT: Okay. So it is then? Okay. I

1 didn't know that. Okay. So --

2 MR. WYMAN: And we were going to put some stuff
3 on the record that we agreed to.

4 THE COURT: Okay. So the Unfair Trade
5 Practices claim is before the Court --

6 MR. WYMAN: And the jury, yes.

7 THE COURT: -- along with the breach and --
8 what's the other?

9 MR. RADEKER: Those are the only two claims,
10 Your Honor. There's an accounting counterclaim,
11 but --

12 THE COURT: All right. I got it. So those two
13 are before -- okay. All right.

14 MR. RADEKER: So that's our position on that
15 motion, Your Honor, unless you have any questions
16 for me.

17 THE COURT: Yes, sir?

18 MR. WYMAN: Your Honor, I'd point out that this
19 written agreement does contain a merger clause. In
20 South Carolina there's a strong favor of recognizing
21 merger clauses and the importance of merger clauses
22 or integration clauses in regards to the Parol
23 Evidence Rule. And I would -- recently the Supreme
24 Court, in *Davis vs. KB Homes of South Carolina*,
25 discussed why -- you know, if there's an integration

1 clause present and the agreement is clear on its
2 face, then extrinsic evidence cannot be brought in
3 to explain, modify or bury the terms of the written
4 agreement.

5 And, Your Honor, I would point out that as far
6 as the applied-to-the-loan language that the
7 defendant is arguing is ambiguous, that
8 applied-to-the-loan is discussed in paragraph 2 of
9 the mortgage, which is Exhibit B for Your Honor. It
10 clearly lays out how proceeds, how payments are to
11 be applied to the loan. The mortgage is referenced
12 in the letter, and I would argue that paragraph 2 of
13 the mortgage clearly sets forth what applied to the
14 loan means. And, therefore, with this agreement not
15 being ambiguous at all, being clear on its face,
16 parol evidence cannot come in to explain, modify or
17 vary the terms in the sense of they're trying to add
18 an additional term that the loan was to be brought
19 current.

20 There's case law in South Carolina that puts
21 forth that even where an agreement -- or a fully
22 integrated agreement, if it's silent on issue, it
23 still cannot be supplemented by parol evidence.

24 MR. RADEKER: And I would note, Your Honor,
25 that the case law is to the opposite effect and that

1 this paragraph 2 does not show what the amount was
2 that was needed to reinstate the loan at this time.
3 And so you'd have to look to parol evidence to
4 determine that or any case involving that question
5 anyway.

6 THE COURT: All right.

7 MR. WYMAN: Your Honor, if I may briefly
8 respond.

9 THE COURT: Yes.

10 MR. WYMAN: The agreement does not mention
11 reinstating the loan at all. And furthermore, Your
12 Honor, the cases that the defendants are relying on,
13 those cases involve oral contracts. The law
14 regarding where an oral contract is silent,
15 certainly parol evidence would be allowed.

16 In this case we have a fully integrated,
17 complete expression of the party's intent here, and
18 it's just clear that he cannot add a term that he's
19 trying to or to explain or do anything regarding to
20 what applied to the loan meant via parol evidence.

21 And as to the argument regarding the Statute of
22 Frauds, I believe there may have been a little bit
23 of confusion on defendants' counsel's part. The
24 Statute of Fraud argument is based on the alleged
25 oral modification of the note and mortgage. We're

1 not contending that the September 2011 agreement is
2 covered by the Statute of Frauds; simply the
3 allegations in the counterclaim are that the note
4 and mortgage were modified either via this agreement
5 or some other oral agreement, and based on the
6 Wyndham case and the Connor case that I have cited,
7 that would not be allowed because the note and
8 mortgage would have to be in writing to satisfy the
9 Statute of Frauds.

10 MR. RADEKER: And, Your Honor, I will keep
11 going, if you let me.

12 THE COURT: Well, how much more do you need me
13 to know about this?

14 MR. RADEKER: I've got copies if you want to
15 look at them. But on the Wyndham and Connor cases,
16 I wanted to note this, both of those cases concern
17 oral contracts, one of them concerns an oral
18 addition to a written contract to sell land. That's
19 what the Statute of Frauds applies to. There's
20 nothing in the notes and mortgages; it's land sales.

21 THE COURT: Okay. What else?

22 MR. RADEKER: That's it.

23 THE COURT: All right. Any other motions? I
24 know we've got some agreements. Any other motions?

25 MR. RADEKER: We've got some agreements on one

1 thing. I don't really know that it's a motion.

2 MR. WYMAN: If I may briefly, Your Honor.

3 Defendants' pretrial brief mentioned a potential
4 Motion to Amend as far as conforming with the
5 evidence under Rule 15 (b). We're not consenting to
6 that whatsoever and we'd argue it's highly
7 prejudicial to bring in two additional claims, a
8 breach of contract accompanied by a fraudulent act
9 and negligent misrepresentation at this late stage,
10 especially considering the two exceptions of those
11 two causes of action would provide an exception to
12 the Parol Evidence Rule. It seems like he's trying
13 to get around poor pleading at the very instance.
14 Nothing in the facts have changed from the time he
15 filed his counterclaim, so we'd argue that the
16 Motion to Amend would be highly prejudicial. My
17 client prepared for breach of contract case, which
18 is simply not in front of us at this time.

19 THE COURT: I was getting ready to ask him
20 about that.

21 Yes, sir?

22 MR. RADEKER: All right. On that I would just
23 say I think, you know, we make motions to amend to
24 conform to the evidence as you present the evidence
25 for when you're done with it. And so I, you know,

1 would say it's -- it would be kind of putting the
2 cart before the horse to take it up at this point.
3 I'd say this: The issues that we might seek to
4 amend to conform to the proof on -- and that would
5 just depend on how things go -- but they wouldn't
6 have occasion, any discovery or preparations, any
7 different from what was already done in the case.
8 And so if another side wants to oppose a Motion to
9 Amend, they got to establish prejudice.

10 And I'm kind of pretalking here. But prejudice
11 is a lack of notice that an issue is to be tried and
12 a lack of opportunity to refute it, as it would only
13 just be legal argument about the meaning of what's
14 already happened and wouldn't have been anything
15 different to get ready for this trial. I just don't
16 see how that can --

17 THE COURT: Well, I already know how I'm going
18 to rule on that. We'll have to see what the
19 evidence is. But I will tell you this now: The
20 Rules of Procedure are set forth so that we don't
21 have trial by ambush and trial by surprise, and
22 we're not going there. Okay? So if you wanted to
23 set forth that, you could have set forth that issue
24 long ago. But we'll see.

25 MR. RADEKER: Thank you, Your Honor.

1 THE COURT: What else?

2 MR. RADEKER: All right. As for agreement,
3 we've agreed on some exhibits. And if that's all
4 right with everybody, we can premark them tonight
5 and bring them in the morning.

6 THE COURT: That's fine with me. We got to
7 have agreement on these exhibits. I think Madam
8 Court Reporter would love it.

9 MR. RADEKER: I think we've agreed that my
10 clients, the Dolan defendants, are in the position
11 of a plaintiff, basically wearing the plaintiff's
12 hat, because we've agreed to bifurcate this case.
13 The only thing that's being tried are their
14 counterclaims. So, in other words, we'd sit here at
15 the plaintiff's table and, you know, go first when
16 we open, go first in reply when we close, present
17 our case first, do all of the other things that the
18 plaintiff normally does.

19 THE COURT: Actually, we had this general
20 conversation at lunch today. I kind of think --
21 what we kind of thought was, since we're not here on
22 the foreclosure -- and really, I know that's going
23 to be mentioned, no doubt about that. But I don't
24 want to go very far I want to tell you that. But we
25 don't need to confuse the jury that they're kind of

1 trying to consider a foreclosure matter. That's not
2 before them.

3 MR. WYMAN: Sure, sure.

4 THE COURT: How do you --

5 MR. WYMAN: Well, certainly, Your Honor, we
6 agree that they would be essentially wearing the
7 plaintiff's hat; however, we do need to modify some
8 of the standard jury charges as to them carrying the
9 burden and things like that, as far as the
10 defendants carrying the burden on their
11 counterclaim.

12 MR. RADEKER: And I can say that what I can do
13 is try to avoid using labels like Plaintiff and
14 Defendant and just say the Dolans and FV-I, as far
15 as the case goes.

16 THE COURT: Yeah. We really did have that
17 conversation too because we were afraid that
18 somebody might think that a defendant in the case --
19 they might not really understand that a defendant is
20 actually acting as the plaintiff before the Court.
21 And we thought, especially when we get to that jury
22 verdict form, we don't want them to be confused one
23 way or the other. So it may -- I don't know how you
24 want to do that. But we may just refer to them
25 as -- how y'all choose, you know, the Dolans vs.

1 FV-I or however you want to do it. Y'all can agree.

2 But I'll follow whatever guide you think.

3 MR. GWYNNE: I'm fine with that. It's just
4 that I don't -- I personally don't want to be
5 limited if it slips out --

6 THE COURT: No, no.

7 MR. GWYNNE: -- because, you know, this is our
8 foreclosure and they've chosen to bring their claims
9 in our case. So the jury needs to understand the
10 whole picture.

11 THE COURT: I agree.

12 MR. GWYNNE: But of course I'm willing to sort
13 of, as much as I remember, to make sure that we
14 don't --

15 THE COURT: No. I didn't mean to shut you down
16 over there. I'm just saying I don't want to confuse
17 them. We're lawyers and these are professional
18 staff and they understand the difference, but I'm
19 not sure that -- I'm not sure that -- and my brother
20 is a skilled laborer, he's a machinist, but I'm not
21 sure that my brother would understand really, to be
22 honest with you.

23 MR. RADEKER: I'd say that probably most people
24 probably don't understand that you can even do that.

25 THE COURT: Right. But I don't understand how

1 to run that equipment that he runs either. He's
2 very good at that. But I don't know how to run that
3 CNC machine or whatever machine it might be.

4 MR. RADEKER: Me either.

5 Your Honor, another thing, the plaintiff has --
6 FV-I has agreed not to mention a prior conviction of
7 Mr. Dolan for filing false tax returns very remote
8 in time. They've agreed not to bring it up.
9 They've agreed not to bring up other debts except as
10 is necessary to explain this. I mean, there's this
11 foreclosure action and a couple of BB&T foreclosure
12 actions that would be absolutely necessary to
13 explain. We'll probably bring those out just to
14 explain what happened. But they've agreed they're
15 basically not going to, like, attack him. So -- and
16 I don't mean to put words in anybody's mouth, I was
17 just trying to kind of find a way to express that.

18 MR. GWYNNE: Yes, Your Honor, we're not going
19 to bring up his other debts. But, obviously, if it
20 comes out that BB&T and First Citizen are defendants
21 in the case, that may come out that -- because they
22 have a lien on the property. That's why we had to
23 name them. That may come out. But we're not going
24 to attack him on what he owes as assets.

25 MR. RADEKER: And we've agreed, if it's okay

1 with you, to go ahead and ask you that no matter
2 what the outcome of this trial is, that whoever
3 wants to make any posttrial motions, they have ten
4 days to do that, if you'll let us.

5 THE COURT: I'll do that.

6 MR. RADEKER: All right. We figured the
7 fairest way to do it is to address it before we --

8 THE COURT: Sure. I'll do that. I'd be happy
9 to help you gentlemen any way I can. Just actually
10 send them to us on the e-mail through Trey because
11 we'll be in Dillon next week.

12 MR. RADEKER: Okay. I'm trying to think if
13 I've got anything else that we need to take up right
14 now. I think that's it.

15 Can y'all think of anything else?

16 MR. WYMAN: Just formally for the record, we've
17 agreed to bifurcate the foreclosure and refer it to
18 the Master in Equity.

19 MR. RADEKER: That's correct.

20 THE COURT: Okay. Do you need to put that in
21 an order or something, a Form 4 or anything?

22 MR. WYMAN: We'll bring that tomorrow, Your
23 Honor.

24 THE COURT: Okay.

25 Madam Clerk, does that suit you to put it on a

1 Form 4?

2 THE CLERK: Not a problem, Judge.

3 THE COURT: Okay. If y'all will just get with
4 Madam Clerk, she'll prepare that, I guess. I know
5 I'm asking a lot, but --

6 THE CLERK: You're fine.

7 MR. RADEKER: We can just bring one.

8 MR. WYMAN: It won't take but a minute.

9 MR. GWYNNE: And we'll bring the reference fee
10 too so we can have it all together.

11 THE COURT: Okay. That'll work. And I'll sign
12 that before we get started. Anything else?

13 MR. RADEKER: Not that I can think of.

14 THE COURT: All right. Why don't we do this:
15 We're going to start promptly at 9:00 a.m. I don't
16 keep my jury waiting at all, if I can. And Trey and
17 I have already done some reading and some talking
18 anyway. We'll do a little more over the next couple
19 hours or next hour and half, something like that.

20 If you gentlemen will watch your e-mails, we'll
21 have a decision on this other matter for you today
22 so that you know where you are tonight. And then if
23 you need us, I'm here by 8:00 in the morning. I'm
24 sure -- and there's lots of staff here. I'm sure if
25 you need to be in up here, you can get in touch with

1 some of these officers and they'll allow you back
2 here. Just don't ex parte me. But if you have some
3 resolution or if something else comes up or if you
4 need some other guidance before the jury gets
5 here -- what I don't want to do is -- what I don't
6 want to do and what I don't like to do is from about
7 8:50 on, I'm done talking and trying to help or do
8 whatever.

9 You know, somewhere around 8:50 I'm going to
10 pour my last cup of coffee out and use the
11 facilities and I'll put on my robe because that jury
12 is sitting back there and those are citizens and
13 taxpayers of Madam Clerk who -- those are her
14 constituents. So we don't need them sitting back
15 there. If you need me, I'm telling you that I'll be
16 here about 8:00. It might be 8:01 or -2, but my
17 bailiff will give me a counseling statement from my
18 DD 201 file.

19 So anyway, seriously, I will be here around
20 8:00-ish if you need me. If that will help you at
21 that point, fine. But around 8:50, if you don't
22 mind, it's just gone. If it settles at a break, it
23 settles at a break, but otherwise, we'll be ready to
24 go and we'll get that jury in here. They're already
25 sworn, we did swear them to try this case, so

1 they're ready to go. I'll just ask Madam Clerk if
2 there's any issues, and then barring none, we will
3 proceed immediately right into the trial.

4 Now, nuts-and-bolts-wise, one witness? Two
5 witnesses? Four witnesses? Doesn't matter to me,
6 just give me an idea.

7 MR. RADEKER: I understand there's only going
8 to be three witnesses total; both of my clients and
9 somebody from -- the present servicer's client.

10 THE COURT: Okay.

11 MR. RADEKER: So I'd expect we'll be done with
12 the presentation of evidence tomorrow. Maybe, if it
13 goes long, we might have to charge and close in the
14 morning on Friday.

15 THE COURT: Okay. Having said that, what Trey
16 does is, if not this afternoon late, certainly
17 tomorrow morning, when people are testifying, he
18 actually starts putting together our jury charge.
19 We use -- unless you want something else, we use
20 Ralph King Anderson's charge book. And then what I
21 generally do have is have a charge conference once
22 everything is done. I want you to actually see in
23 writing what I'm thinking about doing, and we're
24 going to talk about that. And then once we have an
25 understanding about that, then we'll move into

1 arguments and then closing. But if we need to go
2 into Friday, that's fine with me. But if you have a
3 jury charge you want, if you have a particular -- if
4 you can agree on a verdict form, that would be
5 great. Whatever you can do, if you'll send it to
6 Trey, you know, the more we can agree on, the faster
7 it will move.

8 MR. GWYNNE: Your Honor, one thing I'll
9 mention: I think Counsel and I are in agreement
10 that because it's -- the contract is a page and a
11 half, it's not very long, but we're probably going
12 to try to use this projector so the jury can get a
13 good view of it. So we're going to probably use
14 technology as much as we can to publish to the jury.
15 We just have to learn how to use it before.

16 THE COURT: Sure. I mean this when I tell you
17 this: I will let you try your case, I mean, I
18 really will. You can use it and -- I never could do
19 it because I'm not smart enough to do that. But
20 you're welcome to stay in the courtroom for a few
21 minutes to -- anything I can help you do, we will
22 do. And trust me, you try your case, take your
23 time. Don't necessarily drag along, but ask all the
24 questions you want to ask. I know everybody is
25 practicing and representing their side. So whatever

1 you want to do.

2 MR. WYMAN: Thank you, Your Honor.

3 MR. RADEKER: Thank you.

4 THE COURT: Anything else I can help you do?

5 MR. RADEKER: That's it for today.

6 THE COURT: All right. Everybody here has an
7 e-mail address that's with the Bar; right? That's
8 where we get your e-mail addresses.

9 MR. WYMAN: That's correct, Your Honor.

10 MR. RADEKER: I think we're all on that e-mail
11 that I sent.

12 THE COURT: Okay. We'll have your decision on
13 this. Thank you.

14 -- END OF TRANSCRIPT OF RECORD --

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STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
County of Lexington	)	2012-CP-32-2816
	)	
FV-I, Inc.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
Bryon J. Dolan, et al.,	)	
	)	
Defendants.	)	

April 17th, 2014
Lexington, South Carolina

BEFORE:

THE HONORABLE R. KEITH KELLY, JUDGE; and a jury.

APPEARANCES:

CHARLES S. GWYNNE, ESQ.
JASON D. WYMAN, ESQ.
Attorneys for the Plaintiff

ANDREW S. RADEKER, ESQ.
Attorney for the Defendants

AMINAH R. HARDY, CM
Official Court Reporter

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EXHIBITS

No.	Description	Marked	Admitted
P1	Plat Parcel A & B	5	5
P2	Adjustable rate note	5	5
P3	Mortgage		
P4	540 Foreclosure complaint	5	5
P5	544 Foreclosure complaint	5	5
P6	Foreclosure master-in-equity deed	5	5
P7	Waiver of deficiency judgment	5	5
P8	Plat B1 & B2	5	5
P9	Partial release	5	5
P10	Email dated 10/12/11	5	5
P11	SLS welcome letter	5	5
P12	Customer mortgage activity	167	--
P13	Mortgage modification	5	5
D1	Responses and requests to admit	5	5
D2	Notice of assignment/sale transfer	5	5
D3	Saxon welcome letter	5	5
D4	Letter dated 9/22/11	5	5
D5	Email dated 4/12/14	5	5
D6	Email dated 10/12/11	5	5
D7	Email dated 1/9/12	5	5

1	<u>EXHIBITS</u> (continued)			
2	No.	Description	Marked	Admitted
3	D8	Return check document	5	5
4	D9	Internal notes spreadsheet	5	5
5	D10	Foreclosure release	5	5
6	D11	Letter dated 3/15/11	5	5
7	D12	Value conciliation worksheet	5	5
8	D13	Foreclosure review	5	5
9	D14	SLS welcome letter	5	5
10	D15	Notice of interest and payment adjustment	5	5
11	D16	Reinstatement letter dated 4/10/14	5	5
12	D17	Email dated 1/16/12	37	47
13	D18	Email dated 9/23/11	51	52
14	C1	Jury note	114	
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P R O C E E D I N G S

(Plaintiff's Exhibits 1-11 and 13 were marked and admitted.)

(Defendant's Exhibits 1-16 were marked and admitted.)

THE COURT: Are the agreed exhibits for the defendant 1 through 12 for -- I'm sorry, one through 11 and 13.

MR. RADEKER: And, Your Honor, at that time we just formally move those into evidence by stipulation.

MR. GWYNNE: Yes, Your Honor.

THE COURT: They're admitted without objection. And the one you -- in controversy you handled that?

MR. GWYNNE: Yes, Your Honor.

THE COURT: And I guess we'll address that at the appropriate time if necessary.

And before we bring them in, I was just going to say something to the effect, like I told you, this case was initially brought by FV-I as a foreclosure action against the Dolans. Going to stay away from plaintiff and defendant. The Dolans have brought counterclaims of breach of contract and unfair trade practices, and these two causes of action are the only two before you today. That suit you?

MR. RADEKER: It does.

MR. GWYNNE: Yes, Your Honor.

THE COURT: We're ready for the jury.

1 (The jury entered the courtroom at 9:33 a.m.)

2 THE COURT: All right. Good morning, Madame
3 Forelady, ladies and gentlemen of the jury. We appreciate
4 your patience. We had what I refer to as technical
5 difficulties this morning, but they're resolved now. As I
6 told you earlier, I generally get here by 8:00 every
7 morning. The lawyers were joining me here this morning,
8 and we had a nice cup of coffee. Chatted about some
9 mechanical things that take place, and those have been
10 resolved and we're ready now and need your services to try
11 this case.

12 As I've previously told you, my name is Keith Kelly.
13 I'm a circuit court judge for South Carolina. I'm
14 generally stationed or assigned to the 7th judicial
15 circuit, which is the Cherokee/Spartanburg counties area,
16 but I do travel around the state, and it's been great to
17 be here with you this week. I'll tell you your clerk of
18 court has taken very good care of us, and if you see her,
19 give her some thanks.

20 Now, before we begin the trial today, I want to make
21 some comments to you and tell you a few things about how
22 the procedure will go. This case is the matter of FV-I
23 versus Bryon and Dolan -- Bryon Dolan and Lisa Dolan, and
24 this case was initially brought by FV-I as a foreclosure
25 action against the Dolans. The Dolans have brought

1 counterclaims or claims of their own, if you will, of
2 breach of contract and unfair trade practices against
3 FV-I, and these are the only two causes of action that are
4 before you today. Again, the foreclosure action itself is
5 not before you. It's only the two claims by the Dolans.

6 Before we begin the trial, I want to tell you that
7 this trial will probably be different from what you might
8 have come to expect. Many folks do not have the chance to
9 attend an actual court session as you're doing at this
10 time, and many people believe from watching television
11 movies or reading books that the trials are always full of
12 high drama, intense action, and riveting circumstances.
13 Now, while all these may be true at times, this trial is
14 not for entertainment purpose. This trial is a
15 fundamental part of our democracy, a search for the truth
16 in an effort to make sure that justice is done between the
17 parties before the Court. Searching for the truth and
18 making sure that justice is done is often slow,
19 deliberate, repetitive, just the opposite of what we have
20 come to understand from TV, radio, books, and movies.

21 Now, this courtroom is a place of honor dedicated to
22 the protection and preservation of citizens' rights
23 through what many have referred to as the greatest justice
24 system ever created. The attorneys appearing before you
25 are advocates for the parties that they represent. But

1 first and foremost, they are officers of the court sworn
2 to uphold the integrity and the fairness of our judicial
3 system and help you in the search for the truth. You
4 should expect the lawyers to be professional, competent,
5 and ethical in their representation of their clients'
6 interests. Again, we thank you for your accepting
7 responsibility to be jurors in this case.

8 Now, what I tell you now is intended to serve as an
9 introduction of the trial of the case, and my remarks are
10 not a charge on the law. I'll instruct you on the law at
11 the end of the trial before you retire to consider your
12 verdict. My remarks are merely an explanation of the
13 procedure that we will follow in the trial so you may
14 better understand what is happening. You are not to take
15 notes in the trial of this case. You have been selected
16 as a fair and impartial juror whose purpose is to find and
17 determine the facts. You are the sole judge of the facts.
18 If at any time I make any comment regarding the facts, you
19 must disregard them. You are to determine the facts from
20 the testimony you hear and from any other evidence that is
21 presented. You should not be influenced by any opinions
22 or statements that you have heard outside of this
23 courtroom. It is especially important that you perform
24 your jury duty to determine the facts diligently and
25 consciously because ordinarily there is no way to correct

1 an erroneous determination of facts by a jury. When you
2 comply with your oath to impartially determine the facts
3 of the case, you will have fulfilled your duty as jurors
4 and no one will have a right to criticize your verdict.

5 Now, on the other hand and with equal emphasis, I
6 tell you the same law that make you the judge of the facts
7 makes me the judge of the law in this case. The law as
8 given by the Court is the only law that you may consider
9 and you must accept it and follow it even if you disagree
10 with it. I cannot tell you what the facts are, and you
11 cannot disagree with me about what the law is or ought to
12 be or should be. Your job is to take the law as I give it
13 to you and apply to it the facts as you find them to be
14 from the testimony of the witnesses and other evidence
15 that is presented. After doing that, you will render a
16 verdict, a true and just verdict under the oath you took
17 as jurors.

18 Until I advise you to begin your deliberations, you
19 must not discuss the case with anyone, including your
20 fellow jurors, friends, family members, and anyone
21 involved in this case. This includes discussions
22 face-to-face as well as by telephone, e-mail, text, blogs,
23 or any other method of communication.

24 Please do not try to learn information from any
25 source outside of this courtroom. In other words, you

1 must not use or look at dictionaries or other reference
2 materials, search the internet, websites, or blogs, or use
3 any other electronic tools to get information about this
4 case in order to help you decide. You may not use
5 computers, telephones, cell phones, smart phones, tablets,
6 the internet, or other tools of technology with
7 communication capabilities at any time while you are in
8 the courthouse, or certainly in your deliberations in the
9 jury room.

10 During your breaks for meals, you may use those
11 devices; however, you may not at any time use those
12 devices to receive or send information about this case.
13 This means that you must not use phone calls, e-mails,
14 text messages, instant messages, Twitter, or any blog,
15 chat room, or website, including Facebook, Google+,
16 MySpace, Linked In, YouTube, or any social media website
17 to send or receive information about this case. This
18 includes information about a party, a witness, an
19 attorney, or a court officer, news accounts about this
20 case, research on any topic raised or any topics you may
21 think would be helpful in deciding the case or any
22 testimony presented by a witness.

23 During the trial, do not read, listen to, or watch
24 any news report or accounts about this case. This
25 includes anything that may be in newspapers or on the

1 internet, radio, or television. You must not consider
2 anything you may have read or heard about this case
3 outside of the courtroom, whether before or during the
4 trial. Information on television, radio, and on the
5 internet or from other sources might be wrong or
6 incomplete. In our judicial system, it is important that
7 you are not influenced by anything or anyone outside of
8 the this courtroom.

9 If you become aware of another juror's violation of
10 my instructions, please inform me immediately. It is
11 important you keep an open mind and not decide any issue
12 in this case until all of the evidence has been presented,
13 the parties have made their closing statements, and I have
14 instructed you on the law. After the case is submitted to
15 you, you must discuss it only in the jury room with your
16 fellow jurors.

17 The attorneys and the parties in the case have been
18 advised they are not to speak to you at all. So if you
19 see anyone involved in the case and they do not say hello
20 or do not speak to you, they're not being rude or
21 unfriendly. They're merely following my instructions.
22 Again, it's important you keep an open mind and not decide
23 the issues in the case until all of the evidence has been
24 presented, the parties have made their statements, and I
25 have instructed you on the law.

1 Now, in just a moment, the attorney for the parties
2 will make what is called opening statements to you. The
3 attorneys will explain what the issues in this case are or
4 at least what they contend the issues are in this case.
5 The evidence in the case will be presented to you by
6 testimony of the sworn witnesses from the witness stand
7 and/or by the exhibits that may be introduced into trial.
8 What the lawyers tell you during their opening statements
9 is not evidence in the case but merely their contention of
10 what the issues are.

11 Now, ladies and gentlemen, from time to time during
12 the trial you may hear one of the lawyers say something
13 like, "Your Honor, I believe we have a question or matter
14 of law to discuss with you," or "May we approach the
15 bench?" Sometimes I myself find it necessary to excuse
16 you from the courtroom for a short period so the lawyers
17 and I can discuss a matter of law. The reason for this is
18 you and you alone or the judges of the facts in the case,
19 and sometimes when I am discussing a matter of law with
20 the lawyers, it may be necessary for me to comment on some
21 fact in connection with ruling on whether or not a
22 particular law applies. I cannot tell you what I think
23 the facts are, so I will excuse you from the courtroom
24 while my discussions take place with lawyers so that you
25 will not be influenced by anything I say or do.

1 In determining what the true facts are, you must
2 decide whether or not the testimony of the witnesses is
3 believable. It will be my responsibility to rule as a
4 matter of law whether certain testimony is admissible at
5 all, but once the testimony is admitted, whether or not
6 you believe it is solely for you, the jury, to decide. In
7 deciding whether to believe a witness, you have the right
8 to consider whether the witness has an interest in the
9 result of the trial, whether the witness is prejudiced
10 toward either side, the opportunity for the witness to
11 have seen the matters to which he or she may be
12 testifying, and the way that the witness acts on the
13 stand. I tell you that you have a right to consider
14 anything that is in the record that will help you evaluate
15 the testimony of the witnesses, and that means that it is
16 your duty to pay close attention to the witnesses, to
17 observe them, to listen to them, and to pay close
18 attention to the lawyers and the Court. Please do not
19 allow your thoughts to wander, but pay attention to
20 testimony so that at the end of the trial, you will be
21 able to determine what the true facts are and apply the
22 law to those facts and render a just and true verdict.

23 Madame Forelady, ladies and gentlemen, at this time
24 we're ready to begin the trial.

25 Gentlemen?

1 OPENING STATEMENT

2 BY MR. RADEKER

3 Good morning. A mortgage lender cannot break the
4 terms of its own loan contract with the mortgage borrower.
5 Nor can a mortgage lender, like any other business, engage
6 in unfair and deceptive practices in the conduct of its
7 business. And if a mortgage lender does either one of
8 those things, it's liable for the harms and losses that it
9 causes. Let's talk about what the evidence will show in
10 this case. I'm Drew Radeker. I represent Bryon Dolan and
11 Lisa Dolan here. And we're here today on their
12 counterclaims, as the judge told you in this foreclosure
13 case that FV-I -- their full name is FV-I in trust for
14 Morgan Stanley Capital Mortgage Holdings, LLC -- has
15 brought against them.

16 Now, to understand this case, y'all are going to have
17 to learn about -- if you don't already know -- something
18 about the way that banking and particularly mortgage
19 banking is done today and in the modern world. It's not
20 like it once was. You may remember the banking
21 relationships from the movie It's a Wonderful Life where
22 you go have face-to-face contact with your banker.
23 Everybody sits down, they understand what is going on,
24 they know that they can rely on what's told to them by the
25 people at the bank. We're in a different world now.

1 We're in Wall Street's banking world. And in Wall
2 Street's banking world, very often mortgage loans are
3 owned by company like FV-I who don't have any face-to-face
4 contact with their borrowers at all. They operate through
5 other companies, which are called servicers, mortgage
6 servicers.

7 Now, what's a mortgage servicer? A mortgage servicer
8 is for a mortgage loan kind of like what a property
9 manager agent is for someone who, say, owns an apartment
10 building. Just as a property management agent collects
11 the rent, deals with having to evict people who don't pay,
12 deals with the day-to-day interactions with the tenants, a
13 mortgage servicer collects payments on the loan, sends out
14 all the correspondence concerning the loan, they manage
15 any foreclosure action brought on a mortgage loan, and
16 they do the communication with the borrower on the loan.

17 Now, FV-I, acting through its servicers, which are
18 two companies, Saxon Mortgage Services and then it
19 switched over to another company called Specialized Loan
20 Servicing. They broke the mortgage contract that they
21 have with the Dolans and they engaged in unfair and
22 deceptive trade practices in their interactions with them.
23 Now, this case largely concerns a lump sum payment of
24 \$65,250 that was made to Saxon Mortgage Service acting as
25 servicer for FV-I on September 30th, 2011.

1 Now, you're going to see evidence in this case, both
2 testimony and documentary evidence, that will show you
3 that that amount was what necessary and a little bit more
4 to bring the loan that was subject to this case current.
5 You see, the Dolans were in foreclosure at the time. Not
6 this foreclosure case, in another one. Mr. Dolan had been
7 in the building industry. Both he and his wife were hit
8 hard by the recession, and they got to a point where they
9 had exhausted their savings and they weren't able to
10 service the debt on the mortgage loan, and they'll
11 acknowledge that at the time. But they brought it
12 current. And FV-I, acting through its mortgage servicers
13 did the things that a mortgage would do if a loan was
14 brought current. They had the foreclosure action
15 dismissed. You'll see evidence indicating that they said,
16 "Kill the foreclosure case." But when Mr. Dolan goes to
17 make a payment, after they tell him finally where to send
18 payment to, they switch over to another servicer, payment
19 gets sent back to him, and another foreclosure action is
20 begun.

21 Now, you'll see evidence in the case that shows that
22 that foreclosure action wasn't begun because of any
23 default in payments. You'll see the records from the
24 servicer, from Saxon Mortgage Services who was the
25 servicer at the time that train got started out of the

1 station that gives the reason for returning that payment,
2 not because payment amount isn't sufficient, not because
3 it's insufficient to bring the loan current, but other.
4 See notes. You'll see a foreclosure review sheet that
5 sends "Send this to foreclosure. Says reason for
6 foreclosure, other. See notes." Not default in payment.
7 That's why we're here. And you might wonder why it is
8 that this company would do one of two things -- because
9 only one of two things can happen here, which is either
10 deceive the Dolans into believing that amount was
11 necessary to bring the loan current when it wasn't, or a
12 have that amount be necessary to bring the loan current
13 and treat it like it wasn't. Why would they do that?

14 Well, you see, the amount of this loan was \$721,000.
15 That's the principal debt. And it was brought current
16 because of the way the loan was structured that would be
17 the amount that was left. It was interest-only for a
18 period. And it was a nice house. Before the recession
19 the Dolans were making good money. It's a house on the
20 lake, and it's worth a lot of money. And you'll see in
21 FV-I servicer's own records how they valued this house at
22 \$950,000. And they said maybe if we get it through
23 foreclosure we'll discount \$100,000 off that for getting
24 it sold quickly and make it \$850,000 of what we'll bring
25 in. That's a tidy profit. Wall Street is about profit.

1 So there's motive to do this.

2 Now, you may hear from the other side about a
3 November 22, 2011, docket. We're not afraid of it; we'll
4 show it to you ourselves. They'll say, "This doesn't say
5 this \$65,250 amount is sufficient to bring this loan
6 current," and it doesn't. But it doesn't not say that
7 either. It just doesn't talk about what's necessary to
8 bring the loan current. I'll tell you that's a red
9 herring. What the amount was to bring the loan current
10 was what it was. You'll hear that it was represented that
11 this payment would be sufficient to do that. So you may
12 hear from them, well, they're in foreclosure. They're
13 just making this up because they're desperate. You won't
14 have to take my word for it. You can just look at the
15 documents, and listen to the testimony. Even just from
16 the documents, you can see again and again, telltale
17 signs, telltale signs that show they treated this as
18 though it was brought current. Telltale signs created by
19 the other side in this case. People who certainly don't
20 have any motive to help us make up some story. The
21 documents will show you it's true. It will back it up.

22 So at the end of this trial, you'll be asked to
23 render a verdict. Now, "verdict" is just a word that
24 means to speak the truth. And we'll ask you to speak the
25 truth. You'll have to apply the burden of proof. Judge

1 will tell you about what is it. This is not a criminal
2 case where the burden of proof is beyond a reasonable
3 doubt. If you imagine a set of scales in a criminal case,
4 the scales got to go like this in order for the state to
5 win, to go beyond a beyond a reasonable doubt. This is a
6 civil case. And if you find that the evidence tips even
7 just slightly in favor of the Dolans, then it means your
8 verdict must be for the Dolans.

9 And what should your verdict be? Judge will tell
10 your you verdict should be in an amount sufficient to
11 compensate the Dolans for the losses they suffered because
12 of FV-I's unlawful conduct. That amount and just that
13 amount to put things where they would be if FV-I had done
14 what the law requires them to do. That's the verdict
15 we'll ask you to render at the end of this case. You see,
16 when a mortgage loan company doesn't treat somebody who
17 brought their loan current as though they've done that,
18 what it does is it creates a bunch of extra debt. They
19 rack up interest and fees. Here you'll hear that a little
20 over \$168,000 in that amount today. And it -- people are
21 out the money they paid to bring the loan current and
22 they're no better off, facing foreclosure and loss of
23 their home. That's where the Dolans are now. FV-I will
24 try to tell you it's not like that, but evidence will show
25 you. The telltale signs time and time again, the evidence

1 tips in favor of the Dolans. Thank you.

2 THE COURT: Yes, sir.

3 MR. GWYNNE: Thank you, Your Honor. May it please
4 the Court?

5 THE COURT: Yes, sir.

6 OPENING STATEMENT

7 BY MR. GWYNNE

8 Good morning, everybody. My name is Charlie
9 Gwynne, and I'm an attorney with the law firm of Rogers,
10 Townsend & Thompson in Columbia, and my firm represents
11 the plaintiff in this case. And with me at counsel table
12 is Attorney Jason Wyman from my firm and Ms. Loretta Poch
13 who is from -- is a representative here on behalf of the
14 plaintiff in this case. And I want to thank you for being
15 here today and serving as jurors. This case involves an
16 agreement from September 2011 that was signed by my client
17 and the Dolans. My client has been sued by the Dolans
18 alleging we breached that agreement. We've been sued for
19 breach of contract and we've been sued for unfair trade
20 practices.

21 The evidence today will show you two things. It will
22 show you the terms of this agreement were clear,
23 straightforward, unambiguous. And second thing is that
24 the evidence will show my client complied with all of the
25 terms of the agreement. Or to put it a different way:

1 The Dolans will produce no evidence to you my client
2 breached that agreement.

3 Now, before I start talking about the agreement, I
4 think it's important to get a general idea of the
5 background of this case and why we're here. The evidence
6 will show that my client is the current owner of a note
7 and a mortgage that was taken out in 2005 by the
8 defendants for their lake house on Lake Murray. It's
9 right on the water. The principal balance was \$721,000.
10 The evidence will show that the Dolans have not made a
11 timely mortgage payment on that loan since November 2008.
12 The evidence will further show in 2009, my client filed a
13 foreclosure action because of Mr. Dolan has not made
14 timely mortgage payments. That 2009 foreclosure went all
15 the way to a foreclosure judgment, meaning the court
16 ordered that the property could be sold to pay the debt.
17 However, prior to the sale of the property, this agreement
18 came about. This agreement came about in September of
19 2011.

20 The evidence will show my client had no obligation to
21 enter this agreement. The evidence will show my client
22 entered into the agreement to help the Dolans avoid
23 foreclosure. Let's talk about the agreement. You're
24 going to see it today. There's four main terms of the
25 agreement. First, the agreement allows the Dolans, if

1 they pay my client \$65,250, my client agrees to release a
2 small section of their property, 1,043 square feet
3 exactly, in exchange for that money. And the reason why
4 we did that will become clear during the trial. The
5 evidence will show that my client received the money. My
6 client received the money, we applied it to the loan per
7 the terms of the loan documents. And that's the note and
8 the mortgage tell you how to apply proceeds that you
9 receive from them.

10 The evidence will show in exchange for that \$65,250,
11 my client recorded a partial release, releasing the 1,043
12 square foot of land from the mortgage. The second term of
13 the agreement allowed the Dolans three months, roughly
14 three months to try and sell their property. The evidence
15 will show that my client dismissed the 2009 foreclosure
16 action in which we had a judgment so they could try to
17 sell their property. Nobody is going to buy their
18 property if there's a foreclosure judgment on it. The
19 third term of the agreement gave my client sole discretion
20 to extend that time period by two months. The contract is
21 very clear. The agreement is very clear. It was my
22 client's sole discretion to extend that time period for
23 two months if the Dolans paid \$3,000 a month. The
24 evidence will show that at no time did my client agree to
25 that extension. In fact, the evidence will show at no

1 time were the Dolans close to selling their property
2 during that time.

3 The final term of the agreement relevant to this case
4 is that the Dolans would be allowed during this time
5 period to apply for what's known as a loan modification.
6 A loan modification would have allowed the Dolans to avoid
7 foreclosure. It's another option to avoid foreclosure.
8 Now, unfortunately, the Dolans were not able to sell the
9 property, so in 2012 this action gets filed. Another
10 foreclosure action gets filed. In response to that --
11 filing that foreclosure action, the Dolans asserted
12 several counterclaims, and that's why we're here. Your
13 duty today is only to deal with the two counterclaims, one
14 to deal with breach of contract, one for unfair trade
15 practices.

16 And something I forgot to mention that's obviously
17 very important. When my client received the \$65,250 and
18 applied it to the loan, it did not bring it current. At
19 no time did my client tell Mr. Dolan it would bring it
20 current. You'll see the contract. It says it will be
21 applied to the loan. You'll hear the evidence that at the
22 time that money was received by my client, the total debt
23 to bring the account current was over \$100,000.

24 Please keep in mind today that the burden is on the
25 Dolans today to prove their two claims. The problem is

1 that the Dolans do not have any evidence to prove their
2 claim. This is not a complicated case when you look at
3 the facts. You're going to get hit with a lot of numbers,
4 dates today. I just ask you to look at the contract.
5 It's not very long. It's about two pages long. The
6 contract, the agreement speaks for itself when you read
7 it. I ask that you find for my client and dismiss the
8 borrowers' two counterclaims, the Dolans' two
9 counterclaims. Thank you very much for being here today.

10 THE COURT: Thank you, sir.

11 MR. RADEKER: Thank you, Your Honor. We'd call Bryon
12 Dolan to the stand.

13 THE COURT: Mr. Dolan, come forward and be sworn
14 please.

15 BRYON DOLAN, after having first being duly sworn,
16 testified under oath as follows:

17 THE COURT: Sir, if you would tell us your full name
18 and spell your last name for the court reporter.

19 THE WITNESS: My name is Jack Bryon Dolan. Last name
20 is D-O-L-A-N.

21 THE COURT: Thank you.

22 Yes, sir.

23 DIRECT EXAMINATION

24 BY MR. RADEKER

25 Q. Mr. Dolan, when were you born?

BRYON DOLAN - DIRECT EXAMINATION BY MR. RADEKER

- 1 A. February 14, 1960.
- 2 Q. So you've been around a little longer than me?
- 3 A. About 54 years old.
- 4 Q. All right. Are you married?
- 5 A. Yes, sir, I am.
- 6 Q. Who are you married to?
- 7 A. Lisa.
- 8 Q. Thank you, sir. Do you need a minute? Just let me
- 9 know?
- 10 A. I'm good. Go ahead.
- 11 Q. All right. Do you have any children?
- 12 A. Yes, I do. I have Shannon, she's 33. My daughter
- 13 Sheena is 30, and I have a son who is 25, Sean.
- 14 Q. Where are you from?
- 15 A. I grew up in California up until 19 and I joined
- 16 Navy, and that's what brought me to the East Coast.
- 17 Q. How did you get to living in Lexington County, South
- 18 Carolina?
- 19 A. Actually, I came up -- Goose Creek, South Carolina
- 20 was my last duty station on FBM submarines, and I ended up
- 21 getting a computer job here in Columbia, South Carolina.
- 22 Q. Okay. And what do you do for a living?
- 23 A. I'm basically a software engineer/architect. Do
- 24 various things, but that's primarily what I'm doing at
- 25 this point.

BRYON DOLAN - DIRECT EXAMINATION BY MR. RADEKER

1 Q. What else have you done during your -- for work
2 during your career since you got out the Navy?

3 A. Basically, over the last 25 years I've basically been
4 in charge of management information systems for companies.
5 Whether it's been helping them detail a network what
6 software purchase to make, things of that nature. And
7 I've done that all the way up until about 2004.

8 Q. Let's talk about building houses. What experience do
9 you have with that?

10 A. During the years while I was working in IT for my
11 high school days and preNavy days, use to do a lot of
12 plumbing and working on construction sites to earn extra
13 money in summer. When I had a chance to occasionally get
14 a mortgage or build a home, I would build my own homes
15 with a little bit of help from contractors during the
16 course of the years.

17 Q. Okay. And where do you live?

18 A. I live at 540 Windward Point Court, Columbia, South
19 Carolina 29212.

20 Q. Tell me a little bit how you got that place.

21 A. Yeah, about 15 years ago, the good Lord put me in a
22 position to get a promotion. So a piece of property came
23 up, a little cottage and I was able to get it. So it was
24 good news. I hadn't met my wife yet. So I think it was a
25 1999. And me and Lisa got married in June of 2000 and had

BRYON DOLAN - DIRECT EXAMINATION BY MR. RADEKER

1 to do some remodels, make it a little bit bigger. It was
2 only a thousand square feet. And through the years,
3 because it's on the lake, SC & G, the energy regulatory
4 commission, they kind of own what they call the fringe
5 land about 50 feet from the lake line to your property.
6 Why I mention that is if you ever want to make your home a
7 little bit bigger, et cetera, you know, you might need
8 another bedroom or something, most of that property is
9 septic. It's -- there's not a public sewers line out
10 there. So you got to be able to able to what they call
11 put additional lines out there.

12 Long story short, we had an opportunity to buy the
13 fringe land, gave us an opportunity to where if down the
14 road if we wanted to build, we could. Having said that,
15 bought the fringe land. Basically after living small
16 cottage for five years, we were able to subdivide the
17 property and we built the home next door that this case is
18 about now. And we've been there since 2005.

19 Q. Okay. So you built another house next door to the
20 one you have now?

21 A. Yeah. So after we were there for a few years, we
22 basically tore down the original home we first bought and
23 built a bigger home. I was in the building business at
24 that point, and that was 544. I'm in 540.

25 Q. How did you finance that?

BRYON DOLAN - DIRECT EXAMINATION BY MR. RADEKER

1 A. With BB&T. I had known BB&T for 20-plus years and
2 they did my first loan. They did the home next door or
3 the home we live in now and then they were doing the home
4 next door as well now.

5 Q. Okay. And who did you get financing from on the loan
6 that's involved in this case?

7 A. Originally with BB&T, and then through the course of
8 a couple of years I find out that BB&T had sold the
9 loan -- I guess the loan to FV-I Morgan Stanley and Saxon
10 was the servicer, et cetera. And that's where we're kind
11 of at now, or with SLS maybe.

12 Q. Okay. And what's a mortgage servicer, just for the
13 record and our application?

14 A. Basically, what you gave, the analogy is what an
15 apartment manager is for an apartment owner. They take
16 rent. They do any kind of communication, you know, that
17 kind of thing.

18 Q. Okay. Now, when BB&T had the loan, who serviced the
19 loan at that time?

20 A. It was BB&T.

21 Q. Okay. And who did it switch to after it was BB&T?

22 A. The servicer or the loan?

23 Q. Yes, sir.

24 A. The servicer went -- became Saxon Servicing Group, I
25 guess.

BRYON DOLAN - DIRECT EXAMINATION BY MR. RADEKER

1 Q. And who were they servicing the loan for?

2 A. For Morgan Stanley Trust. I guess FV-I Morgan
3 Stanley trust.

4 Q. FV-I being the plaintiff?

5 A. Yes.

6 Q. Sir, did you ever fall behind on that mortgage loan?

7 A. Yes, sir, I did. When BB&T had it, yes, I did.

8 Q. Tell me about why that happened.

9 A. Things were great obviously until the great recession
10 that Wall Street was kind of responsible for. And even
11 though we had plenty of cash to service my debt for a
12 couple of years, the building, of course, I was doing, of
13 course, our own things, even after two years drained that,
14 and you don't have anything to continue on. No homes were
15 selling, so you had no revenue coming in, and that's how
16 we fell behind.

17 Q. Okay. And did BB&T also have the loan on the place
18 next door, the place you built that you weren't living in?

19 A. Yes, they did.

20 Q. What did you decide to do about the place next door
21 and the mortgage loan on that?

22 A. Yeah, what came from it was in fairness to BB&T,
23 there was really a no-win for anybody. I couldn't -- when
24 I say that, I didn't want BB&T to continue to not try to
25 get their money out of the home, so I let that foreclosure

BRYON DOLAN - DIRECT EXAMINATION BY MR. RADEKER

1 action go through so they could go ahead and make that
2 happen. Get some of their money back.

3 Q. Okay. How about the loan that was on your house?

4 A. That was with Saxon at the time and yes, we were, in
5 my opinion, negotiating that. But yes, I was behind as
6 well on that as well at that particular moment.

7 Q. All right. And what was the status of the
8 foreclosure action on that, as far as you know?

9 A. To be honest, I didn't even know at that point we
10 were in a foreclosure action because I thought one had
11 been dismissed.

12 Q. When are we talking about here?

13 A. We're talking about May or June or 2011.

14 Q. Okay. All right. Now, as Mr. Gwynne mentioned in
15 his opening, it was a sale of some 1,000 some odd square
16 feet out of y'all's front yard involved in the background
17 in the case; is that right?

18 A. Yes.

19 Q. Okay. Tell me some about that.

20 A. Okay. So the home at 544, the house next door went
21 into foreclosure and I think March or May. BB&T was now
22 able to get it back on the market and sell it. There were
23 several, several issues that hadn't been decided before it
24 went into foreclosure, so some things had to be solved for
25 any new purchaser.

BRYON DOLAN - DIRECT EXAMINATION BY MR. RADEKER

1 In June, they had a buyer I guess for it or wanting
2 to buy it, but because of some of the issues, they needed
3 me and my wife's help to give them some land and take care
4 of some other things. So I was approached by I believe
5 Ronnie Floyd, the broker who represented them, and the
6 only way they were interested in buying the house was if I
7 would -- since I was the original builder, the owner
8 wanted me to finish it out for him the way they wanted,
9 and they wanted the front yard that was really part of me
10 and Lisa's land, but it looked like it belong to that
11 property, but it never had gotten done by BB&T. So that's
12 why they wanted the 1,043 square feet from our front yard
13 to be joined to their yard.

14 Q. All right. All right. So now what was the problem
15 with you and wife just deeding that part over the to the
16 prospective buyer for the house BB&T now owned?

17 A. Yeah, so when the broker approached me for the other
18 party, their buyer I guess was willing to spend \$25,000
19 for a 1,043 square feet to have it. They wanted me to
20 enter into a contract to sell that for that amount which I
21 agreed to, especially knowing what we -- we could get
22 things totally worked out. But I told them, I said, you
23 know, you're going to have to make sure we get it released
24 by the loan holder of my property, you know, otherwise
25 it's not going be a good sale. So we have no objection to

BRYON DOLAN - DIRECT EXAMINATION BY MR. RADEKER

1 selling it for the \$25,000, but, you know, you're going to
2 have to get quote, unquote FV-I, Morgan Stanley, or Saxon,
3 the servicer, to agree to release the lien.

4 Q. Sir, did you have any communication around that time
5 with anyone from Saxon Mortgage?

6 A. Yes, I did.

7 Q. And who was that?

8 A. It was a gentleman named Kevin Flannigan, who was a
9 VP for Saxon Mortgage.

10 Q. And what, if anything, did Mr. Flannigan tell you
11 about what amount might be necessary to reinstate the
12 mortgage loan, to bring it current?

13 MR. GWYNNE: Objection, Your Honor. Already been
14 ruled on by the Court.

15 MR. RADEKER: Your Honor, this isn't offered to vary
16 any terms of this September 2011, agreement. It's just --

17 THE COURT: Let me see the lawyers.

18 (WHEREUPON, a bench conference was held ~~in the~~
19 presence but not within the hearing of the jury.)

20 BY MR. RADEKER

21 Q. All right. Now, based on any communications you had
22 with Mr. Flannigan, what was your understanding of what
23 was necessary to reinstate the loan, bring it current?

24 A. Basically if I could submit \$65,250, the loan would
25 be brought current and we would -- all foreclosure action

BRYON DOLAN - DIRECT EXAMINATION BY MR. RADEKER

1 would be ceased and I could continue making payments
2 again.

3 THE COURT: Got an issue?

4 JUROR: My apologizes, sir.

5 (A discussion was held off the record.)

6 THE BAILIFF: One of the jurors says that light is
7 distracting. Can we cut it off until we need it?

8 THE COURT: Yes, we sure can.

9 JUROR: The light on the projector. Thank you.

10 THE COURT: Very good. That's a good forelady right
11 there. Sorry to interrupt.

12 MR. RADEKER: That's quite all right.

13 BY MR. RADEKER

14 Q. Mr. Dolan, I'm going show you what's been admitted as
15 ours, Defendant's Exhibit 4. Now, is that a copy of a
16 letter, agreement document signed by you and your wife and
17 by Kevin Flannigan for Saxon Mortgage Services?

18 A. Yes, sir, it is.

19 Q. And it's a shame we just turned that off. I have to
20 turn this on for just a second to show this to the jury.
21 Wait on that. While we're doing that, sir, let me ask
22 you: Does this concern the release of the mortgage lien
23 on that part of the front yard that's being sold?

24 A. The 1,043 feet, yes, sir.

25 Q. And if you look at paragraph 2 in it for me, what is

BRYON DOLAN - DIRECT EXAMINATION BY MR. RADEKER

1 the amount that it says is to be paid to Saxon in exchange
2 for that?

3 A. \$65,250.

4 Q. All right. And looking down at paragraph 3, in that
5 document, it says, "Borrower shall list the property for
6 sale with the intention of the sale closing on or before
7 December 30th, 2011, three months from the date of the
8 sale of the closing which shall occur no later than
9 September 30th." And later it says, "In the event the
10 sale of the property does not close on or before
11 December 30, 2011, Saxon may, in its sole discretion,
12 elect to extend the time frame by an additional two
13 months. In such event, borrower shall remit monthly
14 payments to Saxon of \$3,000 for each month of the
15 two-month extension period."

16 Do you see that?

17 A. Yes, sir, I do.

18 Q. All right. Ask you a few questions about that. Did
19 Saxon receive the \$65,250 on September 30, 2011?

20 A. Yes, sir, they did.

21 Q. And what, if anything, did you and your wife do about
22 listing the property for sale as mentioned in this
23 agreement?

24 A. Well, we already had the property for sale. My wife
25 was a realtor and the only thing Mr. Saxon wanted to do

BRYON DOLAN - DIRECT EXAMINATION BY MR. RADEKER

1 was to have a neutral third-party now list the property.
2 And at that point we complied with the terms and listed it
3 with Ronnie Floyd, another broker. We didn't even really
4 know him before all this came about, which Mr. Flannigan
5 was fine with. He said that would work out fine. So we
6 listed it with him and continued to keep it listed.

7 Q. Toward the bottom says, "Saxon, in its sole
8 discretion, may elect to extend the time frame by an
9 additional two months." Did that happen?

10 A. I believe they initially started the process, yes,
11 but then all of a sudden I'm being told not to send
12 payment.

13 Q. Okay. Tell us about that.

14 A. So January 1st is rolling around. The house hadn't
15 sold yet. During the course of this process, Saxon had
16 never given me an address where to send the payments yet.
17 Now, I had been e-mailing with an Alicia Carter for Saxon
18 prior to the agreement being made. So I emailed her
19 asking, saying, you know, it's the first of January.
20 Where should the payments go? Never got an answer for
21 about three days. So finally I had to place an e-mail to
22 Kevin Saxon, who I hated because he's a VP. You don't
23 want to bother anybody at that level about where a payment
24 gets sent, and letting them know I didn't get a return
25 e-mail, and basically he says, "I'll take care of it

BRYON DOLAN - DIRECT EXAMINATION BY MR. RADEKER

1 today."

2 I got a call, I believe, from Mr. Andrew Farmer who
3 said, "Here is where to send the payment." I got a
4 cashier's check that same day. Sent it to them. Then
5 about a week later Mr. Farmer followed up and asked me,
6 "Hey, did you send that payment?" "Yes, I did. You
7 should have it. If you don't have it, you should have it
8 any day." I think that was on January 12th. The
9 payment got sent on January 9th, the same day I was told
10 what the address was. And then all of a sudden out of the
11 blue, on January 23rd I believe it was, I see a check
12 that's returned back to me, the exact same certified
13 cashier's check I sent them saying they couldn't accept
14 the payment.

15 Q. All right. Let go back and talk about the thing we
16 talked about. You said Kevin Saxon. Do you mean Kevin
17 Flannigan?

18 A. Kevin Flannigan, yes.

19 Q. Who did he work for?

20 A. Excuse me?

21 Q. Who did he work for?

22 A. He worked for Saxon for FV-I, Morgan Stanley.

23 Q. How about Alicia Carter you mentioned?

24 A. Yes, she was represented as working for Saxon because
25 all her e-mail stuff you could see she worked for Saxon.

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1 Q. And that Andrew Farmer person?

2 A. Saxon as well.

3 Q. So I'm going to show you this and ask this be marked
4 ask this be marked as Defendant's Exhibit 17.

5 (Defendant's Exhibit 17 was marked.)

6 Q. Show you what's been marked Defendant's Exhibit 17,
7 Mr. Dolan. Is that a copy of your email to Alicia Carter
8 at Saxon asking where you could send your mortgage payment
9 to?

10 A. Yes, sir, it is.

11 Q. What response did you get to that e-mail?

12 A. I never got a reply back.

13 Q. Okay. And just so we make sure we all understand,
14 what did you do next?

15 A. I waited a couple days. But on January 9th, 3 days
16 after this, I called or sent an e-mail for Kevin Flannigan
17 asking for the address where to send the payments.

18 Q. What happened after that?

19 A. He had Andrew Farmer call me that exact same day with
20 the address of where to send the payments.

21 Q. Okay. Now, what discussion, if any, did you have
22 with Mr. Farmer or Mr. Flannigan around that time to the
23 effect, "Oh, you shouldn't send this \$3,000 payment?"

24 A. They didn't say that at all. They gave it to me so I
25 could send the payment to what I thought continue to honor

BRYON DOLAN - DIRECT EXAMINATION BY MR. RADEKER

- 1 an agreement we had as far as everything being fine.
- 2 Q. All right. Now take a look for me if you would at
- 3 Defendant's Exhibit 8, and I'll get it for you. It's got
- 4 two pages, correct?
- 5 A. Yes, sir.
- 6 Q. Lets look at the second page first, which is a -- got
- 7 to wait on this thing. But it's a copy of the \$3,000
- 8 check?
- 9 A. Yes, certified check. Yes.
- 10 Q. All right. Let's look at the first page. Who does
- 11 this letter say it's from?
- 12 A. Says it's from Saxon.
- 13 Q. Who is it to?
- 14 A. Myself Bryon J. Dolan.
- 15 Q. Look on the left for me. Says, "This letter is to
- 16 advise you we encountered issues with the payment. The
- 17 following states the reasons," and it's got little
- 18 checkmarks going down.
- 19 A. Yes, sir.
- 20 Q. What, if anything, is in the blank next to the words
- 21 the "payment amount is not correct"?
- 22 A. It's not checked.
- 23 Q. And what, if anything, is in the blank next to the
- 24 words "there has been a default on the repayment plan
- 25 agreement"?

BRYON DOLAN - DIRECT EXAMINATION BY MR. RADEKER

1 A. It is not checked.

2 Q. And what, if anything, is in the blank next to the
3 "funds are insufficient to liquidate the account"?

4 A. It's not checked.

5 Q. All right. Let's look at the bottom. Get this
6 focused here. What does it say there at the bottom for a
7 reason?

8 A. It just says check 194074 in amount of \$3,000
9 returned due to status of loan.

10 Q. All right.

11 A. Correct.

12 (A discussion was held off the record.)

13 Q. Okay. What else happened around that time?

14 A. I want to say it was maybe just the day before I --
15 or maybe the day after this, I got a call out of the blue
16 from Andrew Farmer, the same guy who told me to send the
17 check where to send it, et cetera. "Mr. Dolan, you
18 haven't sent a February payment yet, have you?" I said:
19 "Well, no. I'm getting ready to next week." "Well, we
20 can't accept your payment any more." I said, "Why not?"
21 "Your loan has been given to another servicer" --

22 MR. GWYNNE: I'm going to object based on hearsay.

23 MR. RADEKER: I don't understand what the hearsay
24 objection is. He's talking about what -- the statements
25 of the party opponent are through their agent. His

BRYON DOLAN - DIRECT EXAMINATION BY MR. RADEKER

1 statements are only offered to just show the explanation,
2 circumstances the other party says.

3 MR. GWYNNE: Your Honor, there's no foundation about
4 who this individual is, who he worked for, what authority
5 he had at the company. Additionally, he is asserting the
6 statement for the truth of the matter.

7 THE COURT: Yes, sir.

8 MR. RADEKER: Your Honor, there has been testimony
9 about who he is and who he worked for. There's testimony
10 he worked for Saxon Mortgage, which was the servicer on
11 this account.

12 THE COURT: Let's see the lawyers up here.

13 (WHEREUPON, a bench conference was held ~~in the~~
14 presence but not within the hearing of the jury.)

15 THE COURT: Ladies and gentlemen, this is one of
16 these times we have to talk about a little law and what is
17 applicable and what is not. So Madame Forelady, we'll ask
18 you to -- if you'll take your jury and go to the jury
19 room. We won't be long, but do take the time to take a
20 break because before I bring you back, I will allow
21 everybody to use the facilities as well so we don't have
22 stop again. I usually stop about every hour and 15
23 minutes or an hour and a half, and we've been running an
24 hour now. So when we come back, we'll probably run pretty
25 hard on up to lunch. So we'll take 15 minutes. And also

BRYON DOLAN - DIRECT EXAMINATION BY MR. RADEKER

1 if you'll make sure this is sufficient with your juror
2 about the glasses. I know it's a reflection problem. Is
3 it -- is the blue -- just find out if the blue is okay and
4 not the glare down here, and if not, we'll turn that off
5 too.

6 Take the jury out. Don't discuss the case. It's not
7 out yet.

8 (The jury left open court at 10:31 a.m.)

9 THE COURT: All right. Yes, sir.

10 MR. RADEKER: Thank you, Your Honor. I point the
11 Court to Rule 801(d)2(d). A statement by the parties
12 agent or servant --

13 THE COURT: Hold on one second. I didn't bring my
14 evidence book. He's gone to get it. No wonder I couldn't
15 find -- I picked this up and starting doing like this.

16 (A discussion was held off the record.)

17 THE COURT: All right. Go ahead.

18 MR. RADEKER: All right. Rule 801(d)2(d).

19 THE COURT: All right.

20 MR. RADEKER: Says that a statement is not hearsay if
21 it's a statement by the party that is the opposing party.
22 It's clear from the earlier context. Agent or servant
23 concerning a matter within the scope during the agency or
24 employment made during the existence of the relationship.
25 Now, the agency relationship between FV-I and its servicer

BRYON DOLAN - DIRECT EXAMINATION BY MR. RADEKER

1 Saxon has already been established by testimony. It's
2 already been established that Mr. Farmer worked for Saxon,
3 and it's already been established that Mr. Farmer called
4 Mr. Dolan about making this payment, and basically
5 indicating this is where you must send the payment. He
6 calls him back, he's talking about the same subject. We
7 can't take payments now. I don't see what the problem why
8 this is hearsay. And I think this is an admission by a
9 party opponent. Obviously, these are companies. I mean,
10 they have to act through people, and that's what they're
11 doing.

12 I guess I don't really understand what the basis of
13 the objection is. I was hearing from plaintiff's counsel
14 it's got to be established the person has authority, no.
15 It's just has to be within the scope of their agency or
16 employment. He acted within the scope -- it's already in
17 evidence that he said this is where you send the payment.
18 So within the scope of his employment is to tell him, hey,
19 we can't take payment.

20 THE COURT: I call your attention to the South
21 Carolina Marshall versus Thomason and 241 SC 84 which
22 holds that such statements are admissible as admissions of
23 a principal when the agent has been authorized to speak
24 for his principal. But a truck driver is not ordinarily
25 so authorized and therefore his statements about a

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1 collision or whatever it is is not admissible as a
2 statement of the employer. So it has to be -- they have to
3 be authorized to speak for the principal.

4 MR. WYMAN: It's my understanding of the law as well.

5 MR. RADEKER: I would say at least some evidence to
6 indicate that's so here. Because Mr. Dolan inquired to
7 the vice president of the company. "Where do I send
8 payment?" Shortly thereafter gets a call from this man
9 that works at the company -- that's established -- about
10 where to send payments. Man calls him back later and
11 said, "Don't send them anymore." It's all on the same
12 topic. It's already evidence of that authorization. It
13 may be circumstantial, but it's there.

14 MR. WYMAN: I'd say it's self-serving at most as far
15 as whether Andrew Farmer had the authority to do this
16 based on a phone call from Kevin Flannigan. It's
17 simply -- he has not established Andrew Farmer had the
18 authority whatsoever to bind Saxon and the plaintiff in
19 case.

20 THE COURT: Well, that's what I'm looking at. Tell
21 me who Mr. Farmer -- what is his capacity there? Can you
22 establish that? I mean, he may be a customer service
23 person, but I don't think the customer service at the bank
24 has the authority to bind the bank.

25 MR. WYMAN: Exactly, Your Honor. It's like a

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1 janitor.

2 MR. RADEKER: What we know is that he was an employee
3 who worked there. He made this call about where to send
4 the payment after it had been run up to this vice
5 president, officer at the company, and that's evidence of
6 delegation to him to communicate with Mr. Dolan.

7 THE COURT: I respectfully disagree with you. Tell
8 me something else. The person who returned the call, we
9 don't know what his capacity is. May be a customer
10 service person a person that work at the bank is a teller.
11 A person who works at the bank may be a loan officer. If
12 this person is -- tell you what let's do. Can you
13 establish this person has authority, is a loan officer and
14 has signatory authority for the bank. If he's got
15 signatory authority, I'm going to allow it in.

16 MR. RADEKER: Your Honor, I can't establish that he
17 has signatory authority, but I would just note signatory
18 authority isn't what's necessary --

19 THE COURT: No, it is not, but it is evidence that
20 person is authorized to speak for the bank. My wife is in
21 trust business. Okay. Used to work for a broker, and it
22 wasn't Morgan Stanley. Years and years ago, but she's
23 been with a bank for years and years and years. But
24 nonetheless, she has signatory authority, okay? There are
25 lots of folks that work underneath her that are not

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1 authorized to make any trade or any transaction
2 whatsoever. Okay? And often times she has to go
3 physically to a -- one of their branches to sign a
4 document, okay? That's the kind of person I think can
5 bind the bank, because my wife with her signature can bind
6 that bank, and does. There's liability insurance on -- I
7 mean, am I missing something?

8 MR.. WYMAN: No, I think that's a correct statement of
9 the law, Your Honor. Has to be an authorized -- certainly
10 he can't even prove that Andrew Farmer technically worked
11 for Saxon. He has the Alicia Carter e-mail with her
12 signature block and Kevin Flannigan has his signature
13 block and stuff like that in his e-mail, but Andrew
14 Farmer, there's just no delegation of authority whatsoever
15 to bind the company in this type of situation.

16 THE COURT: Well, I doubt that even a branch
17 manager -- I know the bank in my company -- that my wife
18 works for, not a even branch manager can bind the bank.

19 MR. RADEKER: And Your Honor, we're not talking about
20 striking an agreement with Mr. Dolan. We're talking about
21 somebody just telling him don't send payment anymore.
22 That's why I think signatory authority analogy is apples
23 to oranges, respectfully.

24 THE COURT: Might be.

25 MR. RADEKER: We're not -- I'm not going to say in

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1 this conversation we had this agreement. Mr. Dolan is not
2 going to say that because it's not what happened. It's --
3 I guess what we're talking about is it within the scope of
4 the guy's employment to call him and say don't make
5 payments anymore? He'd already had communications with
6 him about making payments. So communicating with him
7 about making payment appears to be within the scope of his
8 employment. That came in, and came in without objection.

9 MR. WYMAN: Your Honor, I would argue it's still --
10 he can't keep going back with -- Andrew Farmer is not
11 present. He hasn't establish that there's any authority
12 whatsoever as far as basically one phone call he claims to
13 have had. To simply -- to continue to say he can bind the
14 company is just going to be --

15 THE COURT: Tell you what. It's sustained at this
16 time. If you can establish it -- we're going to take a
17 break here. If you've got something else you can
18 establish that he has the authority to bind the bank, if
19 you can establish that he has -- he is authorized to speak
20 for the principal. That's the Marshall v. Thomason. I'm
21 not familiar with the case being overturned. Anybody
22 know? Professor Riser (phonetic) wouldn't have it wrong,
23 would he? Anybody remember him besides me? Okay. We're
24 going to take a break.

25 THE WITNESS: May I use the restroom?

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1 THE COURT: Yes, sir. Let me tell you this: You may
2 step down but you may not talk to your lawyer about -- you
3 can talk to him about a baseball game, but you can't talk
4 to him about the case, okay. Please.

5 MR. RADEKER: Just don't talk to me. I don't want
6 to...just --

7 THE COURT: He doesn't want to talk to you.

8 (Laughter.)

9 (A recess was taken from 10:41 a.m. to 10:54 a.m.)

10 THE COURT: While the jury is still out, you got
11 anything else?

12 MR. RADEKER: No, Your Honor, I think we're just
13 going to move on. I have to say for the record I think I
14 satisfied the rule. Obviously, the Court disagrees, so --
15 I would do this, though. Earlier I didn't move what we
16 marked as Exhibit 17 into evidence. I'd do that now.
17 Might as well.

18 MR. GWYNNE: No objection.

19 THE COURT: In evidence without objection. Anything
20 else?

21 (Defendant's Exhibit Number 17 was admitted.)

22 (The jury entered the courtroom at 10:55 a.m.)

23 THE COURT: Yes, sir. Proceed.

24 BY MR. RADEKER

25 Q. Just to pick up where we were and go back and cover a

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1 few things I may have skipped over. In January of 2012,
2 around the time of this letter, sending this check back to
3 you, did the servicer on this loan change?

4 A. Yes, it did.

5 Q. Who did it change to?

6 A. SLS.

7 Q. What does that stand for?

8 A. Specialized Loan Servicing.

9 Q. Let's go back and we'll look at some things here.

10 Want you to take a look at an exhibit that's already been
11 admitted into evidence. Take a look for me at Defendant's
12 Exhibit 6 if you would, sir. Tell us what that is first.

13 A. It's an e-mail from Kevin Flannigan from Saxon dated
14 October 12, 2011.

15 Q. All right. Could you read it to me?

16 A. My response to him?

17 Q. Actually, first of all, let's put it up so everybody
18 can see it. This is dated October 12, 2011, correct?

19 A. Yeah, about 12 days after we sent the money in and
20 the agreement was done.

21 Q. And it says, "Mr. Dolan, I ran the reinstatement
22 figures for your loan as you requested, and the amount to
23 bring your loan current as of October 14, 2011, is
24 35,603.88." Do you see that?

25 A. Yes, I do.

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1 Q. 150all right. And later on, it also says, "I also
2 need to point out that you have an escrow shortage of
3 \$26,039.05, and that that's not included in the \$35,603.88
4 to bring your loan current." Do you see that too?

5 A. Yes, sir, I do.

6 Q. All right. How did you react to receiving this
7 letter?

8 A. Well, I had a million other thing going on at the
9 time, so I didn't react, to be honest with you. Did I
10 like what I was seeing? No, but my years of experience
11 have taught me it was only 12 days after we had done the
12 transaction, so everything obviously wasn't getting posted
13 correctly or hadn't been posted based on that. So I
14 just -- I wasn't going to rock the boat, cause any
15 problems. Like I said, I was trying to complete the house
16 next door for the people that I agreed to do it with. I
17 had a software deadline I was trying to make, so there
18 were more pressing issues. So I just wanted to
19 acknowledge to Kevin that I got his e-mail.

20 Q. Okay. So you see you sent a response here. Now, the
21 time on Mr. Flannigan's e-mail to you and the time of day
22 is what?

23 A. Looks like 11:08 a.m. I don't know if it's his time
24 or my time. I don't know how that syncs up.

25 Q. And your -- his time is 11:01 a.m., correct, and your

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1 response at 11:08 a.m.?

2 A. Yes, sir.

3 Q. So you get this e-mail. How does that make you feel?

4 A. Again, I wasn't mad or anything. I thought it was
5 totally off, something is wrong with the accounting based
6 on everything we discussed. So I wasn't going to react.
7 I just wasn't going react. I had been in charge of
8 accounting departments for many years and you can see
9 where things don't always get posted correctly, and 12
10 days after the fact, again, I just wasn't going to react
11 to it.

12 Q. Okay. Tell me if the response above, you say,
13 "Thanks, Kevin. I'll review and determine what course to
14 take"; is that correct?

15 A. Yes, that is.

16 Q. And let me ask you about -- were you, like, sitting
17 at your computer when you got this email?

18 A. Yeah, so the house is right next door that I'm now
19 completing for the guy that got this whole transaction
20 doable. We -- I had a meeting that day for the septic
21 tank guy. We had to get him and another contractor up.
22 But I'm in the software developer business, so I sit in
23 front of my computer eight to ten hours a day. So I'm
24 always there. You know, you have Outlook open and you're
25 notified that you have an email. So it was almost kind of

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1 instantaneously, I was sitting there doing my thing. This
2 came in. I thought about that, and I just simply, you
3 know, about six, seven minutes later said, "Got your
4 e-mail. Fine. I'll figure out what to do about it."

5 Q. Thank you. Mr. Dolan, had Kevin Flannigan ever said
6 something different to you than that about what amount was
7 necessary to bring your loan current?

8 A. Yes. He told me \$65,250 is what I needed to come up
9 with on that September 29th closing to bring my loan
10 current. That was the whole purpose of all the
11 discussions I had with him.

12 Q. Hold on one second.

13 MR. RADEKER: I would ask this be marked as
14 Defendant's Exhibit 18.

15 (Defendant's Exhibit 18 was marked.)

16 MR. GWYNNE: I objection to this based on the Court's
17 prior ruling. It predates the agreement.

18 (WHEREUPON, a bench conference was held ~~at the~~
19 presence but not within the hearing of the jury.)

20 THE COURT: Yes, sir.

21 BY MR. RADEKER

22 Q. Mr. Dolan, taking a look at what's been marked as
23 Defendant's Exhibit 18, does that contain a copy of an
24 email to you from Kevin Flannigan at Saxon dated
25 September 22nd, 2011?

BRYON DOLAN - DIRECT EXAMINATION BY MR. RADEKER

1 A. Yes, sir.

2 Q. Thank you very much.

3 MR. RADEKER: And we would at this time move this
4 into evidence as Defendant's Exhibit 18.

5 MR. WYMAN: Objection, Your Honor, based on the
6 Court's previous ruling on the in limine motion. It's
7 clearly a reference to the September 22nd, 2011, agreement
8 that's already in evidence. Clearly speaks for itself.

9 THE COURT: I'm going to allow it in over the
10 objection because I don't think it goes to that. I think
11 it goes to what he highlighted right there. Goes to the
12 release itself. You can question him about that.

13 MR. WYMAN: Certainly, Your Honor. Thank you.

14 THE COURT: Go ahead.

15 (Defendant's Exhibit 18 was admitted.)

16 BY MR. RADEKER

17 Q. I'll put this up for us. Take a look at that for me.
18 Sir, that says, "Regarding the recording of partial
19 release, once I receive the wire number for the \$65,250
20 revised amount due Saxon less the \$3,750, Saxon will
21 expedite the filing of the partial release." Do you see
22 that?

23 A. Yes, I do.

24 Q. Mr. Dolan, I'll show you something else. This has
25 already been admitted into evidence as Defendant's

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1 Exhibit 9. Take a look at this for me. I keep having
2 trouble turning this thing off.

3 We're having technical difficulties. All right.
4 Thank you.

5 Take a look at this for me, sir. First of all, what
6 is that document?

7 A. It looks like Saxon's internal documents as far as
8 the recordkeeping of the loan.

9 Q. Take a look for me at the fourth entry down on
10 September 26, 2011. Do you see where that says, "The
11 litigation on this loan is now closed/resolved. Please
12 contact the legal department if additional information is
13 needed. Thanks"?

14 A. Yes I do.

15 MR. WYMAN: Your Honor, if I may, I'd like to object
16 just to show -- it's a little confusing not to be able to
17 see the dates connected. I don't know if he can maybe
18 zoom out a little bit further. It's just I don't want to
19 confuse the jury as to any date.

20 THE COURT: Can you zoom out just a little bit?

21 MR. RADEKER: I can zoom out, but it may make it
22 illegible to zoom out far enough to see.

23 THE COURT: Do you what you did, then maybe slide
24 it --

25 MR. RADEKER: Slide it?

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1 THE COURT: There you go.

2 Q. And that entry is also on September 26th, 2011?

3 A. Correct.

4 Q. Says "litigation closed." Go down to an entry on
5 September 30, 2011, and that says "wire received" on 9/30
6 IAO. In the amount of?

7 A. \$65,250.

8 Q. All right. And the entry under that also dated the
9 same day says, "Please post five payments at \$3,004.19, 12
10 payments at \$2,553.56, ten payments at \$1,877.62.

11 Remainder of funds to suspense. Thank you." So have you
12 added up those numbers that are given in that entry?

13 A. Yes.

14 Q. What do they add up to?

15 A. \$64,439.87.

16 Q. Okay. See where it says, "remainder of funds to
17 suspense." What do you know about what that means?

18 A. Suspense is put it in an account because we don't
19 know what to do with it, which is basically I guess they
20 didn't know where to apply it because I was caught up on
21 the loan just like we agreed.

22 MR. GWYNNE: Objection, Your Honor.

23 THE COURT: That's sustained.

24 MR. GWYNNE: Move to strike.

25 THE COURT: That's stricken.

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1 MR. RADEKER: First part or the last?

2 THE COURT: The last sentence.

3 MR. RADEKER: I think that was a little more than I
4 asked for.

5 BY MR. RADEKER:

6 Q. All right. Take a look at the next page for me.
7 There's an entry the first one for October 3rd, 2011. And
8 you see where that says -- tell me what that says,
9 actually.

10 A. Says, "9/30, task was not fully completed. Need to
11 post ten payments at 1877.62 and remainder of funds,
12 810.13, to suspense."

13 Q. All right. And you see on that same day two entries
14 down, tell me what that says where the word "closed" is
15 there.

16 A. Yes. Says, "task completed as requested. Applied
17 ten payments for total of 18,776.20 from suspense as
18 requested."

19 Q. Look down on the second entry on October 10th, 2011
20 and tell me what that says.

21 A. "Shut down foreclosure process due to loss mitigation
22 activity."

23 Q. How about the one above that, above that on the page?

24 A. The one above it?

25 Q. The one beginning with the word "please." Do you see

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1 where it says, "Please kill and bill FC. Money has been
2 received for the negotiated partial release approved by KF
3 one?"

4 A. Yes, I do.

5 Q. Do you know what FC stands for?

6 A. Foreclosure.

7 Q. Flip on the next page for me and see where it says
8 on -- there's an entry second one down for November 30th,
9 2011. Do you see that, sir?

10 A. Yes, I do.

11 Q. Let's take a look at that. Tell me what that says.

12 A. The one that started with "reviewed loan"?

13 Q. That's correct, sir.

14 A. "Reviewed loan for proposal referral. Approved. No
15 PDP, no RPP. Loan modified in suspense. No HAMP or loan
16 mod approved. Check not active. All docs in imaging."

17 Q. Look on the next page for me. See the last entry on
18 that page dated January 18th, 2012?

19 A. Yes. "We received funds IO of \$3,000. E-mailed
20 whole loan for advising."

21 Q. Flip to the last page of the document. Want you to
22 look at the two entries that are both dated January 18,
23 2012 there.

24 A. Yeah. "Do not send funds back. Need to be applied
25 to account. Ask FF to reach out to me prior to sending

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1 back for posting."

2 Q. What does the next one say?

3 MR. WYMAN: Objection, Your Honor. He misread that.

4 THE COURT: Okay, read it as it is. I can't see it
5 from here. What did he say? Read it again.

6 THE WITNESS: The last one, sir?

7 MR. RADEKER: The first one on the page. I can just
8 ask him.

9 Q. "Do not send" -- does it say, "do not send funds
10 back. NEE to be applied to account. Asked FF to reach
11 out to me prior to sending back or posting."

12 A. Yes, it does say that.

13 Q. All right. And what does it say in the next entry?

14 A. "AFS approval. T received. Returned all funds. No
15 active agreement on file."

16 Q. No active agreement. Do you know what that means?

17 A. No, I'm just reading the notes. But it appears --

18 Q. That's okay.

19 A. I don't know what they're talking about.

20 Q. And there was a foreclosure case going on at the time
21 that the September 30th, 2011, payment was made, wasn't
22 there?

23 A. Yes, there was.

24 Q. All right. And I'll show you -- let me ask you this:
25 What happened to that foreclosure case?

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1 A. It got dismissed after I sent the money.

2 Q. Okay. I'm going to show you what's been admitted as
3 Defendant's Exhibit 10, sir. And I'd ask you to take a
4 look at that for me. First of all, does that appear to be
5 a consent order releasing foreclosure portion of judgment
6 and closing the case in that foreclosure case?

7 A. Yes, sir.

8 Q. Flip to the next page for me. Who does it say --

9 A. I'm sorry.

10 Q. Who does it say under, "I so move"?

11 A. Rogers, Townsend, and Thomas.

12 Q. Attorneys for who?

13 A. Saxon Mortgage, FV-I, Morgan Stanley.

14 MR. WYMAN: Objection, Your Honor. It doesn't say
15 that.

16 MR. RADEKER: It says attorney for the plaintiff, and
17 that's what I'm trying to get out. It says what it says.

18 MR. WYMAN: Plaintiff in the case is not a --

19 MR. RADEKER: We can just agree to strike that last
20 response. It says what it says.

21 THE COURT: Okay. Stricken.

22 BY MR. RADEKER

23 Q. Look at the first page for me. So take a look at
24 that. Do you see the fourth entry under "It is hereby
25 ordered." Do you see there where it says, "The note and

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1 mortgage of the defendant are hereby reinstated"?

2 A. Yes, sir.

3 Q. "Without merger into the judgment released herein as
4 fully as if the hearing release judgment had not been
5 obtained"?

6 A. Yes, I do.

7 Q. Now, who did you understand at this time was in
8 charge of managing the foreclosure action on your loan?

9 A. Well, at that time, Saxon, the servicer on behalf of
10 Morgan Stanley.

11 Q. Okay. Sir, let me ask you: We've been looking at a
12 lot of exhibits, and we'll look at more. The property you
13 live in, how much is it worth?

14 A. According to the latest appraised values from Saxon
15 itself, it's close to \$950,000.

16 Q. And I'll ask you to take a look at Defendant's
17 Exhibit 12. And is this a copy of a piece of paper
18 allegedly Saxon value reconciliation worksheet?

19 A. Yes, sir, it does.

20 Q. All right. What does it give as the base value of
21 comparable sale listing research?

22 A. \$950,000.

23 Q. When is it dated as the date of reconciliation?

24 A. September 6th, 2011, about 23 days before we gave
25 them the money.

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1 Q. Okay. What does it say down there at the bottom in
2 the portions I have highlighted?

3 A. Yeah, they're throwing a discount, I guess, in there
4 and it says \$850,000.

5 Q. What was the amount your loan was for?

6 A. \$721,000.

7 Q. All right. Sir, I'll show you another exhibit -- be
8 done with these soon -- marked as Defendant's Exhibit 13.
9 Let me ask you while I'm turning this on, what does this
10 say at the top?

11 A. "Foreclosure review verification for Morgan Stanley
12 Saxon loan."

13 Q. What loan does this appear to be about?

14 A. The one that's on me and my wife's current home.

15 Q. When is this document dated?

16 A. It's dated November 30th, 2011.

17 Q. When does it say a last payment date is?

18 A. October 3rd.

19 Q. All right. Does it give a number to the right of the
20 word valuation?

21 A. One second. Yes. \$910,000.

22 Q. Flip over to the next page of it for me. Up at the
23 top there you see where it says "reason for default"?

24 A. It says other, see notes.

25 Q. See where it says, "loan has no reason for denial"?

BRYON DOLAN - DIRECT EXAMINATION BY MR. RADEKER

1 A. That's correct.

2 Q. Do you know what that means?

3 A. No, I do not.

4 Q. See where it says, "foreclosure recommendations"?

5 A. Yes. "Refer to foreclosure," it appears.

6 Q. I'm going to show you one more thing. Take a look at
7 what's been admitted as Defendant's Exhibit 16. First of
8 all, what is this?

9 A. It looks like a notice from a debt collector from
10 Specialized Loan Servicing dated October 10th, 2014,
11 looking for some kind of -- or loan value that's due at
12 this time.

13 Q. Let me ask you about at a date. It's 2014. It is
14 today, April 17th.

15 A. Yes, sir.

16 Q. You want to tell me what that date is?

17 A. Seven days ago was April 10th.

18 Q. You said it was October.

19 A. I apologize. April 10th.

20 Q. See it says, "The following amount is needed to
21 reinstate the above-referenced mortgage loan." And it
22 says \$131,326.26 for payments due through April 1st?

23 A. That's what it says, correct.

24 Q. It's got \$33,421.93, what's listed as corporate
25 advances. Do you see that?

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1 A. I do.

2 Q. Do you know what that is?

3 A. I haven't a clue.

4 Q. All right. And what they're -- see where it has a
5 line labeled suspense one?

6 A. Yes, I do.

7 Q. What's the amount that's given there?

8 A. \$810.13.

9 Q. Do you recognize that amount?

10 A. Yeah, that's the same amount they didn't know where
11 to apply after they applied all my money previously.

12 Q. What does it say is the total reinstatement amount?

13 A. \$167,893.62.

14 Q. Thank you. Let me ask you, sir, what was the reason
15 or reasons that you got together the money to send Saxon
16 \$65,250 payment?

17 A. Two primary reasons. One, if we didn't, they were
18 going to sell the house for about 500 something thousand
19 dollars next door, which would have significantly dropped
20 the value of our property, and to bring the loan current.

21 Q. Now, if you had believed that amount would not have
22 brought the loan current, what would you have done?

23 A. I wouldn't even have done anything. My wife and I
24 literally had to drain our savings. I had to work on a
25 house for 90 days after that to try to get it finished.

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1 Why would I spend that money only for them to turn around
2 and foreclose on me again?

3 Q. All right. And what, if anything, did you rely on in
4 making the decision to send that money?

5 A. Everything that Kevin Flannigan from Saxon told me.

6 Q. Now, what's your understanding of where Kevin
7 Flannigan works now?

8 A. It's my understanding he works for SLS or FV-I Morgan
9 Stanley.

10 Q. Thank you. Do you -- is he in the courtroom with us
11 today?

12 A. No, he didn't come.

13 Q. Thank you, sir. Please answer any questions opposing
14 counsel has for you.

15 THE COURT: Yes, sir.

16 MR. GWYNNE: Thank you, Your Honor. May it please
17 the Court.

18 THE COURT: Yes, sir.

19 CROSS-EXAMINATION

20 BY MR. GWYNNE

21 Q. Good morning, Mr. Dolan. My name is Charlie Gwynne.
22 We met before.

23 A. Yeah.

24 Q. I kind of want to start at the beginning of when you
25 purchased the property. Is it correct you purchased a

BRYON DOLAN - CROSS-EXAMINATION BY MR. GWYNNE

1 parcel of land on Lake Murray back in 1999; is that
2 correct?

3 A. Yes.

4 Q. And it was roughly .6-acres; is that correct?

5 A. No, it's not correct. It was -- I think 1.something
6 acres.

7 Q. Going to show you -- can you tell me if you can see
8 the exhibit if I put it over here so I can make sure we're
9 all looking at the same document?

10 A. Sure.

11 Q. Show you what's been marked Plaintiff's Exhibit 1,
12 and is already in evidence. Is that the property that you
13 purchased in 1999?

14 A. The line dividing it was not there. It was all one
15 piece. The two together added together comes over to 1
16 acre.

17 Q. Yes, I'm sorry. So parcel A and parcel B, that's the
18 large parcel you bought in 1999, correct?

19 A. That's correct.

20 Q. And when you purchased the property, you said there
21 was a -- you called it a cottage. Thousand square foot
22 house, correct?

23 A. Yes, sir.

24 Q. It's not depicted on here; is that correct?

25 A. It is, actually. It's the one right up there now.

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1 That was the old cottage that was there.

2 Q. Now, after several years, you decided to subdivide
3 the lot, correct?

4 A. I think it was a couple years, yeah.

5 Q. But the answer is yes?

6 A. Yes. I'm sorry.

7 Q. And at that time we're talking about 2004, 2005 time
8 frame or earlier?

9 A. It was earlier. I think we actually subdivided the
10 lot somewhere around 2002 or 2003.

11 Q. Now, at the that time you were a builder; is that
12 right?

13 A. No, I was not. I worked for Whaley Food Service
14 Preparers. I was managing information systems.

15 Q. But in terms of this piece of property, you
16 subdivided the lot, correct?

17 A. My wife and I did, yes.

18 Q. And you decided to build two houses on each of the
19 lots; is that right?

20 A. No, I did not. We decided to build one house on what
21 you see now is parcel B.

22 Q. Okay. And you eventually built a house on the other
23 parcel; is that right?

24 A. Yes, we did, years later.

25 Q. And what I'm trying to do is make sure we understand

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1 everything. So you have two parcels, two houses that
2 weren't there. You divided the lot and then you built the
3 house eventually; is that correct?

4 A. Yes, sir.

5 Q. And just so we get an idea of what we're talking
6 about, you got parcel A and parcel B. Now, what address
7 is parcel A currently?

8 A. 544.

9 Q. And what is parcel B?

10 A. 540.

11 Q. And what property do you currently live in?

12 A. 540. The one on parcel B.

13 Q. Can you describe the two houses for me in general
14 terms in terms of square footage, how big they are, that
15 type of thing?

16 A. The parcel B house that we live is about 5,000, 5,400
17 square feet. And I think parcel A was about 6,000 square
18 feet when we finished it for the homeowner that bought it
19 in 2011.

20 Q. Now, according to Exhibit A, you see the dividing
21 line; is that right?

22 A. Yes, sir.

23 Q. Okay. And you have a house there. Is that the
24 location of the current house that's on 544?

25 A. The bottom corner -- see the bottom corner of the

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1 house that's on there? That's where the corner of the
2 house is currently that's on there. It's a lot bigger
3 than that.

4 Q. Though this isn't a representation of the current
5 house in terms of location -- in terms of location of the
6 proximity to the house to the line, subdivided property,
7 it's pretty accurate?

8 A. It's close to that.

9 Q. Now, at one point just so we're clear, you owned both
10 houses yourself?

11 A. Yes, I did.

12 Q. And you took out a mortgage -- you had two mortgages,
13 one on each house with BB&T; is that right?

14 A. A construction loan and I had a regular mortgage with
15 BB&T, perm loan they call it.

16 Q. Show you a few more exhibits, and if you can't see an
17 exhibit, please let me know. Going to show you what's
18 been marked Plaintiff's Exhibit 2. I can show you what's
19 been marked Plaintiff Exhibit 2. Does this appear to
20 be -- it has more than one page, but does it appear to be
21 your note that you signed?

22 A. Yes, sir, it does.

23 Q. And it's dated March 28th, 2005, correct?

24 A. Yes, sir.

25 Q. And covers your property, 540 Windward Point Court,

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1 right?

2 A. Yes, sir.

3 Q. Principal value according to section 1 is \$721,000.

4 A. The loan amount, correct.

5 Q. And I'll show you what's been marked Plaintiff's

6 Exhibit 3. Is this the mortgage for your property --

7 appear to be the mortgage for your property?

8 A. Yes, sir, it does.

9 Q. Dated March 28th, 2005?

10 A. Yes, sir.

11 Q. So the total amount you borrowed was \$721,000; is
12 that right?

13 A. That's correct.

14 Q. Now, do you understand how a mortgage and a note
15 work?

16 A. Yes, I do.

17 Q. Because you've built several houses, haven't you, in
18 your career, correct?

19 A. A few, yes.

20 Q. So you know if you don't pay back the money per the
21 terms of the note, the lender can enforce the
22 foreclosure -- enforce mortgage and foreclose on your
23 property. Do you understand that?

24 A. Yes, sir, I do.

25 Q. And the purpose of foreclosing is to sell the

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1 property in order to -- at a foreclosure sale in order to
2 receive funds to pay off the note; is that correct?

3 A. Yes.

4 Q. Now, in 2009, isn't it true that you -- both of your
5 houses and both of your loans were foreclosed on; is that
6 correct?

7 A. They were foreclosed on?

8 Q. The -- two foreclosure actions were filed against you
9 for your two loans; is that correct?

10 A. They were filed, but not foreclosed.

11 Q. Let's look at Exhibits 4 and 5 that are already in
12 evidence. This is Plaintiff's Exhibit 4. And this is a
13 foreclosure action filed in Lexington County in 2009; is
14 that correct?

15 A. It appears to be, yes.

16 Q. And the property address according to the page is
17 540. It's a little difficult to read. Does that say 540?

18 A. Yes, it does.

19 Q. And Plaintiff's Exhibit 5, is this a foreclosure
20 action filed in 2009?

21 A. It is.

22 Q. Correct?

23 A. It is.

24 Q. And the property address on the second page is 544;
25 is that right?

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1 A. Yes, it is.

2 Q. And you're named as a defendant in both of these
3 actions; is that correct?

4 A. I am.

5 Q. The property address of 544 went through the
6 foreclosure process, meaning there was a judgment and
7 master issued a deed to sell the property -- sold the
8 property and issued what's known as a master deed; is that
9 correct?

10 A. Yes, it did.

11 Q. I'm just going to show you what's been marked as
12 Plaintiff's Exhibit 6. Is this a copy of the foreclosure
13 master-in-equity deed for 544?

14 A. Yes, it -- I never have ever seen it up, you know, up
15 until just recent. But yes, it appears to be.

16 Q. So when this deed was issued by the master, it's
17 recorded May 13th, 2011. You had no interest in 544,
18 right?

19 A. None at all at this point.

20 Q. No legal interest, no ownership interest at all?

21 A. That's correct.

22 Q. Now, the foreclosure action on 540 we're talking
23 about, did that go all the way to a judgment?

24 A. I'm not familiar with the exactly the lease. I'm not
25 trying to be difficult. I just don't know what you're

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1 asking of me.

2 Q. Okay. Let's look at Plaintiff's Exhibit 7 that's
3 already in evidence. This document is entitled judgment
4 of foreclosure and sale?

5 A. Okay.

6 Q. And you can look at the document yourself, of course,
7 I'll represent to you it's for 544?

8 A. Okay. I agree.

9 Q. And it's has the same civil action number.

10 A. Okay.

11 Q. And it says judgment, foreclosure, and sale, and
12 according to paragraph 4, it says you were in default for
13 failing to answer. Do you agree with that?

14 A. For failing to answer?

15 Q. Failing to answer the complaint of the case.

16 A. I think I did answer the original complaint and even
17 showed up at couple of hearings. But at this particular
18 point in the process, yes, I didn't show up on the court
19 on that day. That's correct.

20 Q. Okay. Let's just make sure it's signed by Judge
21 Spence, the master-in-equity. Do you see that?

22 A. Correct.

23 Q. The date of the judgment -- it's got a stamp on it --
24 says May 26th, 2010. Do you see that?

25 A. I do.

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1 Q. It's a little hard to read. Now, eventually was this
2 judgment vacated, meaning it was dismissed or released?

3 A. From what my attorney showed me, yes, it was.

4 Q. And I believe your attorney has shown you the
5 document, so I'll just grab it.

6 A. You might have marked Exhibit 10. I think it says
7 Exhibit 10.

8 Q. I can take those for you so we keep them all
9 together. Sorry about that. Defendant's Exhibit 10, that
10 was already shown to you. This is a consent order
11 releasing the foreclosure portion of the judgment we just
12 looked at. Do you agree with that?

13 A. I do.

14 Q. I'll just represent to you it has the same civil
15 action number.

16 A. I agree.

17 Q. And this was filed November 16th, 2011. Do you agree
18 with that?

19 A. I do.

20 Q. Now, the action we're here about today is a
21 foreclosure action on 540?

22 A. That is correct.

23 Q. Okay. Do you know when the foreclosure action was
24 filed in the case?

25 A. Are we on a foreclosure action or our breach of

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1 contract action? I'm just asking. Are we talking about
2 the foreclosure today?

3 Q. Sir, this case is a foreclosure action dealing with
4 your counterclaims.

5 A. Okay.

6 Q. So are you aware that a foreclosure action was filed
7 in July of 2012 on your property, 540?

8 A. Yes, I am.

9 Q. Now, your attorney had you look at some parts of this
10 order. Are you a lawyer?

11 A. No, I'm not.

12 Q. Are you qualified to interpret certain legal terms or
13 anything like that?

14 A. No, I'm not.

15 Q. This judgment -- this order vacating the sale of
16 your -- the judgment, I'm sorry. The judgment

17 foreclosure, judgment against your property is dated

18 November 16th, 2011. Isn't it correct, sir, that

19 November 2011 is right in the middle of the window that

20 the Saxon granted you to try to sell your property? Is
21 that correct?

22 A. What is that? November of 2011? Yes, it is.

23 Q. Okay. Mr. Dolan, wouldn't it have been hard to sell
24 your property if there was a foreclosure judgment on
25 there?

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1 A. If there had been a foreclosure judgment on it, yes,
2 it would have.

3 Q. So isn't it logical to assume that Saxon was trying
4 to assist you in selling your property by dismissing the
5 foreclosure action?

6 A. That wouldn't be the logical assumption to me, no,
7 because I started working with Saxon at their request with
8 Alicia Carter four or five months earlier. So why
9 wouldn't -- if that was the case, why wouldn't they have
10 simply released the foreclosure action then?

11 Q. Isn't this simply Saxon trying to help you out by
12 dismissing the foreclosure so they can complete the part
13 of the contract that allows you to try to sell your
14 property from October, November, and December of 2011?

15 A. No, I disagree with that logic.

16 Q. In September 2011, your attorney has already talked
17 to you about this agreement that was entered into and
18 shown you a copy of it. The agreement has been marked
19 Defendant's Exhibit 4. Do you remember seeing this
20 document?

21 A. Uh-huh.

22 Q. Just for the record, you acknowledge this is your
23 signature on the second page?

24 A. I do agree with that.

25 Q. Does that appear to be your wife's signature on the

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1 second page?

2 A. It does.

3 Q. Would you agree with me that this two-page agreement
4 from September, it essentially deals with 544 and 540 in
5 some way; is that correct?

6 A. Yes, it does.

7 Q. And isn't it true you contacted Saxon to initiate the
8 agreement that eventually resulted in this signed
9 agreement in September; is that right?

10 A. My initial contact, yes, it was.

11 Q. And I'm trying to understand make sure I understand
12 what you're saying. The house that was at 544 was lost in
13 a foreclosure case. We already talked about that. It was
14 sold to BB&T at the foreclosure sale. And BB&T was trying
15 to sell it to some buyers; is that correct?

16 A. Correct.

17 Q. Now, part of this agreement deals with releasing a
18 portion of your parcel, parcel B, in order to assist in
19 the sale of 544; is that correct?

20 A. No. It helped 544 sell, but it was done to get
21 caught up and current. Without doing that, we don't have
22 the \$65,250 to bring the loan current, which is what Kevin
23 Flannigan wanted. That's why we did it.

24 Q. Sir, my question to you was: The purpose of
25 releasing the portion of your land, the 1043 square feet,

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1 was so that BB&T could close the loan -- sale of the house
2 on 544; is that correct?

3 A. That -- that would be a correct statement.

4 Q. Going to show you what's been marked Plaintiff's
5 Exhibit 8. Sorry. Rotated too far. This is Plaintiff's
6 Exhibit 8. Can you describe what we're looking at here?

7 A. I think we're looking at the final revised plat. See
8 where it says 1,043 square feet. You kind of see a dotted
9 line and then the hard line. That triangular kind of
10 piece of property is what we ended up giving the people --
11 not giving. We ended up selling the people at 544 that
12 eventually bought the house.

13 Q. I'm tall, but I'm not that tall. Appear to be that
14 wedge shaped piece up there?

15 A. It does.

16 Q. So you see the house there; is that right? You see
17 that house?

18 A. Yes, I do.

19 Q. That is parcel B. Says parcel B1, but that's the
20 parcel B that you lived at?

21 A. It is. That's the house that my wife and I live in.

22 Q. Okay. That's 540. And although it's not depicted
23 here, you can kind of see at the top of the page the
24 parcel A, which is was 544 being sold?

25 A. Right. I agree.

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1 Q. And can you explain again what the reasoning is to
2 sell that 1,043 square feet of land?

3 A. Well, there's -- again there was two reasons. One,
4 if we didn't, they were getting ready to fire sale that
5 property for somewhere in the neighborhood of 570 or
6 \$600,000, which obviously would have devalued my wife's
7 and my home because we didn't want that. But it also
8 allowed the opportunity to bring the mortgage current that
9 we're in so that everybody was happy and we could continue
10 to move on forward. Because by selling that property, it
11 helped generate the revenue to pay the \$65,250.

12 Q. Okay. So one reason is increase your property value;
13 is that correct?

14 A. Keep it from going down. Yes.

15 Q. Yes. That's certainly a legitimate reason. There's
16 another issue, the fact that 544 basically had no front
17 yard?

18 A. Yeah, if you look -- if you looked at it, it had a
19 front yard. But when you got down to it, that line really
20 cut across their front yard.

21 Q. Their corner is almost on your property?

22 A. True, very much. I agree with that.

23 Q. Isn't another reason there was an access issue?

24 A. There was.

25 Q. Can you describe that access issue?

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1 A. Yes. Could you put back the other exhibit up? I
2 think that might help the jury. Kevin Flannigan hadn't
3 been aware yet when we first spoke that if you look at the
4 upper left-hand corner -- again, you can only see parcel
5 where it says B1, but A goes over there as well. So when
6 you pull across where it says Windward Point Court, you're
7 driving down the road, you're literally having to cross
8 that property to get into our property. In other words,
9 technically there's no easement, driveway easement to get
10 into our property anymore. And that was another reason
11 why Kevin really wanted to see that happen because he
12 wanted that solved so he didn't have to worry about any
13 encumbrances on a property he had a mortgage on.

14 Q. Okay. But in general terms, it was hard to get
15 trucks or anything else behind the property, 544, correct?

16 A. And it still is unless you get on my property. That
17 didn't do anything to solve that.

18 Q. Okay. So wasn't part of the agreement that's before
19 you would grant an easement, meaning you would grant --

20 A. It wasn't.

21 Q. -- access; is that correct?

22 A. It was BB&T and the buyers of the new property.
23 They're the ones who gave the easement, not me.

24 Q. Well, you agree with me the way the property is
25 subdivided, it created an access issue. You agree on

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1 that?

2 A. I agree on that.

3 Q. Okay. Good.

4 A. Not a real access, just an imaginary access issue.
5 From a legal standpoint, it would have created an issue.

6 Q. Okay. Now, isn't it also true that you contracted
7 with the buyers of 544 to do some construction work at
8 their house. Isn't that correct?

9 A. That is correct.

10 Q. So the sale of 544 helps you out in that way too. It
11 allowed you to get some work?

12 A. No, I didn't necessarily quote, unquote need the
13 work. I was working. What it allowed me to do was get
14 the current mortgage caught up with Kevin Flannigan so we
15 all are back on regular basis again. That -- between the
16 sale of the parcel, between the money that was advanced at
17 the time of closing to do the construction and my own wife
18 and I bringing another \$10,000 to closing, that brought up
19 the 62 -- \$65,250 that Kevin Flannigan wanted to bring the
20 loan current.

21 Q. Okay, but my question to you was: You were
22 contracted to do some services there, correct?

23 A. Yes.

24 Q. All right. Now, just so we're all clear on this, you
25 couldn't just sell that 1043 square feet yourself?

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1 A. I didn't never want to. That's correct.

2 Q. My question to you was: You couldn't, on your own,
3 sell that piece of land, right?

4 A. I could not.

5 Q. And the reason is there was a mortgage on your
6 property, correct?

7 A. Correct.

8 Q. And if you sold a part of your land, that would
9 decrease the collateral or the property that secures the
10 mortgage; is that correct?

11 A. That is correct.

12 Q. Now -- so in this case, Saxon, acting for the
13 plaintiff, had to agree to it; is that right?

14 A. Yes, that is correct.

15 Q. And just so we're clear on this too, when the closing
16 occurred at 544, the funds the 65,250 would go directly
17 from the closing to Saxon, right?

18 A. That's correct.

19 Q. It didn't go through you; is that right? You didn't
20 get a check and then write a check to Saxon?

21 A. We made it happen that way because that's the way
22 Kevin Flannigan wanted. It could have happened that, but
23 yes, it's a matter of the way the transaction was done.

24 Q. You didn't send any money to Saxon for the \$65,000?

25 A. I brought personally \$10,000 to closing, me and my

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1 wife, so that they could apply that to send to Saxon.

2 Q. So let's just recap a little bit. You purchase a
3 lot. You subdivide the lot. You built two houses on the
4 lot, but because of the way you subdivided the lot, it
5 created an issue; is that right? It created an access
6 issue, it created a front yard issue which decreased the
7 value of the property; is that correct?

8 A. Based on your statement as it sits right now, that's
9 correct.

10 Q. All right. I want to look at the agreement a little
11 closer with you, if that's all right. This is Defendant's
12 Exhibit 4. Mr. Dolan, would you agree with me that the
13 note and the mortgage we've already looked at and this
14 agreement is the only agreement you have -- written
15 agreement you have with Saxon or any lender regarding your
16 mortgage?

17 A. Yes. Written agreement?

18 Q. Yes.

19 A. Yes, I would agree to that.

20 Q. If it's okay, I want to read through it. It's not a
21 very long agreement. I just want to be sure we're all
22 clear on what the document says. It's dated
23 September 22th, 2011; is that right?

24 A. Yes, sir.

25 Q. And on the top right has an address. Do you see the