THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.

REPLY BRIEF OF APPELLANT

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Appellant Quicken Loans Inc. ("Quicken Loans") submits this Reply to the Brief of Respondent Wayne D. Wilson as Personal Representative of the Estate of Ezekiel T. (Ellen) Wilson (the "Estate").

INTRODUCTION

The 2011 refinance loan (the "Loan") at issue in this appeal is not unconscionable. The parties' bargained-for exchange complies in all respects with South Carolina law. The Estate does not dispute that the Loan substantially benefited Mrs. Wilson, and it does not contend that Mrs. Wilson was harmed by the Loan's terms or the origination process. As explained in Quicken Loans' initial brief, the Special Referee's March 18, 2016 order (the "Order") must be reversed.

Quicken Loans ascertained that the Wilsons had no preference for an attorney to close their residential real estate refinance transaction. Quicken Loans did so by asking the Wilsons if they had a preference during an initial telephonic application, by providing a written Attorney/Insurance Checklist ("AIP Checklist") - which the Wilsons signed and returned, and by confirming their lack of preference on the loan application itself. A South Carolina licensed attorney also explained their rights under the Attorney Preference Statute to the Wilsons before closing the refinance transaction. At each stage, the Wilsons indicated they did not have a preference for an attorney and wished to proceed.

The lower court's decision should be overturned because the Special Referee erred in holding the written form described in the Attorney Preference Statute is the exclusive means of compliance. The Estate does not refute Quicken Loans on this issue. Likewise, the Estate cannot refute there are issues of material fact as to whether Quicken Loans complied via lawful means other than the use of the written form described in the statute. The Estate also failed to refute that the sole testimony the Special Referee relied on in granting summary judgment was inadmissible

under Rule 404(b) of the South Carolina Rules of Evidence. Namely the Special Referee erred in using testimony from another case while ignoring the only testimony related to this case from the closing attorney. The Estate also did not address Quicken Loans' statute of limitations argument or argument on Quicken Loan's motion to amend the pleadings and demand for a jury trial. Moreover, the Estate does not offer any legal or evidentiary support for its request for the loan to be declared unconscionable. Instead, it offers a new theory for why the Loan should be invalidated with nothing more than its contention that the relief is justified.

The Estate's response brief does not substantively challenge any of Quicken Loan's issues on appeal or the detailed reasons it offered as to why the Special Referee's Order should be reversed. The Estate simply cites to the Order below as its main supporting authority as well as a single case involving the unenforceability of an arbitration provision. This case does not involve arbitration.

Rather than address the issues presented, the Estate continues to engage in slight-of-hand with its legal theories, hoping that this Court will adopt the novel approach accepted by the Special Referee without any further analysis. Support does not exist for the relief the Estate advances. Rather than apply the law, the Special Referee took great strides to craft an unprecedented outcome. This Court should not permit the Estate's continued avoidance of the arguments and the plain statutory language of the Consumer Protection Code. The Special Referee erred by granting summary judgment and should be reversed.

ARGUMENT

I. The Estate cannot refute the Special Referee erred in granting it summary judgment.

The Estate does not respond to Quicken Loans' arguments for the reversal of the Special Referee's Order. The Estate does not address those arguments because it cannot. The Order should

be reversed on the basis that the Estate did not challenge the issues raised. See Turner v. S.C. Dep't. of Health & Envtl. Control, 377 S.C. 540, 547, 661 S.E.2d 118, 121-22 (Ct. App. 2008) ("If [a] respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct.").

The failure to address the issues in a substantive fashion goes beyond any technical compliance with the appellate court rules, however. It represents a total lack of support for the Special Referee's decision, both as to the law and the facts.

The two central issues raised by Quicken Loans on appeal are:

- "Did the Special Referee err in holding that the exclusive method for complying with the Attorney Preference Statute is to follow its safe harbor provision"; and
- "Did the Special Referee err by not allowing the parties to complete discovery before granting summary judgment."

(Appellant's Br. p.1.)

A. The safe harbor form is not the sole means of compliance, and discovery, had it been permitted, would have provided additional facts on this issue.

In Parts I.B.1 and I.B.2 of its opening brief, Quicken Loans provided a detailed analysis of evidence showing that it complied with the Attorney Preference Statute by means additional to the AIP Checklist, including: i) the Wilsons' initial application call with Guy Brusca; ii) questions on the loan application; iii) and testimony from Carlton Robinson that the Wilsons agreed to his closing the loan after he explained the requirements of the Attorney Preference Statute to them. (Appellant's Br. pp. 12-17.) At a minimum, the evidence creates genuine issues of material fact that precludes summary judgment. (Id. at 19.) The Special Referee ignored the evidence and focused solely on whether the AIP Checklist satisfied either of the two optional methods for compliance provided in the Attorney Preference Statute's safe harbor provision. (Res. Br. pp. 1-6.)

Similarly, the Special Referee ignored the showing made by Quicken Loans, pursuant to Rule 56(f) of the South Carolina Rules of Civil Procedure, that discovery was likely to uncover additional relevant evidence, and the argument that summary judgment was therefore premature. (Appellant's Br. at 17-19).

The Estate does not address either of these points. It elected not to do so because its theory hinges on ignorance of the attorney preference statute and its dogmatic insistence that only one means of compliance exists.

B. Testimony from an unrelated case was impermissibly relied upon and undisputed testimony pertaining to the refinance transaction at issue in this case was ignored.

Quicken Loans argued that testimony from the Boone action, which did not involve an attorney preference claim but instead related to the alleged unauthorized practice of law, was not admissible under Rule 404(b) of the South Carolina Rules of Evidence. (Appellant's Br. pp. 1 & 36-37.)[1] Despite that, the Special Referee heavily relied on testimony from that action while ignoring the testimony of the closing attorney, Carlton Robinson, specifically pertaining to this case.

Under Rule 404(b), evidence of similar acts is not admissible unless the offering party establishes that "the other acts were substantially similar to the event in issue." Pope v. Heritage Communities, Inc., 395 S.C. 404, 426-27, 717 S.E.2d 765, 777 (Ct. App. 2011). The Boone action

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[1] Testimony from the Boone action is also inadmissible because it is subject to a Confidentiality Protective Order ("Confidentiality Order") entered by Judge Goodstein. (Appellant's Br. pp. 34-36.) The Estate argues the Confidentially Order ceased to apply once the testimony was read into the record during a hearing. This argument is incorrect. The Confidentiality Order states it ceases to apply to confidential information in only three specific situations—(1) the party claiming a document is confidential withdraws that designation in writing; (2) the party claiming a document is confidential failed to timely designate it as such; or (3) the Court rules that a document is no longer confidential. (Id. at pp. 35-36.) None of those events have occurred, and therefore, the Confidentially Order is still in effect.

was limited to allegations concerning the unauthorized practice of law, not the Attorney Preference Statute. The witnesses in the Boone action were not Rule 30(b)(6) designees, were not personally involved in the Wilsons' loan, and did not testify on issues concerning the Attorney Preference Statute. (Appellant's Br. pp. 34-35 & 37.) The Estate has never explained how the events at issue in the Boone action are "substantially similar" to the events at issue in this case and it cannot. The two cases involve entirely different claims divided by the clear demarcation of the application process as opposed to the loan closing process. Also, questions regarding the unauthorized practice of law in the Boone action are within the sole province of the South Carolina Supreme Court. See Hambrick v. GMAC Mortgage Corp., 370 S.C. 118, 124, 634 S.E.2d 5, 8 (Ct. App. 2006) (holding there is no private right of action for the unauthorized practice of law). The Boone action testimony, therefore, does not concern any matter that was before the Special Referee and did not concern events substantially similar to the Estate's attorney preference case. The Special Referee erred in relying upon this testimony and should be reversed.

The Court ignored the only testimony related to the events prior to the closing in this case; the testimony of Carlton Robinson. (Robinson Aff.; R. __). It is the duty of the trial court to address the testimony before it. See Higgins v. MUSC, 326 S.C. 592, 599, 486 S.E.2d 269, 272 (Ct. App. 1997) ("When ruling on a motion for summary judgment, the trial judge must consider *all* of the documents and evidence *within the record*, including the pleadings, depositions, answers to interrogatories, admissions of file, and affidavits." (emphasis in original)). Here, the Special Referee failed in his obligations by not addressing the testimony but choosing to ignore it. Moreover, Attorney Carlton Robinson's testimony was unchallenged by other testimony. On this basis too, the Special Referee erred in ignoring the testimony. See South Carolina Prop. & Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001) (holding that at

the summary judgment stage, a trial court cannot make credibility determinations, but must view all evidence and inferences in the light most favorable to the non-moving party); see also BPS, Inc. v. Worthy, 362 S.C. 319, 329, 608 S.E.2d 155, 161 (Ct. App. 2005) (holding trial court erred by granting summary judgment without considering all evidence before it).

This Court, therefore, should hold that testimony from the Boone action was inadmissible and that Attorney Carlton Robinson's testimony was unchallenged and the sole testimony pertinent to the claims at bar.

C. The Estate did not comprehensively address other issues properly raised to this Court.

Finally, the Estate's only response to the Quicken Loans statute of limitations argument, its motion to amend the pleadings, and its demand for a jury trial was to, in bullet point fashion, cite the Special Referee's Order. (Resp't Br. p. 12.) The Estate does not address Quicken Loans' arguments as to why the Special Referee erred on those issues. (See Appellants Br. pp. 31-34.) Because the Estate cannot respond to those arguments, the Order should be reversed. See Turner, 377 S.C. at 547, 661 S.E.2d at121-22 (a party's failure to respond may be deemed a confession on the issue).

II. The Special Referee awarded remedies not available for an attorney preference violation, and the Estate's reliance on the Simpson case is misplaced.

The remedies contained in S.C. Code Ann. section 37-10-105(C), which allows a court to "refuse to enforce the agreement," are not applicable to violations of the Attorney Preference Statute. (Appellant's Br. at pp. 21-24.) The relief awarded, purportedly under section 37-10-105(C), is unprecedented and not supported by the language of the Code. (Id.) Moreover, no case from this Court or the Supreme Court supports the reasoning offered by the Special Referee. (Id.) The Simpson case relied upon by the Estate does not alter this conclusion.

In Simpson, the Court held that an arbitration clause contained within a car sales agreement was substantively and procedurally unconscionable. 373 S.C. at 35, 644 S.E.2d at 674. Because the arbitration clause was unconscionable, the Court affirmed the trial court's denial of a motion to compel arbitration. Id. Contrary to the position advanced by the Estate, the Simpson court, ***did not*** hold that the entire sales contract was unenforceable. See id. Thus, Simpson does not support the Special Referee's conclusion that the Estate's can be relieved from its payment obligations under the Loan. The Estate's misplaced reliance on Simpson does not stop there. The Special Referee went far beyond anything contemplated in Simpson's limited holding. Indeed, the Simpson court addressed a material term of the parties' final sales agreement. In contrast, the AIP Checklist was a form used during the Loan's application process. It was not incorporated into the note and mortgage, and it did not impact any of the Loan's terms. Nothing in Simpson, or South Carolina jurisprudence, supports the Special Referee's conclusion that the AIP Checklist could somehow render the Loan unconscionable in its entirety. The Special Referee should be reversed.

III. The Estate has not shown that the Loan was unconscionable or unconscionably induced.

Even if -105(C) remedies were available for attorney preference claims, the Estate has not shown that it is entitled to them here. The Estate agrees that to obtain relief under Section 37-10-105(C), it must establish the Loan (*i.e.*, the transaction) was unconscionable or unconscionably induced. (Id. at 6-10.) The Estate also agrees that it has the burden of showing both procedural **and** substantive unconscionability. (Id. at p. 6 ("The courts have held that '[u]unconscionability is defined as the absence of meaningful choice on the party of one party due to one-sided contact provisions, *together with terms* that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." (citing Simpson, 373 S.C. at 24-24, 644 S.E.2d at 668) (emphasis added)). The Estate has not met its burden.

A. The Loan is not procedurally unconscionable.

The Estate's only basis for procedural unconscionability is the fact that Quicken Loans is a national lender while the Wilsons were in their eighties when they applied for the Loan. (Resp't Br. pp. 7-8.) The Estate does not contend the Wilsons' age prevented them from negotiating or understanding the terms of the Loan. It does not contend that Quicken Loans took advantage of the Wilsons' age. See S.C. Code Ann. § 37-5-108 (stating that evidence of a debtor's "physical or mental infirmities" is only evidence of unconscionability if the "lender knowingly has taken advantage" of it). The Estate also does not explain how the parties' bargaining positions, which the Estate speculates were unequal, prevented the Wilsons from having a meaningful choice or otherwise made the loan procedurally unconscionable. The Estate presented ***no*** evidence or testimony on this alleged uneven bargaining position. None.

The final and fatal flaw in the Estate's procedural unconscionability argument is that the Estate cannot say the Wilsons lacked meaningful choice "*due to one-sided contract* provisions." York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 85, 749 S.E.2d 139, 148 (Ct. App. 2013) (emphasis added). Indeed, the Estate has not identified a single one-sided *contract provision*, and the Order focused improperly on the purportedly one-sided attorney preference form. (See Order p.17.) The inquiry in any unconscionability claim is as to the transaction. The Estate ignores this point and tries to conflate the application process and the attorney preference statute into a larger attack on the transaction without any evidentiary support for such a broad attack on the transaction as a whole.

These facts do not establish procedural unconscionability under Simpson as the Estate contends. The Simpson court did not find the arbitration provision procedural unconscionable simply because the plaintiff was an individual consumer while the defendant was a larger

corporation. Rather, the parties' bargaining position evidenced procedural unconscionability because it allowed the defendant to "hastily" present a sales contract that contained an arbitration provision typed in small print that was hidden within the body of a lengthy document. Simpson, 373 S.C. at 27-28, 644 S.E.2d at 670. Here, the Estate has not shown that the contract between the parties contained hidden terms or that the Wilsons were pressured into signing a contract with one-sided provisions. To the contrary, in their own words, the Wilsons were "treated to outstanding service by Quicken personnel," and "[a]ll the questions [they] asked [were] answered effectively and very helpful[ly]" during the loan's origination. (Client Survey; R. __.) The terms of the Loan were favorable to the Wilsons, and have not been challenged by the Estate at all. At the very least, issues of fact remain as to whether procedural unconscionability exists, and therefore, the Special Referee erred in granting summary judgment.

B. The Loan is not substantively unconscionable.

The Estate also failed to identify any evidence of substantive unconscionability. The Loan paid off the $99,545.28 unpaid principal balance on the Wilsons' existing loan and lowered their interest rate by 2.385%. (Compare Note; R. __, with Wells Fargo Payoff Statement; R. __.) It also netted them over $14,000 in cash, which was their stated purpose for seeking a refinance loan. (Settlement Statement; R. __; 11/7/11 Loan App.; R. __.) With these favorable terms, the Wilsons made their monthly payments for nearly three years until shortly before Mrs. Wilson's death. (Am. Compl. ¶ 13; R. __.) The Estate does not contend that the terms of the Loan are "so oppressive that no reasonable person would make them." York, 406 S.C. at 85, 749 S.E.2d at 148. Rather, it contends the way Quicken Loans recorded information on the AIP Checklist— information provided by the Wilsons—constituted a waiver of their rights to express a preference for an attorney. (Resp't Br. p. 8.) Quicken Loans has already explained why the Wilsons did not waive

anything when they signed the AIP Checklist. (Appellant's Br. pp. 29-31.) Quicken Loans also explained why a waiver, even if it existed, would not render the Loan unconscionable and would not entitle the Estate to remedies under Section 37-10-105(C). (Id.)

Furthermore, the Estate's waiver argument is not supported by Simpson. In Simpson, the court found an arbitration provision in a sales contract was substantively unconscionable because of the following provisions: (1) it waived the plaintiff's right to recover statutorily mandated treble damages under the South Carolina Unfair Trade Practices Act; (2) it provided the dealer a unilateral right to file an action in magistrates court that could not be stayed due to a pending arbitration proceeding; and (3) it purported to apply to warranty claims under the Magnuson-Moss Warranty Act in violation of regulations promulgated by the FTC. 373 S.C. at 30-33, 644 S.E.2d at 670-73. These substantively unconscionable provisions were material terms to the parties' written contract. Id.

Here, the AIP Checklist was not part of the Note or Mortgage, and the Estate does not contend that the alleged waiver affected the terms of the Loan in any way.[2] Because the Estate has not shown that the loan's express terms were unconscionable, Simpson, which analyzes the terms of the parties' agreement, simply does not apply, and the Estate's substantive unconscionability argument fails. See Mosely v. Quicken Loans, Inc., No. 1:16-cv-00384, 2016 WL 3551999, at *4 (D.S.C. June 30, 2016) ("[E]ven though Plaintiff has alleged that Defendant's conduct deprived him of a meaningful choice as to his attorney, Plaintiff has not alleged that any term of the loan agreement was so oppressive that no reasonable person would accept the agreement.").

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[2] The claim that the Wilsons waived the need for an attorney is nonsensical. A South Carolina licensed lawyer closed the Loan. Thus, nothing was waived as a matter of law and fact.

C. The Wilsons were not unlawfully induced into the Loan.

Quicken Loans did not induce the Wilsons into entering this refinance Loan. On unconscionable inducement, the Estate states: "Closely akin is the fact of inducement by the unconscionable conduct of Quicken, leading Wilson to enter into the mortgage loan transaction with Quicken." (Resp't Br. p.9.)

This is the first time the Estate has raised the issue of inducement in this case. It is too late for a party to raise an issue not addressed by the lower court. U. Student Aid Funds, Inc. v. SCDHEC, 356 S.C. 266, 588 S.E.2d 599 (2003) ("[A]n appellate court will not consider issues raised for the first time on appeal."). Because the issue was not raised, the Special Referee made no findings of fact or conclusions of law concerning inducement; it is simply not a part of the Order.

Nor was inducement ever a part of the case. The Second Amended Answer and Counterclaim lacks any allegation of inducement by unconscionable conduct. Berry v. SCDHEC, 402 S.C. 358, 363, 742 S.E.2d 2, 5 (2013) (refusing to consider claims not raised in complaint because "[t]his Court will not, under the guise of liberal construction of the pleadings, write into the complaint allegations that are not presented."). There is also no evidence that the Wilsons applied for the loan based on the identity of the closing attorney. Because the ability to express a preference for a closing attorney did not induce the Wilsons into entering the Loan, the Estate has failed to establish unconscionable inducement. See Mosely, 2016 WL 3551999, at *4 ("There is no allegation that Plaintiff chose to apply for the loan based on statements made, or conduct, by Defendant regarding Plaintiff's ability to choose an attorney for closing. Accordingly, Plaintiff has not stated a claim for unconscionable inducement.").

This Court should reverse the Special Referee's finding that the Loan was unconscionable. No such relief is available here based on the law or facts.

CONCLUSION

The Estate failed to truly address the grounds upon which Quicken Loans filed this appeal. On those grounds to which the Estate has responded, it failed to identify any evidence or legal authority upon which the Special Referee's Order can be confirmed. Quicken Loans complied with the Attorney Preference Statute and provided the Wilsons with a loan that was beneficial to them.

At the very least, the record demonstrates that there are numerous disputed issues of material fact that make the Special Referee's granting of summary judgment in the Estate's favor improper at this stage in the case.

For these reasons, and the reasons set forth in Quicken Loans' initial brief, this Court should reverse the Special Referee's Order.

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Respectfully submitted,

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December 1, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BARNWELL COUNTY
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J. Martin Harvey, Special Referee

Case No. 2015-CP-06-00070
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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.

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:

Reply Brief of Appellant

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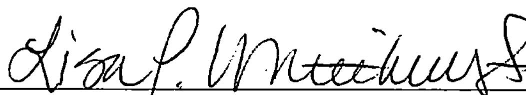

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December 1, 2016

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SC Court of Appeals
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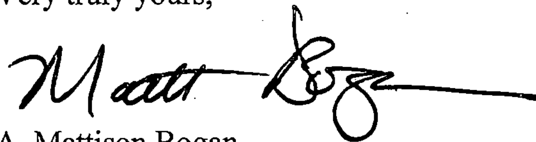
RE: Quicken Loans, Inc. v. Wayne D. Wilson, et al.
Civil Action No. 2015-CP-06-00070
Appellate Case No. 2016-001214
Our File No. 42677/01510

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Initial Reply Brief of Appellant 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 a copy of the initial reply brief.

Very truly yours,



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