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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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SC Court of Appeals
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APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

J. Martin Harvey, Special Referee

Case No. 2015-CP-06-00070
Appellate Case No. 2016-001214

Quicken Loans, Inc., ... Appellant,

v.

Wayne D. Wilson; Calvin O. Wilson, III; Any other Heirs-at-law or Devisees of Ezekiel (Ellen) T. Wilson, Deceased, their heirs, Personal Representatives, Administrators, Successors and Assigns, and all other persons entitled to claim through them; all unknown persons with any right, title or interests in the real estate described herein; also any persons who may be in the military service of the United States of America, being a class designated as John Doe; and any unknown minors or persons under a disability being a class designated as Richard Roe; Park Sterling Bank, ... Respondents.

RETURN IN OPPOSITION TO MOTION TO CERTIFY AND TRANSFER APPEAL FROM THE COURT OF APPEALS PURSUANT TO RULE 204(b)

Appellant Quicken Loans Inc. ("Quicken Loans") opposes the motion to certify and transfer this appeal from the Court of Appeals pursuant to Rule 204(b), SCACR (the "Motion") filed by Respondent Wayne D. Wilson, the Personal Representative of the Estate of Ezekiel T. (Ellen) Wilson ("Respondent").

Introduction

To ensure this Court does not become the de facto appellate court of first resort, certification of appeals directly to the Supreme Court is reserved for cases of special

significance. Respondent's motion should be denied because this appeal fails to meet the standard for certification under Rule 204(b), SCACR, as this case does not involve: 1) an issue of significant public interest or 2) a legal principle of major importance. To the contrary, this appeal stems from a special referee entering summary judgment on an "attorney preference" claim raised in opposition to a foreclosure[1] prior to the start of discovery. As such, this appeal addresses straightforward questions of statutory interpretation and whether discovery should have been allowed. No issues exist which warrant this Court's current involvement. Indeed, if this appeal were deemed suitable for transfer, then it is difficult to imagine any appeal that should not be transferred to the Supreme Court.

Moreover, Respondent's attempt to support this Motion by reference to: i) his separate action subsequently filed in the original jurisdiction of the Supreme Court; and ii) a currently pending unauthorized practice of law ("UPL") action now before the Court is unavailing. Respondent is proposing not merely to transfer this appeal to the Supreme Court, but also to prosecute a separate purported declaratory judgment action involving UPL allegations (the "*Wilson UPL*" action)—**and** to have this Court somehow combine his own two separate actions together **and** to associate his combined actions in some way with an action captioned as *Boone, et. al. v. Quicken Loans and Title Source* ("*Boone*"), which is currently pending in the Court's original jurisdiction and wherein Boone, et. al. seek to have this Court certify a UPL class action.

[1] Appellant commenced a foreclosure action after Respondent defaulted on a note secured by a mortgage on real property. In response to the foreclosure action, Respondent filed a counterclaim alleging Appellant violated S.C. Code Ann. § 37-10-102 (commonly referred to as the "attorney preference statute").

Argument

This appeal concerns an ordinary, individual attorney preference claim asserted as a defense and counterclaim in a foreclosure action. It does not implicate an issue of significant public interest or a legal principle of major importance. The appeal is properly before the Court of Appeals, and the Court of Appeals is competent to address the appeal.

I. This Court certifies appeals pursuant to Rule 204(b) only in cases of utmost importance.

Certification of an appeal from the Court of Appeals is a power that is utilized only when this Court must consider significant or important issues prior to a decision by the Court of Appeals. This power, in recent times, is rarely exercised. The nature of the recent cases certified pursuant to Rule 204(b) presents a stark contrast to the appeal Respondent now asks the Court to consider.

The Court's 2016 online Roster of Cases reveals only two cases certified for review by this Court in the present term. Both involve novel issues in criminal matters raising significant constitutional issues. *See State v. Ricky Dale Pace*, Appellate Case No. 2014-001106, heard March 23, 2016 (involving the issue of whether the use of a child victim's recorded forensic interview statement at trial violates the Confrontation Clause); *State v. Stephanie Irene Greene*, Appellate Case No. 2014-000764, heard June 14, 2016 (involving the issue of the alleged failure to instruct a jury that multiple convictions in the case would implicate Double Jeopardy).

Beyond the current term, the Court has recently certified only a select few cases which also involved important legal issues. In those few cases, the issues presented stand in definite contrast to the run-of-the-mill attorney preference claims presented by this appeal. *See Maybank v. BB&T Corp.*, Op. No. 27640 (S.C. Sup. Ct. filed June 3, 2016) (Shearouse Adv. Sh. No. 23 at 14) (involving alleged unfair trade practices directed at an elderly person and trial

judgment including treble and punitive damages) (rehearing petition pending); *Freeman v. J.L.H. Invs., LP*, 414 S.C. 362, 778 S.E.2d 902 (2015) (transferring a class action involving over 5,000 citizens where there were related actions and questions concerning Rule 23 and its interplay with a statutory scheme allowing a representative action); *Deerfield Plantation Phase II B Prop. Owners Ass'n v. S.C. Dep't of Health & Envtl. Control*, 414 S.C. 170, 777 S.E.2d 817 (2015) (accepting a natural resources and water management case with significant federal law implications); *State v. Brewer*, 411 S.C. 401, 768 S.E.2d 656 (2015) (addressing a grave constitutional error wherein law enforcement would have the accused prove his innocence because of the admission of damning out-of-court statements not subject to cross-examination).

This year and last year, this Court has certified no case of the nature of the matter the Respondent now moves to transfer to this Court. The case and the issues presented in this appeal do not rise to a level that would warrant this Court taking the case from the Court of Appeals. Indeed, if this case were transferred, then any appeal, regardless of its limited significance to the parties to the appeal, is subject to certification and transfer from the Court of Appeals; granting Respondent's motion will serve only to encourage such motions and practice in the future.

II. This attorney preference appeal does not present any issues of public interest or major importance, and the Court of Appeals can address the issues on appeal concerning the attorney preference statute.

A. Respondent's motion fails to assert any grounds warranting certification under Rule 204(b).

Respondent does not assert any grounds justifying transfer of this appeal. No mention of public importance or significant legal issues is made in the motion. Instead, Respondent attempts to associate this matter by reference to the *Boone* matter now before the Court, raising the UPL action as a means to create importance. Conflating the alleged attorney preference claim with the *Boone* action does not change the straightforward nature of the issues presented

by this appeal. Rather, the attempted stitching together of the issues reflects Respondent's hopes that the separate issues can be intertwined in a "single case" to engineer a private right of action for UPL where none exists under law and to surmount the legislative ban on class actions in attorney preference cases.

B. The Court of Appeals routinely addresses attorney preference issues.

The majority of the appellate decisions from South Carolina addressing attorney preference claims have been issued by the Court of Appeals in unpublished decisions. *See Palmer v. Hatcham Grove, Inc.*, Up. Op. No. 2016-UP-169 (S.C. Ct. App. filed April 16, 2016) (affirming the trial court's grant of summary judgment in favor of the lender on an attorney preference claim); *Branch Banking & Trust Co. v. Gray*, Up. Op. No. 2015-UP-349 (S.C. Ct. App. filed Aug. 26, 2015) (affirming the trial court's order granting summary judgment in favor of the lender on an attorney preference claim based on statute of limitations grounds); *Deutsche Bank Nat'l Trust Co. v. Brooms*, Up. Op. No. 2015-UP-097 (S.C. Ct. App. filed Feb. 25, 2015) (affirming the lower court's determination that the maximum recovery for a violation of an attorney preference statute is $7,500).

Thus, no good grounds exist for this Court to remove this appeal from the Court of Appeals. Such routine issues are addressed often and in the normal course by the Court of Appeals.

III. Respondent's motion does not serve judicial economy.

Respondent invites this Court to transfer this appeal under the contention that it will promote judicial economy. (*See* Mot. at 4-5.) Respondent seemingly desires to make the three above-referenced actions a "single case," creating a Frankenstein's monster by stitching together something from this Court's original jurisdiction with something from its appellate jurisdiction;

something from a UPL matter, in which there is no private right of action, with something from a foreclosure action in which individual, statutory rights are asserted as a defense; and something from a putative UPL class action with something from an "attorney preference" action in which no class actions are allowed. Respondent is not secretive about his plan:

> The two concurrent requests to this Court – the Petition for Original Jurisdiction and this Motion to Certify and Transfer – are intended to bring a single case before this Court so that all issues may be addressed at the same time.

(Mot. to Certify & Transfer Case at 2.)

No such "single case" has ever existed before and should not be allowed now. Respondent's attempted manipulation of this Court's jurisdiction is improper procedurally, substantively, and prudentially. It is contrary to Rule 204(b) and unsupported by any precedent—an aberration that would thwart judicial efficiency by entangling separate actions that were initiated at different times and involve wholly separate issues arising in distinct jurisdictional spheres. Moreover, the attempt to link Respondent's "attorney preference" claim with the *Boone* case defies the will of the General Assembly, which banned class actions for attorney preference violations when it amended S.C. Code Ann. § 37-10-105 in 1997 ("[i]f a creditor violates a provision of this chapter, the debtor has a cause of action, other than in a class action, to recover actual damages and also a right in an action, other than in a class action, to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars."). This Court should not permit Respondent to manufacture an action that the General Assembly banned. Nor should Respondent or others be allowed to do anything that would delay the *Boone* original jurisdiction matter that has been pending before this Court for nearly three years and is approaching adjudication this fall, with briefing closing very soon, on July 28, 2016.

The motion to certify and transfer should be summarily denied, and this appeal should remain with the Court of Appeals.

The creation of the proposed "single case," however, would halt the progress of the *Boone* matter now pending in the original jurisdiction and set this appeal and proposed new *Wilson UPL* original jurisdiction action on courses that deviate from the rules and procedure and would result in the violation of Quicken Loans' and Title Source's due process rights.

A. Respondent admittedly seeks to present this Court with issues that are not preserved for review by this Court and desires to manufacture a way to have those issues interjected before this Court in contravention to the Appellate Court Rules and longstanding issue preservation jurisprudence.

Respondent's proposal to this Court is a blatant attempt to craft a means for private relief based on the unauthorized practice of law and seek to have a class certified as well. The issues Respondent seeks to join, however, cannot be joined in one action. For example, Respondent's motion to certify and transfer states the following in regard to this appeal:

> In the proceedings before the Special Referee certain matters were raised and addressed. . . . Other matters were raised below but not addressed by the Special Referee . . . .

(Mot. at 2.) An issue raised to the lower court but not ruled upon is not preserved for appellate review. *Town of Hollywood v. Floyd*, 403 S.C. 466, 479, 744 S.E.2d 161, 167 (2013) (an issue not ruled upon by the trial court is not preserved for appellate review). This Court has adhered to this judicial philosophy for over 50 years. Further, the Appellate Court Rules provide that the appellate courts will consider only the issues presented for review. *See, e.g.*, Rule 208(b), SCACR. Respondents now wish to cast appellate procedure aside in order to present issues to the Court that cannot ordinarily be determined.

B. This appeal and the newly filed petition for original jurisdiction should not be combined into a "single case."

Insofar as Respondent attempts to link this appeal to his newly filed *Wilson UPL* matter, Quicken Loans will timely file its opposition to that petition by July 19, 2016, to which this Court is respectfully referred. Quicken Loans will show this Court that the newly filed *Wilson UPL* petition alleging Quicken Loans engaged in UPL is unnecessary and contradicts judicial efficiency because, among other reasons, no private right of action exists for UPL and any new UPL suit by Respondent will create useless duplication and will waste judicial and other resources.[2]

Apart from the reasons for denying the petition, the existence of a petition for original jurisdiction does not support Respondent's motion, as there is no precedent for commingling matters committed exclusively to the Court's original jurisdiction with matters that are appropriately decided in the lower courts. To the contrary, consistent with constitutional constraints, this Court holds that matters properly decided by lower courts must be decided there and not in the original jurisdiction of the Supreme Court. In short, the transfer of this run-of-the-mill attorney preference case arising in a foreclosure is not justified.

[2] Contrary to Mr. Wilson's contention in his petition for original jurisdiction, the acceptance of the newly filed *Wilson UPL* action in the original jurisdiction would necessitate fact finding and discovery. One of the errors necessitating reversal of the order now on appeal pending before the Court of Appeals is the trial court's failure to allow discovery on contested issues of fact prior to the entry of summary judgment. Respondent does not like facts. He wishes the courts to be ignorant of facts because the facts will reveal that the Wilsons had an opportunity to express a preference for an attorney and did not have a preference. The facts also will show that the attorney who closed the residential real estate refinance loan complied with South Carolina law and undertook dual representation of the Wilsons with express permission. Quicken Loans looks forward to the chance to discover those facts and provide them to the courts once the subject appeal is reversed. Quicken Loans and Title Source have not engaged in the unauthorized practice of law.

In addition, this Court cannot combine this appeal with Mr. Wilson's UPL petition because Title Source is not a party to the present appeal. This Court cannot adjudicate the rights of Title Source through a single combined case when it is not a party to the attorney preference appeal. Respondent's request defies due process and thus would not promote judicial efficiency and economy.

Further, no facts have been discovered as to Respondent's claims in either this action or the newly proposed UPL action. Among the errors committed by the Special Referee in the instant appeal is that he did not permit discovery to go forward on the attorney preference claim. Instead, the Special Referee erroneously used materials, subject to a protective order, from the *Boone* UPL case now pending before this Court. *Boone* is not an attorney preference case. This appeal will require reversal and remand for discovery. Similarly, the newly filed *Wilson UPL* action will require fact-finding. Neither of these propositions promote association with the now-pending *Boone* matter as it is close to finality.

Accepting Respondent's present invitation will serve only to delay the separate matters that currently are pending in separate courts. Discovery is necessary, and necessary parties are absent. This Court is postured to adjudicate the pending *Boone* matter before the close of the year on the present briefing schedule. Similarly, the Court of Appeals is well-suited to consider the issues in this appeal in the first instance on an expedited basis.

Should some matter of emergency exist warranting an expedited consideration of this case before the Court of Appeals, undersigned will consent to the appeal being heard on an expedited basis, agree to seek no further extensions, and will file the initial appellant's brief with the Court of Appeals prior to the current deadline. Given Respondent's hope for shortened time,

no extension should be needed for Respondent's filings in the Court of Appeals or for the response brief due in the *Boone* matter—on July 18, 2016.

Hence, the stated contention that judicial economy will be best served is not accurate. Instead, granting the transfer and accepting a second UPL action by Respondent Wayne Wilson will lengthen the consideration process for this Court in the *Boone v. Quicken Loans and Title Source* matter.

Conclusion

This Court should deny the motion to certify and transfer. The issues in this single case do not justify the Court taking the case in the first instance. Further, no good grounds exist for this Court to take the extraordinary measure of taking this appeal while simultaneously combining the case with an original jurisdiction action—an unprecedented measure.

Respectfully submitted,

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Columbia, South Carolina
July 11, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BARNWELL COUNTY
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J. Martin Harvey, Special Referee

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Quicken Loans Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Appellant's Return in Opposition to Motion to Certify and Transfer Appeal from the Court of Appeals Pursuant to Rule 204(b)

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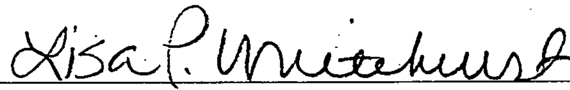

Lisa Whitehurst
Administrative Assistant

July 11, 2016

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July 11, 2016

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SC Court of Appeals

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
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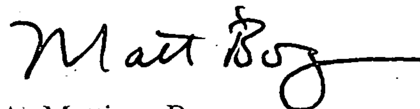
RE: Quicken Loans, Inc. v. Wayne D. Wilson, et al.
Civil Action No. 2015-CP-06-00070
Appellate Case No. 2016-001214
Our File No. 42677/01510

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of Appellant's Return in Opposition to Motion to Certify and Transfer Appeal From the Court of Appeals Pursuant to Rule 204(b) in regard to the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier.

By copy of this letter to counsel of record, we are serving them with a copy of this Return.

Very truly yours,



A. Mattison Bogan

AMB:lpw
Enclosures
cc: The Honorable Jenny Abbott Kitchings, Clerk of Court, SC Court of Appeals
C. Bradley Hutto, Esquire
Steven W. Hamm, Esquire
Daniel W. Williams, Esquire
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