THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
JAN 10 2017
SC Court of Appeals

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

J. Martin Harvey, Special Referee

Case No. 2015-CP-06-00070

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..... Respondent.

FINAL BRIEF OF APPELLANT

B. Rush Smith III
A. Mattison Bogan
Carmen Harper Thomas
Brian M. Barnwell
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Appellant Quicken Loans Inc.

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

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..... Respondent.

FINAL BRIEF OF APPELLANT

B. Rush Smith III
A. Mattison Bogan
Carmen Harper Thomas
Brian M. Barnwell
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Appellant Quicken Loans Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... **Error! Bookmark not defined.**

STATEMENT OF ISSUES ON APPEAL 1

INTRODUCTION 2

STATEMENT OF THE CASE 3

STATEMENT OF THE FACTS 5

ARGUMENT 7

SUMMARY OF ARGUMENT 7

STANDARD OF REVIEW 9

I. The special referee erred in finding that Quicken Loans violated the attorney preference statute 9

A. Quicken Loans' AIP Checklist sufficiently ascertained the Wilsons' lack of attorney preference prior to closing, in compliance with the safe harbor provisions of S.C. Code Ann § 37-10-102(a)(1) and (2) 9

B. The Special Referee also prematurely granted summary judgment on the question of whether Quicken Loans complied with the Attorney Preference Statute through means other than the safe harbor provisions of S.C. Code Ann § 37-10-102(a)(1) and (2) 12

1. The Attorney Preference Statute may be satisfied by mechanisms other than the two optional methods in the statute's safe harbor provision 13

2. Genuine issues of fact exist, and Quicken Loans is entitled to additional discovery, as to whether Quicken Loans ascertained the Wilsons' attorney preference through means other than the safe harbor mechanisms, thus satisfying S.C. Code Ann. § 37-10-102 17

II. Unconscionability is not a remedy for violations of the attorney preference statute and is inappropriate in this case 21

A. Section 37-10-105(C), allowing a finding that "the agreement or transaction is unconscionable . . . at the time it was made, or was

induced by unconscionable conduct," does not apply to Attorney Preference Statute violations 21

B. The Special Referee erred in holding that Quicken Loans' conduct was unconscionable under Section 37-10-105(C) 24

C. The Special Referee's findings of an unlawful waiver and unlawful furnishing of an attorney do not support a finding of unconscionability 28

III. The Estate's attorney preference counterclaim under section 37-10-105(a) is time-barred 31

IV. The Special Referee erred in denying Quicken Loan's jury trial demand and Motion to Amend the Pleadings 32

V. The Special Referee erred by relying upon protected testimony from a non-attorney preference case 34

A. Testimony from the Boone action was inadmissible in this case due to the Confidentiality Order 34

B. Testimony from the Boone action was inadmissible under the South Carolina Rules of Evidence 36

CONCLUSION 38

TABLE OF AUTHORITIES

Page(s)

Cases

Ahrens v. State, 392 S.C. 340, 709 S.E.2d 54 (2011) 16

Baughman v. Am. Tel. and Tel. Co., 306, S.C. 101, 112, 410 S.E.2d 537 (1991) 17, 18, 19

Branch Banking v. Gray, 2015-UP-439, 2015 WL 5050823 (S.C. Ct. App. Aug. 26, 2015) 32

Branham v. Ford Motor Co., 390 S.C. 203, 701 S.E.2d 5 (2010) 37

Centura Bank v. Cox, No. 2004-UP-348, 2004 WL 6331130 (S.C. Ct. App. May 25, 2004) 14, 15

Davis v. NationsCredit,326 S.C. 83, 484 S.E.2d 471 (1997) 12, 16

Drummond v. Beasley, 331 S.C. 559, 503 S.E.2d 455 (1998) 16

Eillis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004) 9

Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 472 S.E.2d 242 (1996) 25, 26, 27

First Fed. Sav. Bank v. Knauss, 296 S.C. 136, 370 S.E.2d 906 (Ct. App. 1988) 32

Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002) 9, 24

Green Tree Financial Corp. v. Fleming, 95-CP-40-4282 (S.C. Comm. Pleas Feb 2, 2002) 24

Greene v. Household Fin. Corp., No. 3:02-cv-02436, Dkt. No. 28 (D.S.C. Jan. 12, 2004) 11

Groleau v. Russo-Gabriele, 32 MassL. Rptr. 513 (Mass. Super. Ct. Dec. 5, 2004) 29

Hambrick v. GMAC Mortgage Corp., 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006) 31

Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009) 9, 20

Hunter Eng'g Co. v. Hennessy Indus., Inc., Case No. 4:08 CV 465, 2010 WL 1186454 (E.D. Mo. Mar. 29, 2010) 36

In re Biovail Corp. Sec. Litig., 247 F.R.D. 69 (S.D.N.Y. 2007) 36

In re Breckenridge, 2016 WL 1583998 (2016) 19, 20

King v. American General, 386 S.C. 82, 687 S.E.2d 321 (2009) 15, 16

King v. James, 388 S.C. 16, 694 S.E.2d 35 (Ct. App. 2010) 29, 30

Lackey v. Green Tree Financial Corp., 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998) 25

McFarland v. Wells Fargo Bank, N.A., 810 F.3d 273 (4th Cir. 2016) 28

Montgomery v. CSX Transp., Inc., 362 S.C. 529, 608 S.E.2d 440 (Ct. App. 2004) 34

Moore v. Wells Fargo Bank, No. 09-40229, 2012 Bankr. LEXIS 1085 (Bankr. S.D. W. Va. 13, 2012) 25

Mosely v. Quicken Loans, Inc., No. 1:16-cv-00384, 2016 WL 3551999 (D.S.C June 30, 2016) 26, 28

Pallares v. Seinar, 407 S.C. 359, 756 S.E.2d 128 (2014) 17

Pope v. Heritage Communities, Inc., 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011) 37

Prudential Ins. Co. of Am. v. Jefferson Assoc., Ltd., 896 S.W.2d 156 (Tex. 1995) 29

Rainey v. Haley, 404, S.C. 320, 332, 745 S.E.2d 81 (2013) 30

Rice v. Multimedia, Inc., 318 S.C. 95, 456 S.E.2d 381 (1995) 14

Sanders v. Allis Chalmers Mfg. Co., 237 S.C. 133 115 S.E.2d 793 (1960) 27

Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003) 9

Schneider v. Liberty Asset Mgmt., 251 P.3d 666 (Kan. Ct. App. 2011) 29

Sherman v. W & B Enterprises, Inc., 357 S.C. 243, 592 S.E.2d 307 (Ct. App. 2003) 14

Sneed v. Homebridge Mortgage Bankers Corp., 2010 WL 4053605 (D.S.C. Oct. 14, 2010) 17

State v. Addison, 338 S.C. 277, 525 S.E.2d 901 (Ct. App 1999) 16

State v. Buyer's Service, 292 S.C. 426, 357 S.E.2d 15 (1987) 28, 30, 31

State v. Sweat, 379 S.C. 367, 665 S.E.2d 645 (Ct. App. 2008) 29

State v. Wilson, 274 S.C. 352, 264 S.E.2d 414 (1980) 14

Tilley v. Pacesetter Corp., 355 S.C. 361, 585 S.E.2d 292 (2003) 24

Vance Boone et al. v. Quicken Loans, Ap. Case. No. 2013-002288 ..... 34, 35, 36

Whaley v. CSX Transp., Inc., 362 S.C. 456, 609 S.E.2d 286 (2005) 37

Wiegand v. U.S. Auto. Ass'n, 391 S.C. 159, 705 S.E.2d 432 (2011) 20

Willis v. Wu, 362 S.C. 146, 607 S.E.2d 63 (2004) 9

Wolters Kluwer Fin. Servs. Inc. v. Scivantage, Case No. 07 CV 2352, 2007 WL 1498114 (S.D.N.Y. May 23, 2007) 36

York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013) (emphasis added) 25

Rules

South Carolina Rule of Civil Procedure 32 37

South Carolina Rule of Civil Procedure 38(a) 32

South Carolina Rule of Civil Procedure Rule 53 33

South Carolina Rule of Civil Procedure Rule 56(f) 17, 18

South Carolina Rules of Civil Procedure Rule 12(a) 32

South Carolina Rules of Civil Procedure Rule 12(f) 32

South Carolina Rules of Civil Procedure Rule 30(b)(6) 37

South Carolina Rules of Civil Procedure Rule 38 ..... 32, 33

South Carolina Rules of Civil Procedure Rule 38(b) 4

South Carolina Rules of Civil Procedure Rule 53(b) 32

South Carolina Rules of Civil Procedure Rule 56(e) 34

South Carolina Rules of Evidence Rule 404(b) 36

Statutes

S.C. Code Ann. 37-10-102(a) (1996) 16

S.C. Code Ann. § 37-1-107 ..... 28, 29, 30

S.C. Code Ann. § 37-1-301(3) 23

S.C. Code Ann. § 37-5-108 ..... 22, 23

S.C. Code Ann. § 37-5-108(1)(a) 8

S.C. Code Ann. § 37-5-108(1)(b) 8

S.C. Code Ann. § 37-5-108(4)(a)(iv) 26

S.C. Code Ann. § 37-10-102 ..... 2, 3, 4, 8, 13, 16, 17, 21, 24, 29

S.C. Code Ann. § 37-10-102(a) 8, 11, 14, 15, 16, 17, 19

S.C. Code Ann. § 37-10-102(a)(1) 8, 9, 10, 12, 13

S.C. Code Ann.§ 37-10-102(a)(1)-(2) 4, 10, 13, 14

S.C. Code Ann. § 37-10-102(a)(2) 8, 9, 10, 12, 13

S.C. Code Ann. § 37-10-105 ..... 21, 24

S.C. Code Ann. § 37-10-105(A) 4, 21, 22, 23, 31, 32

S.C. Code Ann. § 37-10-105(C) 21, 22, 23, 24, 26, 28, 31

S.C. Code Ann. § 37-10-105(C)(1) 21

S.C. Code Ann. § 40-5-320 ..... 28, 30, 31

S.C. Code Ann. § 62-3-803 33

S.C. Code Ann. § 62-3-803(c)(2) 33

Other Authorities

Validity, Construction, and Application of Criminal Statutes or Ordinances as Proper Subject for Declaratory Judgment, 10 A.L.R.3d 727, § 2 Annotation (1966 & Supp.2013) 30

Merriam Webster' Collegiate Dictionary 1327 (11th ed. 2007) 23

STATEMENT OF ISSUES ON APPEAL

I. **Did the Special Referee err in holding that Appellant violated the Attorney Preference Statute?**

II. **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?**

III. **Did the Special Referee err by not allowing the parties to complete discovery before granting summary judgment?**

IV. **Did the Special Referee err in holding that a borrower may recover remedies under S.C. Code Ann. § 37-10-105(C) for alleged violations of the Attorney Preference Statute?**

V. **Did the Special Referee err in holding that Appellant's alleged violation of the Attorney Preference Statute was unconscionable under S.C. Code Ann. § 37-10-105(C) without any proof of unconscionability or the elements required for the same?**

VI. **Did the Special Referee err in holding that the Respondent's counterclaim under S.C. Code Ann. § 37-10-105(A) was not time-barred by the three-year statute of limitations?**

VII. **Did the Special Referee err in denying Quicken Loans' jury trial demand and Motion to Amend the Pleadings?**

VIII. **Did the Special Referee err by relying on confidential information subject to a protective order from an unrelated case to reach his decisions?**

INTRODUCTION

This case arises out of a mortgage loan refinance by Appellant Quicken Loans Inc. ("Quicken Loans")[1] to Calvin and Ezekiel Wilson on December 14, 2011. The refinance reduced the Wilsons' interest rate by 2.385%, and the Wilsons received over $14,000.00 in cash. The Wilsons, after the closing, indicated in a survey that they received "outstanding service" from Quicken Loans, and that "[a]ll questions I asked w[ere] answered effectively and very helpful." The Wilsons paid on the loan for nearly three years without incident or complaint. Mr. Wilson died on September 20, 2013, and Mrs. Wilson died on November 17, 2014. The loan went into default shortly before Mrs. Wilson died.

Quicken Loans instituted this foreclosure action on March 3, 2015, due to the ongoing and undisputed default on the loan. By way of counterclaims, Mrs. Wilson's estate (the "Estate"), by and through its personal representative Wayne D. Wilson, has attempted to avoid or delay foreclosure and recover damages as a set-off on the indebtedness. Although not a party to the closing, the Estate argues that an Attorney/Insurance Preference Checklist for the transaction—a form signed by Mr. and Mrs. Wilson indicating "I (We) have been informed by lender that I (we) have a right to select legal counsel to represent me (us) in all matters of this transaction relating to the closing of the loan. . . . I/We will not use the services of legal counsel"—did not technically satisfy the South Carolina Attorney Preference Statute, S.C. Code Ann. § 37-10-102. It argues, and the Special Referee agreed, that this form was not sufficient. The Special Referee went further and held this purported technical violation rendered the transaction unconscionable at the time it was made. Quicken Loans appeals this from the Special Referee's summary judgment order.

[1] Appellant Quicken Loans Inc. is incorrectly identified in the caption as Quicken Loans, Inc.

STATEMENT OF THE CASE

Quicken Loans filed this foreclosure action on March 3, 2015, against Ezekiel T. Wilson a/k/a Ezekiel (Ellen) T. Wilson. The Estate, by and through its personal representative Wayne D. Wilson, answered the foreclosure Complaint on May 21, 2015, without pleading any counterclaims or affirmative defenses.

Realizing Mrs. Wilson had died, Quicken Loans filed a First Amended Complaint on May 29, 2015, naming as parties the Estate, Mrs. Wilson's sons Wayne D. Wilson and Calvin O. Wilson, III, and any other heirs or assigns having an interest in the subject property (hereinafter Wayne D. Wilson and Calvin O. Wilson, in their individual capacities, may be referred to as "the Sons"). By consent motion, this case was referred to J. Martin Harvey, Jr., Special Referee for Barnwell County, on August 27, 2015.

On October 22, 2015, the Estate filed a Second Amended Answer and Counterclaims.[2] The Estate asserted two counterclaims alleging that Quicken Loans violated the Attorney Preference Statute, S.C. Code Ann. § 37-10-102. Quicken Loans answered the Estate's Second Amended Answer and Counterclaims on November 10, 2015.

Although in default at the time, the Sons filed an Answer and Counterclaims on October 22, 2015, which asserted the same counterclaims as the Estate's Second Amended Answer and Counterclaims. On November 24, 2015, Quicken Loans filed a motion to strike the Sons' pleading on the grounds that it was untimely.

---

[2] Although captioned as a Second Amended Answer and Counterclaims, this pleading was actually the first amended pleading that the Estate filed in response to the Amended Complaint. The Estate initially answered the Amended Complaint on June 19, 2015, asserting one counterclaim for an alleged violation of the Attorney Preference Statute, S.C. Code Ann. § 37-10-102. The Second Amended Answer and Counterclaims asserts two counterclaims based on the same allegations.

On January 19, 2016, the Estate filed a Motion for Partial Summary Judgment on its counterclaims. The Estate's Motion for Partial Summary Judgment asked the Special Referee to determine whether Quicken Loans failed to ascertain the Wilsons' preference for an attorney in violation of S.C. Code Ann. § 37-10-102. In response to the Estate's Motion for Partial Summary Judgment, Quicken Loans requested time to conduct discovery to establish that it complied with Section 37-10-102 by ascertaining the Wilsons' attorney via a mechanism other than that set forth in the statute's safe harbor provisions.[3]

On January 25, 2016, Quicken Loans filed a Jury Trial Demand pursuant to Rule 38(b) of the South Carolina Rules of Civil Procedure and filed a Motion to Transfer this case to the General Docket for an eventual jury trial. In response, the Sons withdrew their responsive pleading and remain in default.

On March 8, 2016, Quicken Loans served a Cross-Motion for Summary Judgment, arguing that the Estate's claims failed as a matter of law because it complied with the safe harbor provision of S.C. Code Ann. § 37-10-102. Quicken Loans did not seek summary judgment on the grounds that it ascertained the Wilsons' attorney preference through methods other than the safe harbor provision; there are outstanding issues of fact as to this issue on which the Estate moved for summary judgment. Quicken Loans further argued for judgment as a matter of law on the basis the Estate's claims under Section 37-10-105(A) were time barred and that it was not entitled to the relief sought by the Estate.

[3] As used in the Order and in this brief, the term "safe harbor" refers to subsections (a)(1)-(2) of Section 37-10-102. See S.C. Code Ann.§ 37-10-102(a)(1)-(2).

Quicken Loans also filed a Motion to Amend the Pleadings on March 8, 2016. Among other things, the Motion to Amend sought leave to assert two breach of contract claims and to demand a jury trial on those claims.

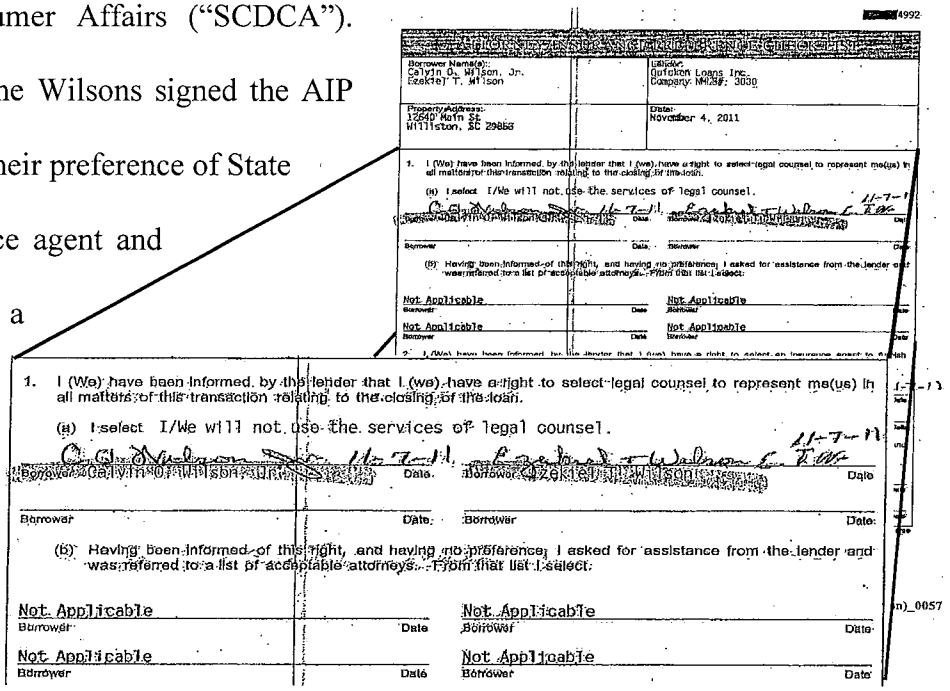
The Special Referee held a hearing on the pending motions on March 18, 2016. In an order dated May 13, 2016, (the "Order"), the Special Referee granted the Estate's Motion for Partial Summary Judgement and denied Quicken Loans' Cross-Motion for Summary Judgment. The Special Referee also denied Quicken Loans' Motion to Transfer to the General Docket for a Jury Trial and denied, in part, its Motion to Amend the Pleadings. Quicken Loans filed its Notice of Appeal on June 7, 2016.

STATEMENT OF THE FACTS

On November 4, 2011, Ezekiel Wilson and her husband, Calvin Wilson, spoke over the telephone with a Quicken Loans' representative named Guy Brusca to refinance their existing loan (the "Loan"). (See 11/7/11 Loan App.; R. 341.) Mr. Brusca electronically entered information provided by the Wilsons into a loan application, a copy of which was then provided to the Wilsons. (See id.; R. 341.) The Wilsons reviewed the completed application and signed it on November 7, 2011. (Id. at p.4.; R. 344.) The purpose of the Loan was to pay off several of the Wilsons' existing debts and to provide cash from the equity of their home. (See id. at p.1; R. 341.)

Also during this conversation, Mr. Brusca asked the Wilsons if they had a preference for a closing attorney and an insurance agent. (See Attorney/Insurance Preference Checklist; R. 346.) The Wilsons expressed a preference as to an insurance agent but had no preference as to a closing attorney. (Id.) Mr. Brusca used the information the Wilsons provided him to electronically prepare an Attorney/Insurance Preference Checklist ("AIP Checklist"). (See id.)

The AIP Checklist was substantially similar to the form issued by the South Carolina Department of Consumer Affairs ("SCDCA"). (Order p. 7, R. 7.) The Wilsons signed the AIP Checklist confirming their preference of State Farm as their insurance agent and that they did not have a preference for a closing attorney and did not request the services of legal counsel of their own selection. (Id.) The Wilsons never amended this information. (See id.)



1. I (We) have been informed, by this lender that I (we) have a right to select legal counsel to represent me(us) in all matters of this transaction relating to the closing of the loan.

(a) I select I/We will not use the services of legal counsel.

Borrower Calvin O. Wilson, Jr. Date 11-7-11 Borrower Ezekiel T. Wilson Date 11-7-11

Borrower Date Borrower Date

(b) Having been informed of this right, and having no preference, I asked for assistance from the lender and was referred to a list of acceptable attorneys. From that list I select:

Not Applicable Borrower Date Not Applicable Borrower Date

Not Applicable Borrower Date Not Applicable Borrower Date

Carlton Robinson, a licensed South Carolina attorney in good standing, closed the Loan on December 14, 2011. (See Robinson Aff.; R. 461.) Mr. Robinson's practice was to explain all documents to a borrower before closing a loan, including the requirements of the Attorney Preference Statute. (Id. ¶ 6; R. 462.) Mr. Robinson would not have proceeded with the closing if the Wilsons had expressed any dissatisfaction with him representing them during the closing or if they preferred another attorney. (Id. ¶ 7; R. 462.) Additionally, the Wilsons signed a disclosure form confirming that Mr. Robinson explained the legal effect of the documents at the closing and that he dually represented the Wilsons and Quicken Loans at the closing. (Id. at Ex. A, Real Estate Closing Disclosure Form; R. 465.) At the closing, Mr. and Mrs. Wilson signed an updated loan application. (12/14/11 Loan App. at p.4; R. 383.) The final page of the updated application

confirmed that State Farm was the Wilsons' preferred insurance agent and that Carlton Robinson was their closing attorney. (Id., R. 386.)

Under Mr. Robinson's supervision, the Wilsons executed a note in the amount of $126,000.00 (the "Note") in favor of Quicken Loans secured by a mortgage (the "Mortgage") on certain real property located at 12640 Main Street, Williston, South Carolina (the "Property"). (Note; R. 348; Mortgage; R. 352.) The Loan included a 3.99% fixed interest rate, which was 2.385% lower than the existing loan that it refinanced. (Compare Note; R. 348, with Wells Fargo Payoff Statement; R. 369.) The Loan also provided the Wilsons with $14,178.66 in cash, which accomplished their stated purpose for seeking a refinance loan. (Settlement Statement; R. 374; see also 11/7/11 Loan App. R. 341.)

The Wilsons paid on the loan for nearly three years without incident or complaint. Shortly before Mrs. Wilson died, the Loan went into default. (Id. at ¶ 13 (alleging Loan is in default and due for 10/1/14).)

ARGUMENT

Summary of Argument

The 2011 refinance transaction benefitted the Wilsons substantially, reducing their interest rate by 2.385% (from 6.375% to 3.99%), and netting them some $14,000.00 in cash. In their post-closing survey, they expressed their high degree of satisfaction with Quicken Loans' service, and indicated that "[a]ll questions" they had were "answered effectively and very helpful." They paid the loan for nearly three years—it did not go into default even after Mr. Wilson died, but only just prior to Mrs. Wilson's death. Only in response to a foreclosure action due to the undisputed and uncured default on the loan did the issue of attorney preference arise. The attorney preference challenge fails in this case because Quicken Loans complied with the underlying statutes and even

if it technically fell short of full compliance, the remedy sought by Respondents and ordered by the Special Referee exceeds the statutory limits and is disproportionate and unjust.

The Attorney Preference Statute, S.C. Code Ann. § 37-10-102, requires only that "[t]he creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction . . . ." S.C. Code Ann. § 37-10-102(a). As set forth below, Quicken Loans complied with this statutory command, whether its conduct and the Wilsons' signed AIP Checklist are construed to fall within the safe harbor provisions of S.C. Code Ann. § 37-10-102(a)(1) or (2), or otherwise satisfy the requirement to ascertain the borrowers' preference. There was no violation.

Even if the signed AIP Checklist did not technically comply with the Attorney Preference Statute, the Special Referee erred in the remedies he granted. S.C. Code Ann. § 37-10-102(A) provides for a cause of action for actual damages and a penalty of $1,500-$7,500, and there is a corresponding limitations period of three years. There can be no claim here that any alleged violation of the Attorney Preference Statute caused the Wilsons any actual damages—in fact, they significantly benefited from this loan. In the absence of damages, even if the Estate could overcome the expired limitations period, it would otherwise be limited to a relatively small set-off.

To avoid this outcome, the Estate argued that the alleged technical problems with the AIP Checklist rendered this transaction unconscionable at the time it was made, under S.C. Code Ann. § 37-5-108(1)(a). The Special Referee agreed, a finding that allows the court to impose, *inter alia*, the draconian remedy of "refus[ing] to enforce the agreement." S.C. Code Ann. § 37-5-108(1)(b). The finding of unconscionability is completely unwarranted and unjust where the borrowers—Mr. and Mrs. Wilson—benefitted substantially from the loan, expressed their great satisfaction with

the process, and made nearly three years of payments. Moreover, the finding is unwarranted where there is no indication, and no argument whatsoever, as to how compliance with the Attorney Preference Statute, as construed by the Estate and the Special Referee, would have changed anything. There is no basis to conclude that the borrowers suffered any harm whatsoever from the alleged violation of the Attorney Preference Statute. The Special Referee's Order should be reversed, as set forth below.

Standard of Review

Summary judgment should not be granted when a genuine issue of material fact exists. Eillis v. Davidson, 358 S.C. 509, 520, 595 S.E.2d 817, 823 (Ct. App. 2004). In determining whether any triable issues of material fact exist, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Fleming v. Rose, 350 S.C. 488, 493–94, 567 S.E.2d 857, 860 (2002); Willis v. Wu, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004); Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003) ("All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party."). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid–South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 8032 (2009).

I. The special referee erred in finding that Quicken Loans violated the attorney preference statute.

A. Quicken Loans' AIP Checklist sufficiently ascertained the Wilsons' lack of attorney preference prior to closing, in compliance with the safe harbor provisions of S.C. Code Ann § 37-10-102(a)(1) and (2).

The safe harbor provision provides two, non-exclusive methods for complying with the Attorney Preference Statute. First, the creditor may "include[] the preference information on or

with the credit application" in a form substantially similar to the one issued by the SCDCA. S.C. Code Ann. § 37-10-102(a)(1). Second, the creditor may comply by "providing written notice to the borrower of the preference information with the notice being delivered or mailed no later than three business days after the application is received or prepared. If a creditor uses a preference notice form substantially similar to the form distributed by the administrator, the form is in compliance with this section." S.C. Code Ann. § 37-10-102(a)(2). As argued in its Cross-Motion for Summary Judgment, Quicken Loans' AIP Checklist satisfied both of the safe harbor provisions' options.

Specifically, the Wilsons signed the AIP Checklist on November 7, 2011, which was the same day they signed the loan application and over a month before the loan closed. (11/7/11 Loan App.; R. 341; AIP Checklist; R. 346.) The AIP Checklist was substantially similar to the form distributed by the SCDCA. (Order p. 7, R. 7; see also SCDCA Attorney/Insurance Preference Form; R. 7, 181.) Because this form was provided to the Wilsons (1) with the loan application and (2) within three days of when Quicken Loans received the loan application, Quicken Loans satisfied both options created by the safe harbor provision. See S.C. Code Ann. § 37-10-102(a)(1)-(2).

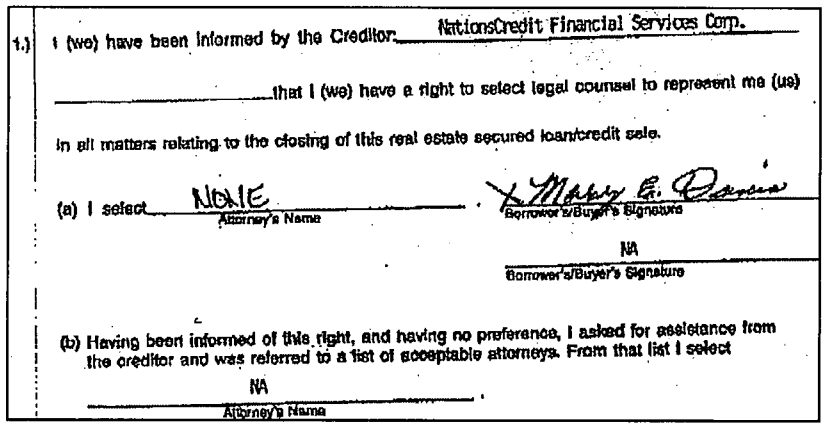
Furthermore, the AIP Checklist expressly advised the Wilsons of their right to select an attorney: "I (We) have been informed by the lender that I (we) have a right to select legal counsel to represent me (us) in all matters of this transaction relating to the closing of the loan." (AIP Checklist; R. 346.) After reviewing the AIP Checklist, the Wilsons signed it, thereby ratifying its contents and confirming that they did not have a preference for a closing attorney. The form was signed over a month prior to closing. Moreover, there was no evidence before the Special Referee showing that the Wilsons would have preferred to use a different closing attorney or did not have

any chances prior to the closing to express a preference. (See 12/14/11 Loan App. at p.4; R. 386.) There was also no evidence that Quicken Loans prevented the Wilsons from using the attorney of their choice. (See id.; R. 386; see also Robinson Aff. ¶ 7; R. 462; Client Survey; R. 388.) In fact, the closing attorney stated he would not have closed the loan had the borrowers preferred another attorney. (Robinson Aff. ¶ 7; R. 462.)

Despite the undisputed fact that Quicken Loans used a form substantially similar to the one referenced in the statute and timely provided the preference information to the Wilsons, the Special Referee found there was a violation of the statute because Mr. Brusca electronically recorded "Not Applicable" into section 1(b) of the form rather than providing a list of attorneys after the Wilsons told him they had no preference for a closing attorney. (Order p.8, R. 8) The Special Referee erred in his finding. The Attorney Preference Statute does not require a lender to provide borrowers with a list of references if they do not have an attorney preference. See S.C. Code Ann. § 37-10-102(a). Nowhere is such a requirement found in the plain language of the statute.

Indeed, United Stated District Judge Joseph F. Anderson rejected this very argument in Greene v. Household Fin. Corp., No. 3:02-cv-02436, Dkt. No. 28 (D.S.C. Jan. 12, 2004). In Greene, Judge Anderson found that the Attorney Preference Statute is a disclosure measure, not a lawyer referral mechanism, stating that the statute "clearly does not require" the "extra step" of providing the borrower with a list of attorneys even though the form distributed by the SCDCA does. Id. at p. 7. Judge Anderson also rejected the argument that ascertaining the lack of preference is insufficient to satisfy the statute, instead finding that "a plain reading of the statute reveals that the creditor need not require the customer to designate an attorney in order to comply with the attorney-preference provision." Id.

Likewise, in Davis v. NationsCredit Financial Services Corp., a case relied upon by the Estate and cited in the Order, the South Carolina Supreme Court found that a lender complied with the Attorney Preference Statute by using a form that recorded "N/A" in section 1(b) and "NONE" for their legal counsel in section 1(a) after the borrower stated no preference. See Davis, 326 S.C. at 84, 484 S.E.2d at 471 (finding no violation). Specifically, the form attached as an appendix to the Davis plaintiff's brief appeared, in relevant part, as indicated at right. See id. at 86, 484 S.E.2d at 472-73 (considering form attached as appendix to plaintiff's brief).



1.) I (we) have been informed by the Creditor: NationsCredit Financial Services Corp.

that I (we) have a right to select legal counsel to represent me (us) in all matters relating to the closing of this real estate secured loan/credit sale.

(a) I select NONE (Attorney's Name) — Borrower's/Buyer's Signature

NA (Borrower's/Buyer's Signature)

(b) Having been informed of this right, and having no preference, I asked for assistance from the creditor and was referred to a list of acceptable attorneys. From that list I select

NA (Attorney's Name)

Quicken Loans' AIP Checklist is substantially similar to the one issued by the SCDCA and at issue in Davis, and it clearly disclosed to the Wilsons their right to express a preference as to an attorney. The Special Referee should have ruled in favor of Quicken Loans on this issue, or, at a minimum, found an issue of material fact as to whether Quicken Loans is protected from suit based on its compliance with the safe harbor provisions for the Attorney Preference Statute. The Order should, therefore, be reversed.

B. The Special Referee also prematurely granted summary judgment on the question of whether Quicken Loans complied with the Attorney Preference Statute through means other than the safe harbor provisions of S.C. Code Ann § 37-10-102(a)(1) and (2).

Quicken Loans also argued below that it had satisfied the requirements of the Attorney Preference Statute by means other than the safe harbor provision, and argued discovery was necessary to prove such compliance. The Special Referee committed two errors in ruling on these

arguments: (1) the Special Referee wrongly concluded that the safe harbor provision is the exclusive method for complying with the Attorney Preference Statute (Order pp. 5-6 & 8-10 (citing S.C. Code Ann. § 37-10-102(a)(1)-(2), R. 5-6, 8-10), because the plain language of the statute does not require use of a particular form, or any form at all; and (2) the Special Referee prematurely granted summary judgment as to compliance via these other means because there are genuine issues of fact and Quicken Loans is entitled to discovery on these issues. The Order should be reversed.

1. The Attorney Preference Statute may be satisfied by mechanisms other than the two optional methods in the statute's safe harbor provision.

The Attorney Preference Statute states, in relative part, as follows:

> Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose:
>
> (a) The creditor *must ascertain prior to closing* the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction . . . .

S.C. Code Ann. § 37-10-102 (emphasis added). The plain statutory language merely requires a creditor to "ascertain prior to closing the preference of the borrower." Id. The statute does not mandate **how** the borrower's preference must be ascertained. Id.

In 1996, the General Assembly added the optional safe harbor provisions to S.C. Code Ann. § 37-10-102(a)(1) and (2), which now provide:

> The creditor *may* comply with this section by:
>
> (1) including the preference information on or with the credit application so that this information shall be provided on a form substantially similar to a form distributed by the administrator; or
>
> (2) providing written notice to the borrower of the preference information with the notice being delivered or mailed no later than three business days after the application is received or prepared. If a

> creditor uses a preference notice form substantially similar to a form distributed by the administrator, the form is in compliance with this section.

(Id.) (emphasis added).

The General Assembly's use of the word "may" instead of "must" or "shall" establishes that it did not intend for the safe harbor provision to be the exclusive method of compliance. "The cardinal rule of statutory construction is . . . to ascertain and effectuate the actual intent of the legislature." Sherman v. W & B Enterprises, Inc., 357 S.C. 243, 249, 592 S.E.2d 307, 310 (Ct. App. 2003). "The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand a statute's operation." Id. "'The use of the word 'may' signifies permission and generally means that the action spoken of is optional or discretionary.'" Rice v. Multimedia, Inc., 318 S.C. 95, 98, 456 S.E.2d 381, 383 (1995); see also State v. Wilson, 274 S.C. 352, 356, 264 S.E.2d 414, 416 (1980).

In accordance with the foregoing principles, the safe harbor mechanisms in Section 37-10-102(a)(1) and (2) are optional. In Centura Bank v. Cox, No. 2004-UP-348, 2004 WL 6331130, at *2 (S.C. Ct. App. May 25, 2004)—unpublished but persuasive authority—the borrower argued that her lender violated the Attorney Preference Statute by failing to provide her a preference disclosure form within three days of her application. Id. The borrower asserted that the safe harbor provision was the exclusive method for compliance. Id. Rejecting the borrower's position, the Court of Appeals held that use of the word "may" was permissive and that the safe harbor provision "merely describes one way a lender may comply with the statute." Id. (citing S.C. Code Ann. § 37-10-102(a)). The Centura Bank court further explained that it "doubt[ed] the preference statute requires anything more of a creditor than ascertaining a borrower's attorney preference prior to closing." Id.

Under the plain meaning of the statute, the creditor "may" comply with the Attorney Preference Statute by utilizing one of the two enumerated mechanisms, but is not required to do so. Each of those two subparts "merely describes one way a lender may comply with the statute." Centura Bank, 2004 WL 6331130, at *2. The Special Referee's holding to the contrary is incorrect as a matter of law.

The Special Referee's reliance on outdated administrative interpretation of a previous version of the statute illustrates the scope of the error. A prior version of the statute specified only one, exclusive mechanism for lenders to comply—the prior statute required the attorney preference disclosure information in writing on the first page of the loan application.[4] The Special Referee relied on the SCDCA's Administrative Interpretation No. 10.102(a)-8302 (1983) (the "A.I") and King v. American General, 386 S.C. 82, 687 S.E.2d 321 (2009), which addressed this previous version of the Attorney Preference Statute, not the current version.

The A.I., for example, was issued nearly thirteen years before the General Assembly enacted, by amendment, the modern day Attorney Preference Statute.[5] The prior version of the statute addressed by the A.I. stated that "the loan application on the first page thereof **shall** contain

---

[4] The pre-amended version of the statute stated as follows:

> (a) The creditor shall ascertain the preference of the borrower as to the legal counsel that shall be employed to represent the debtor in all matters of the transaction relating to the closing of the loan and the insurance agent to furnish required insurance in connection with the mortgage and shall comply with such preference and the loan application on the first page thereof ***shall contain*** such information as is necessary to ascertain these preferences of the borrower.

S.C. Code Ann. § 37-10-102(a) (1982) (emphasis added).

[5] The SCDCA issued the A.I. to answer whether the pre-1996 version of the statute required a lender to put the preference disclosure on the application form itself or if it could supply the disclosure on a separate sheet of paper.

such information as is necessary to ascertain these preferences of the borrower." S.C. Code Ann. § 37-10-102 (1982) (emphasis added); see also A.I. pp. B-211-12. When it created the optional safe harbor provision in 1996, the General Assembly removed the mandate for providing information in writing on the loan application to ascertain the borrower's preference. See S.C. Code Ann. 37-10-102(a) (1996). Moreover, the General Assembly added two optional methods by which lenders "may comply" with the requirement to "ascertain prior to closing the [attorney] preference of the borrower." Therefore, the A.I.'s interpretation of an outdated version statute that has been abrogated cannot alter the meaning and plain text of the modern day Attorney Preference Statute. See Ahrens v. State, 392 S.C. 340, 349, 709 S.E.2d 54, 58 (2011) (explaining that administrative agencies may not make rules that "conflict with, or . . . change in any way the statute conferring such authority"). The Special Referee's reliance on the A.I. from 1983 was improper.

The same goes for the Special Referee's reliance on King. King also addressed the prior version of the Attorney Preference Statute and does not provide a basis for ignoring the plain language of the modern day statute.[6] King, 386 S.C. at 324, 687 S.E.2d at 324 (applying S.C. Code Ann. § 37-10-102(a) (1989 & Supp. 1995)).[7]

---

[6] In a pair of footnotes, King quotes portions of the current version of Section 37-10-102 to explain the case before it was governed by the pre-amended version. Id. at 85-90 nn.1 & 3; 687 S.E.2d at 322—325 nn.1 & 3. Because the prior version was at issue, the King court did not analyze the current statute and did not hold that the safe harbor provision is the exclusive method for compliance. See id.; see Drummond v. Beasley, 331 S.C. 559, 563, 503 S.E.2d 455, 457 (1998) (finding language from a case concerning a subject that is unnecessary to answering the question before the court is dicta); see also State v. Addison, 338 S.C. 277, 282, 525 S.E.2d 901, 904 (Ct. App 1999) ("[D]icta . . . is neither binding nor illuminating on the issue at bar.").

[7] The Order suggests that the South Carolina Supreme Court has relied upon the A.I. in the past. (Order p.6)) The cases cited in the Order, however, construed the pre-1996 amended version of the Attorney Preference Statute and are, therefore, not precedential. Additionally, the King court only relied upon the A.I. in deciding the timing element of the prior version of the statute, which is not at issue here. See King, 386 S.C. at 90, 687 S.E.2d at 325. The Davis court did not even rely upon the A.I. in reaching its decision even though the parties cited it in their briefs. Davis v. NationsCredit,326 S.C. 83, 84, 484 S.E.2d 471, 471 (1997).

The plain language of S.C. Code Ann. § 37-10-102(a) requires only that the creditor "ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing . . . ." The statute does not say exactly how to ascertain this preference. As such, this requirement may be met, for example, through oral communications, which may be pragmatic in situations where an application is initially taken telephonically.[8] Thus, the Special Referee erred in holding that the safe harbor mechanisms are mandatory and exclusive.

2. Genuine issues of fact exist, and Quicken Loans is entitled to additional discovery, as to whether Quicken Loans ascertained the Wilsons' attorney preference through means other than the safe harbor mechanisms, thus satisfying S.C. Code Ann. § 37-10-102.

"[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." Baughman v. Am. Tel. and Tel. Co., 306, S.C. 101, 112, 410 S.E.2d 537, 543 (1991). Summary judgment is also premature "when further development of the facts is desirable to clarify the application of the law or when there is a dispute as to the conclusions and inferences to be drawn from the facts." Pallares v. Seinar, 407 S.C. 359, 373, 756 S.E.2d 128, 135 (2014); see also Rule 56(f), SCRCP (allowing court to deny summary judgment and allow time for discovery "[s]hould it appear from the affidavits of the party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his position").

The Special Referee prematurely granted summary judgment as to the issue of compliance with the Attorney Preference Statute outside of the safe harbor provisions. Issues of fact exist as to whether Quicken Loans adequately ascertained the Wilsons' attorney preference. The existing

[8] To support its conclusion that Quicken Loans could not orally ascertain the Wilson's preference, the Order cites Sneed v. Homebridge Mortgage Bankers Corp., 2010 WL 4053605 (D.S.C. Oct. 14, 2010). In Sneed, the only issue the court decided was that a law firm that provided an attorney's certificate of title to a prospective title insurer had no duty to provide a borrower with a preference disclosure under Section 37-10-102(a). Id. at *2. Therefore, Sneed is not precedent.

evidence also created inferences that should have been drawn in favor of Quicken Loans as the non-movant on this issue. Additionally, the discovery requested by Quicken Loans would have produced facts that further demonstrate how and when it ascertained the Wilsons' attorney preference. Thus, the Special Referee erred in granting the Estate summary judgment on this issue.

The Estate filed its motion for partial summary judgment less than three months after it finalized its counterclaims and before any depositions were taken. (See id.) In response, Quicken Loans' counsel filed an affidavit under Rule 56(f) identifying the specific discovery needed to fully and properly oppose the Estate's motion. This discovery included (1) the deposition Calvin O. Wilson, III, who witnessed the loan closing; (2) the deposition of Carlton Robinson, the closing attorney; and (3) the opportunity to present testimony from a Quicken Loans representative. (Barnwell Aff. ¶¶ 3-4; R. 474.) Because Mr. and Mrs. Wilson are both deceased, the deposition of these witnesses is vital to discovering facts relevant to whether Quicken Loans ascertained the Wilsons' preference for an attorney prior to closing. (See id.)

For instance, Mr. Guy Brusca, the representative who prepared the loan application, would have testified on whether he asked the Wilsons about their attorney preference. Carlton Robinson and his staff had conversations with the Wilsons to schedule the closing, and he would have testified about whether the Wilsons expressed an attorney preference during those conversations or immediately prior to the closing itself. Mr. Calvin Wilson, III likewise would have testified about the circumstances of the loan's closing and whether his parents expressed a preference for an attorney other than Mr. Robinson. Thus, Quicken Loans' Rule 56(f) affidavit "demonstrated a likelihood that further discovery will uncover additional [relevant] evidence." See Baughman v. Am. Tel. and Tel. Co., 306, S.C. at, 112, 410 S.E.2d at 543.

Quicken Loans was not dilatory in seeking discovery because the Estate did not finalize its counterclaims until October 22, 2015. At the time the Estate filed its Motion for Partial Summary Judgment, Quicken Loans was still waiting for a ruling on its motion to strike the Sons' untimely asserted counterclaims—the resolution of which directly impacted the scope of the needed depositions, especially Calvin O. Wilson, III's. Thus, the Special Referee erred by granting summary judgment when discovery was still needed. See Baughman v. Am. Tel. and Tel. Co., 306, S.C. at 112, 410 S.E.2d at 543.

Moreover, the evidence that was before the Special Referee demonstrated, at a minimum, the existence of a genuine issue of material fact as to whether Quicken Loans adequately ascertained the Wilsons' attorney preference. Quicken Loans' representative Guy Brusca asked the Wilsons' who their preferred attorney was during their initial telephone interview on November 7, 2011. (AIP Checklist; R. 346.) When the Wilsons said they had no preference, Mr. Brusca electronically recorded that information on the AIP Checklist, which the Wilsons reviewed and signed. (AIP Checklist; R. 346.) In addition to their conversation with Mr. Brusca, the Wilsons signed a loan application on November 7, 2011. (11/7/11 Loan App.; R. 341.) This loan application contained a section for the Wilsons' to list their preferred attorney. (Id. at p.4, R. 344.) The Wilsons left this section blank, expressing again no preference. (Id.) While the Wilsons could have updated their loan application or the AIP Checklist at any time, they did not.

Additionally, the closing attorney, Carlton Robinson, explained to the Wilsons their attorney preference rights under Section 37-10-102(a) prior to closing the loan. (Robinson Aff. ¶¶ 6-7; R. 462.)[9] Mr. Robinson would not have conducted the closing if the Wilsons had expressed

[9] The Order cites In re Breckenridge, 2016 WL 1583998 (2016) as saying Mr. Robinson could not explain to the Wilsons their preference rights prior to conducting the closing. In re Breckenridge was a lawyer disciplinary matter, and it was based entirely on the South Carolina Rule of

any reservation about him. (Id.) Moreover, in conjunction with the closing, the Wilsons signed a Real Estate Closing Disclosure Form and an updated loan application confirming they had no objection to Mr. Robinson serving as their closing attorney. (See Real Estate Closing Disclosure Form; R. 465.; see also 12/14/11 Loan App. at p.4; R. 386.)

The foregoing evidence is more than the mere scintilla required to establish a genuine issue of material fact making summary judgment improper. See Hancock, 381 S.C. at 330, 673 S.E.2d at 803. The Special Referee, however, ignored this evidence. He also drew inferences in favor of the Estate that should have been drawn in favor of Quicken Loans as the non-movant on this issue. (See e.g., Order p.7 (ignoring fact that Mr. Brusca electronically inserted information into the AIP Checklist); id. at pp. 10-11 (inferring that Carlton Robinson did not conduct closing properly or ascertain the Wilsons' attorney preference); R. 7, 10-11.) The Court should reverse the Order and remand this case to allow discovery..

To the extent Respondents argue Quicken Loans conceded this issue can be decided as a matter of law by filing cross-motions for summary judgment, the argument must fail. Quicken Loans sought summary judgment only on the Attorney Preference Statute's safe harbor provision. (Mem. in Supp. Cross-Mot. Summary Judgment Part II; R. 326.) In contrast, the Estate's Motion for Partial Summary Judgment argued that Quicken Loans failed to ascertain the Wilsons' attorney preference via any method. (Mot. for Partial Summary Judgment; R. 164.) Given Quicken Loans did not seek summary judgment on the issue of compliance outside of the safe harbor provisions, it has not conceded that the issue can be decided as a matter of law. Any reliance on Wiegand v. U.S. Auto. Ass'n is therefore misplaced. Wiegand v. U.S. Auto. Ass'n, 391 S.C. 159, 705 S.E.2d

---

Professional Conduct. The Estate has not joined Mr. Robinson as a party to this action. Moreover, In re Breckenridge does not address the Attorney Preference Statute or how a lender can comply with the statute. It is irrelevant to this appeal and should be ignored.

432 (2011) (holding that parties only concede the issues put before the court by both parties' cross-motions can be decided as matter of law).

II. Unconscionability is not a remedy for violations of the Attorney Preference Statute and is inappropriate in this case.

Quicken Loans has established its AIP Checklist properly ascertained the Wilsons' lack of preference as to legal counsel, and that Quicken Loans otherwise ascertained this lack of preference prior to closing, satisfying the Attorney Preference Statute. The Special Referee disagreed, holding that Quicken Loans failed to satisfy the statute. Without articulating how such a failure actually hurt the Wilsons, or how the transaction in general—that substantially reduced their interest rate and netted them some $14,000.00 in cash—actually hurt the Wilsons, the Special Referee concluded Quicken Loans' conduct was unconscionable under S.C. Code Ann. § 37-10-105(C). This finding has profound implications as it allows, for example, the court to "refuse to enforce the agreement." S.C. Code Ann. § 37-10-105(C)(1). This Court should reverse the finding of unconscionability and that the remedy exists for an attorney preference violation.

A. Section 37-10-105(C), allowing a finding that "the agreement or transaction is unconscionable . . . at the time it was made, or was induced by unconscionable conduct," does not apply to Attorney Preference Statute violations.

The Special Referee erred in holding a borrower could have a mortgage loan declared unconscionable under Section 37-10-105(C) for violations of the Attorney Preference Statute. That remedy is not available for violations of Section 37-10-102, but is instead a remedy for unconscionable transactions or agreements. The sole remedy for violations of Attorney Preference Statute violations is set forth in Section 37-10-105(A)—actual damages or a statutory penalty.

Section 37-10-105 states in relevant part:

> (A) If 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. . . .
>
> * * *
>
> (C) If the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct, the court may, in an action other than a class action:
>
> (1) refuse to enforce the agreement, or a term, or part of the agreement or transaction that the court determines to have been unconscionable at the time it was made;
>
> (2) enforce the remainder of the agreement without the unconscionable term or part, or limit the application of the unconscionable term or part to avoid an unconscionable result;
>
> (3) rewrite or modify the agreement to eliminate an unconscionable term, part, or result and enforce the new agreement; or
>
> (4) award:
>
> (a) not more than the total amount of the loan finance charge and allow repayment of the unpaid balance of the loan without any finance charge;
>
> (b) not more than double the amount of the excess loan finance charge or other charges or fees actually received by the creditor or paid by the debtor to a third party; and
>
> (c) attorney's fees and costs.

S.C. Code Ann. § 37-10-105(A) & (C) (emphasis added).

The introductory language of subparagraphs (A) and (C) distinguish the availability of these two distinct remedies. Subparagraph (A) provides a remedy of actual damages and a penalty of $1,500-$7,500 "[i]f a creditor violates a provision of this chapter." S.C. Code Ann. § 37-10-105(A). The Attorney Preference Statute is part of the same chapter (Chapter 10, Title 37), meaning that a violation of the Attorney Preference Statute subjects the lender to a claim for actual damages and a penalty of $1,500-$7,500.

Subparagraph (C)—allowing a finding of unconscionability—in contrast, does not state that it is available "[i]f a creditor violates a provision of this chapter." Cf. S.C. Code Ann. § 37-10-105(A). Rather, the triggering language is "[i]f the court finds as a matter of law that the agreement or transaction is unconscionable . . . at the time it was made, or was induced by unconscionable conduct." S.C. Code Ann. § 37-10-105(C).

The unconscionability remedies set forth in S.C. Code Ann. § 37-10-105(C) are not available for Attorney Preference Statute violations. Section 37-10-105(C) only applies when either (1) "the ***agreement or transaction*** is unconscionable pursuant to Section 37-5-108 at the time it was made," or (2) "[the ***agreement or transaction***] was induced by unconscionable conduct." S.C. Code Ann. § 37-10-105(C) (emphasis added). "Agreement" is defined under the Consumer Protection Code as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance." S.C. Code Ann. § 37-1-301(3). While not defined in the Consumer Protection Code, a "transaction" is generally defined as "an exchange or transfer of goods, services, or funds." Merriam Webster' Collegiate Dictionary 1327 (11th ed. 2007). Ascertaining whether a consumer has a preference for an attorney prior to a mortgage loan closing is not a "bargain in fact" or "transfer of goods." Where an attorney preference disclosure form is used, the parties do not exchange consideration for it—it is not a separate transaction. Further, as discussed below, the AIP Checklist was not incorporated into the mortgage loan contract, and it did not alter any of the substantive terms of that contract. Because ascertaining a borrower's attorney preference is not an

"agreement" or "transaction," subsection (C) does not apply to violations of the Attorney Preference Statute.[10]

Furthermore, construing subsection (C) to impose penalties for a violation of the Attorney Preference Statute would nullify the "1997 amendments to § 37-10-105[, which] changed the penalty structure to a per debtor penalty and prohibit[ed] class actions." Tilley v. Pacesetter Corp., 355 S.C. 361, 370, 585 S.E.2d 292, 296 (2003). "The purpose of the amendment was to **decrease** liability for violations of the attorney and insurance preference statutes." Id. (emphasis added). Addressing the 1997 amendments and how they applied to violations of the Attorney Preference Statute, the South Carolina Supreme Court explained that subsection (A) is the only "relevant part" of § 37-10-105 to consider. Id. Thus, the Special Referee erred in holding that subsection (C) applied to the Estate's attorney preference claims.[11]

B. The Special Referee erred in holding that Quicken Loans' conduct was unconscionable under Section 37-10-105(C).

Even if the remedies in Section 37-10-105(C) are available for attorney preference claims, the Special Referee erred in finding that Quicken Loans' conduct was unconscionable in this case.

---

[10] The General Assembly added subsection (C) to Section 37-10-105 in 1996 to provide borrowers with a remedy for unconscionable first lien mortgage transactions. Such a remedy was necessary because first lien mortgage transactions are not subject to the Consumer Protection Code outside of Chapter 10. See S.C. Code Ann. § 37-3-105 (stating that a consumer loan does not include a first lien mortgage). Prior to the amendment adding subsection (C), therefore, borrowers had no remedy for first mortgage loans that otherwise satisfied the unconscionability criteria in S.C. Code Ann. § 37-5-108.

[11] The Order cites Green Tree Financial Corp. v. Fleming, 95-CP-40-4282 (S.C. Comm. Pleas Feb 2, 2002) to support its conclusion that Section 37-10-105(C) applies to attorney preference claims. In Fleming, the lender affirmatively admitted that it had no policy or procedure to attempt to comply with Section 37-10-102. Moreover, the lender in Fleming did not raise the issue of whether Section 37-10-105(C) applied to attorney preference claims, and the South Carolina Supreme Court has since recognized that unconscionability is not available for violations of the Attorney Preference Statute. See Tilley, 355 S.C. at 370, 585 S.E.2d at 296 (explaining that subsection (A) is the only "relevant part" of § 37-10-105 to consider when addressing attorney preference violations).

The Estate did not show that any provision of the Note or Mortgage was unconscionable when they were entered into. It also did not show that Mrs. Wilson was induced into entering the mortgage loan by any wrongful action by Quicken Loans. Thus, the Special Referee erred by granting summary judgment in favor of the Estate on the issue of unconscionability.

Under South Carolina law, unconscionability is defined as "the absence of meaningful choice on the part of one party due to one-sided contract provisions, ***together with*** terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 85, 749 S.E.2d 139, 148 (Ct. App. 2013) (emphasis added). South Carolina law thus requires both procedural and substantive unconscionability. See Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996) (affirming finding of no Consumer Protection Code violation where the plaintiffs had a meaningful choice in accepting a procurement fee and continuing with the transaction). The mere fact that a contract is one of adhesion does not make it unconscionable; unconscionability "requires a greater showing." Lackey v. Green Tree Financial Corp., 330 S.C. 388, 395, 498 S.E.2d 898, 901 (Ct. App. 1998).

The Estate did not establish substantive unconscionability. The refinance loan provided favorable terms to the Wilsons. It provided them a 3.99% fixed interest rate, which was 2.385% lower than their existing loan. (Compare Note; R. 348, with Wells Fargo Payoff Statement; R. 369.) It also gave them $14,178.66 in cash, which accomplished their stated purpose for seeking a refinance loan. (Settlement Statement; R. 374; see also 11/7/11 Loan App.; R. 341.) The Wilsons were able to afford their monthly payments, and the loan did not go into default for nearly three years, which undercuts any argument of substantive unconscionability. (Am. Compl. ¶ 13; R. 38.); see also Moore v. Wells Fargo Bank, No. 09-40229, 2012 Bankr. LEXIS 1085, at *14 (Bankr. S.D.

W. Va. 13, 2012) (holding as a matter of law that there was no basis for plaintiff's substantive unconscionability claim where plaintiff acknowledged that she was able make payments for at least a year after she received it).

The Estate did not identify a single term of the mortgage loan that was unconscionable. It further failed to identify any term that would have been different if Mrs. Wilson had expressed a preference for an attorney to close the loan. Facing allegations identical to those raised by the Estate, United States District Court Judge Michele Childs recently held that allegations of attorney preference violations do not constitute substantive unconscionability. Mosely v. Quicken Loans, Inc., No. 1:16-cv-00384, 2016 WL 3551999, at *4 (D.S.C June 30, 2016). Judge Childs explained that "[e]ven though Plaintiff has alleged that Defendant's conduct deprived him of a meaningful choice as to his choice of attorney, Plaintiff has not alleged that any term of the loan agreement was so oppressive that no reasonable person would accept the agreement." Id. (dismissing unconscionability claims based solely on alleged attorney preference violation). Because the identity of the closing attorney did not render any of the loan's terms substantively unconscionable, the Estate is not entitled to relief under Section 37-10-105(C). See Fanning, 322 S.C. at 403, 472 S.E.2d at 245.

Moreover, the Estate did not establish procedural unconscionability. In order to render a finding of unconscionability, the Special Referee must have given consideration to several factors, including whether "the seller, lessor, or lender knowingly has taken advantage of the inability of the consumer or debtor reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy, inability to understand the language of the agreement, or similar factors." S.C. Code Ann. § 37-5-108(4)(a)(iv). The Estate submitted no evidence to show that any of these factors exist in this case. See Mosley, 2016 WL 355199, at *4 (holding allegation of

attorney preference violation is "not consistent with the factors listed under section 37-5-108(4)"). There was no evidence showing that Mrs. Wilson was physically or mentally infirm when she signed the AIP Checklist, the Note, or the Mortgage. There was also no evidence that Mrs. Wilson was ignorant, illiterate, or unable to understand the terms of the Loan. Moreover, even if Mrs. Wilson did have any of these characteristics, the Estate did not show that Quicken Loans knew about them or that it intentionally exploited them.

The Estate further failed to identify any terms that were hidden from Mrs. Wilson when she applied for, and eventually closed on, the loan. To the contrary, South Carolina law presumes that Mrs. Wilson understood the terms of the documents she signed. See Sanders v. Allis Chalmers Mfg. Co., 237 S.C. 133, 139 115 S.E.2d 793, 796 (1960) (holding that a party who signs a contract is presumed to know its terms and is bound them). A South Carolina licensed attorney, Carlton Robinson, closed the loan and explained the closing documents and applicable laws to the Wilsons. (Robinson Aff. ¶¶ 6-7; R. 462.) Moreover, the only evidence concerning how the Wilsons themselves viewed the closing process states that they were "treated to outstanding service by Quicken personnel" and "***[a]ll questions [they] asked [were] answered effectively and very helpful.***" (Client Survey (emphasis added); R. 388.) Moreover, the Wilsons were free to obtain financing from any lender of her choosing. Therefore, the Estate failed to show that Mrs. Wilson and her husband lacked any meaningful choice before entering into the Loan. Thus, the Estate failed to establish procedural unconscionability, and the Special Referee erred by ruling in its favor. See Fanning, 322 S.C. at 403, 472 S.E.2d at 245.

Lastly, the Estate did not establish unconscionable inducement. The Second Amended Answer and Counterclaim does not contain any allegations concerning unconscionable inducement. Indeed, Quicken Loans did not induce Mrs. Wilson into the Loan by making

representations to her about the identity of the closing attorney. There is also no evidence that Mrs. Wilson decided to apply for, and eventually enter into, the Loan based on the identity of the closing attorney. Because the ability to express a preference for a closing attorney did not induce Mrs. Wilson 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."); see also McFarland v. Wells Fargo Bank, N.A., 810 F.3d 273, 285 (4th Cir. 2016) (recognizing that unconscionable inducement claims under state consumer protection codes generally require a showing of "affirmative misrepresentations or active deceit"). The Special Referee erred in holding that the Estate was entitled to relief under Section 37-10-105(C).

C. The Special Referee's findings of an unlawful waiver and unlawful furnishing of an attorney do not support a finding of unconscionability.

In arguing that the loan was unconscionable, the Estate ignored the actual, favorable terms of the Loan, as well as Mrs. Wilson's personal experiences in applying for it. Instead, the Estate argued, and the Special Referee held, that the Loan was unconscionable because during its origination there was (1) a waiver in violation of S.C. Code Ann. § 37-1-107 and (2) an unlawful furnishing of an attorney in violation of S.C. Code Ann. § 40-5-320 and conduct contrary to the holding in State v. Buyer's Service, 292 S.C. 426, 357 S.E.2d 15 (1987). Neither of these arguments establish procedural or substantive unconscionability or unconscionable inducement.

Section 37-1-107 only bars attempts by creditors to force a borrower to waive a right under the South Carolina Consumer Protection Code as a condition of an agreement or settlement. S.C. Code Ann. § 37-1-107 ("[A] buyer, lessee, or debtor may not waive or agree to forego rights or benefits under this title."). Section 37-1-107 is a self-enforcing remedy—if a creditor obtains an

improper waiver, the waiver is simply ineffective and the consumer's rights remain. It is not a duplicative protection of the attorney preference right already guaranteed by Section 37-10-102. See State v. Sweat, 379 S.C. 367, 377, 665 S.E.2d 645, 651 (Ct. App. 2008) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.").

Further, waiver is a fact issue, and there is no evidence it occurred here. The AIP Checklist does not state that Mrs. Wilson waived her attorney preference rights by signing it. The form allowed her to express a preference—she had none. "A waiver is a voluntary and intentional abandonment or relinquishment of a known right." King v. James, 388 S.C. 16, 29, 694 S.E.2d 35, 42 (Ct. App. 2010). Courts construing non-waiver statutes similar to Section 37-1-107 have found that they apply to binding contracts that expressly state the borrower is waiving a specific right or claim under a consumer protection statute. See Schneider v. Liberty Asset Mgmt., 251 P.3d 666, 669 (Kan. Ct. App. 2011) (no waiver where contract did not expressly state that consumer was waiving claims under the Kansas Consumer Protection Act Claim); see also Prudential Ins. Co. of Am. v. Jefferson Assoc., Ltd., 896 S.W.2d 156, 164 (Tex. 1995) (holding that a clause expressly stating that consumer was waiving statutory rights was unenforceable but a provision stating that consumer was taking property "as is" was not a waiver of statutory guaranty rights and did not violate a non-waiver statute); Groleau v. Russo-Gabriele, 32 Mass. L. Rptr. 513, at *17 (Mass. Super. Ct. Dec. 5, 2004) (no waiver where addendum to contract did "not waive the owner's statutory rights by its terms . . . [and did] not waive rights in a clear and conspicuous way, which would ordinarily be expected in a consumer transaction where the business person claims a waiver of statutory consumer protection rights.").

Mrs. Wilson voluntarily signed the AIP Checklist, which stated clearly: "I (We) have been informed by the lender that I (we) have a right to select legal counsel to represent me (us) in all matters of this transaction relating to the closing of the loan." (AIP Checklist; R. 346.) She did not waive or forgo anything by signing the AIP Checklist. See James, 388 S.C. at 29, 694 S.E.2d at 42 (stating there must be a "relinquishment" of a right for waiver to exist). Therefore, Quicken Loans did not violate Section 37-1-107, and even if it did, the result is that Mrs. Wilsons' attorney preference rights remain—not unconscionability or any other remedy.

Furthermore, the Special Referee also erred in finding unconscionability based on Quicken Loans' alleged violation of Section 40-5-320 and the holding of Buyer's Service. Section 40-5-320, as recognized in Buyer's Service, prohibits corporations from furnishing legal advice, practicing as an attorney at law, or holding themselves out to the public as being able to do either. See Buyers Serv. Co., 292 S.C. at 430, 357 S.E.2d at17. Section 40-5-320 is a criminal enforcement statute, and it does not provide a remedy for alleged violations of the Attorney Preference Statute.

The hearing on the Estate's Motion for Partial Summary Judgment was a summary proceeding without a jury. It was not a proceeding in which the Special Referee could determine that Quicken Loans violated a criminal statute, and by doing so, Quicken Loans was denied its constitutional right to a jury trial despite its pending motion requesting one. *See Rainey v. Haley*, 404, S.C. 320, 332, 745 S.E.2d 81, 87 (2013 (Beatty, J. concurring) ("[A] declaratory judgment action is not the appropriate proceeding for determining guilt or innocence in criminal matters. If we were to permit this type of relief, Respondent would be denied her constitutional right to a jury trial." (citing W.E. Shipley, Annotation, *Validity, Construction, and Application of Criminal Statutes or Ordinances as Proper Subject for Declaratory Judgment*, 10 A.L.R.3d 727, § 2 (1966

& Supp.2013)). Moreover, the Estate does not have authority to enforce a criminal statute such as Section 40-5-320, and allowing it to do so indirectly through an attorney preference claim was improper. *Id.* (explaining that private citizens lack authority to seek relief through criminal statutes).[12] The Special Referee erred, therefore, by holding that Section 40-5-320 and Buyer's Service could be used to establish unconscionability for purposes of Section 37-10-105(C). The Order should be reversed.

III. The Estate's attorney preference counterclaim under section 37-10-105(a) is time-barred.

Section 37-10-105(A) states that "[n]o debtor may bring an action for a violation of this chapter more than three years after the violation occurred." S.C. Code Ann. § 37-10-105(A). The loan closed on December 14, 2011. (Note; R. 348.) The Estate did not file its counterclaim until more than three years later on June 19, 2015. Thus, it is time-barred.

There is an exception to the three-year statute of limitations that applies to affirmative defenses: "This subsection does not bar a debtor from asserting a violation of this chapter in an action to collect a debt . . . *as a matter of defense* by recoupment or set-off in such action." S.C. Code Ann. § 37-10-105(A) (emphasis added). The Special Referee erred by taking this exception for affirmative defenses and extending it to the Estate's counterclaim under Section 37-10-105(A). (Order p. 10-11, R. 10-11.)

[12] To the extent the Order suggest that Quicken Loans engage in the unauthorized practice of law, it should also be reversed. Determining whether an act is the unauthorized practice of law is within the sole province of the South Carolina Supreme Court, and therefore, such allegations cannot be used to support civil causes of action. See Hambrick v. GMAC Mortgage Corp., 370 S.C. 118, 124, 634 S.E.2d 5, 8 (Ct. App. 2006) (affirming dismissal of common law claims because they were "intertwined with" allegation that lender in loan closing engaged in the unauthorized practice of law because no private right of action exists for the unauthorized practice of law).

The Estate's counterclaim is not a "defense" because it affirmatively seeks monetary damages, civil penalties, and attorneys' fees—regardless of whether Quicken Loans prevails on its foreclosure action. (Sec Am. Answer & Countercl. ¶¶ 39 & 49; R. 54-55); see also Branch Banking v. Gray, 2015-UP-439, 2015 WL 5050823, at *1 (S.C. Ct. App. Aug. 26, 2015) (applying three-year statute of limitations to bar counterclaims asserted under Section 37-10-105(A)). In fact, the Estate conceded during the summary judgment hearing that it was limited to receiving a setoff under Section 37-10-105(A) due to the statute of limitations. (Hr. Trans. p. 37 ("[T]hat's a setoff, we admit to that . . . ."), R. 109.) Quicken Loans is not seeking money damages in a deficiency judgment (Am. Compl. p.1; R. 36.), so there is nothing to set off by way of a defense. See First Fed. Sav. Bank v. Knauss, 296 S.C. 136, 138, 370 S.E.2d 906, 907 (Ct. App. 1988) (noting that setoff is a proper defense to a foreclosure action only if deficiency is sought). As such, this portion of the Order should be reversed.

IV. The Special Referee erred in denying Quicken Loan's jury trial demand and Motion to Amend the Pleadings.

Rule 38 of the South Carolina Rules of Civil Procedure "preserves inviolate" the right of a trial by jury as declared by the Constitution or as given by a statute of South Carolina. Rule 38(a), SCRCP. Pursuant to Rule 53(b), after a case has been referred to a special referee, [a]ny party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury, and upon the filing of a jury demand, the matter shall be returned to the circuit court." Rule 53(b), SCRCP.

On October 22, 2015, Mrs. Wilson's sons, Wayne and Calvin Wilson (the "Sons"), filed an Answer and Counterclaim asserting counterclaims identical to the Estate's. (Sons' Answer & Countercl.; R. 57.) Quicken Loans moved to strike the Son's Answer and Counterclaim as untimely under Rule 12(f). (Mot. to Strike; R. 152.) Quicken Loans' Motion to Strike tolled its time to answer the Sons' Answer and Counterclaims. See Rule 12(a), SCRCP. While its Motion

to Strike was still pending, Quicken Loans filed a Notice of Demand for Jury Trial pursuant to Rule 38, SCRCP. Quicken Loans' jury demand was timely filed before "the last pleading directed" to the issues raised in the Sons' counterclaims was served. See Rule 38, SCRCP (allowing jury trial demand to be filed within ten days of the last pleading). The Special Referee erred, therefore, by failing to immediately transfer this case to the Circuit Court's general docket for a jury trial. Rule 53, SCRCP.[13]

The Special Referee further erred by denying Quicken Loans' Motion to Amend the Pleadings to assert a breach of contract claim based on a Compliance Agreement signed by the Wilsons and to demand a jury trial on that claim.[14] The Special Referee held that Quicken Loans' breach of contract claim was bared by the Probate Code's no-claim statute, S.C. Code Ann. § 62-3-803. (Order p.2, R. 2) This holding is incorrect because Quicken Loans' claim did not arise until the Estate breached it on March 7, 2016, which was after Mrs. Wilson's death. (Mot. to Am. Ex. A; R. 402.) Section 62-3-803(c)(2) states that "[a]ll claims against the decedent's estate which arise at or after the death of the decedent . . . are barred . . . unless presented . . . ***within the later*** of eight months after it arises [or one year after the decedent's death]." S.C. Code Ann. § 62-3-803(c)(2) (emphasis added). Because Quicken Loans sought leave to assert this claim within eight months after it arose, it was not barred by Section 62-3-803. Therefore, the Order should be

[13] Further, because the Estate's counterclaims attempt to interject allegations of criminal liability, Quicken Loans has a constitutional right to a jury trial on those counterclaims. *See supra*, Part II.C.

[14] The Compliance Agreement required the Wilsons to re-sign or correct any of the closing documents that contained errors of fact or law. (See 2/12/16 Ltr.; R. 422.) On February 12, 2016, Quicken Loans made a written demand for the Estate to fulfill its obligations under the Compliance Agreement. (Id.) The Estate breached the Compliance Agreement by failing to re-execute the relevant documents within seven days of Quicken Loans' demand. (See id.)

reversed, and Quicken Loans should be allowed to assert this claim and have it decided via a jury trial.

V. The Special Referee erred by relying upon protected testimony from a non-attorney preference case.

In order to be considered, materials offered in support of a motion for summary judgment "must set forth facts which would be admissible in evidence." Rule 56(e), SCRCP; see also Montgomery v. CSX Transp., Inc., 362 S.C. 529, 543, 608 S.E.2d 440, 447 (Ct. App. 2004) ("Our appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence."). Aside from the AIP Checklist, which shows Mrs. Wilson had no preference for an attorney, the Special Referee relied almost exclusively upon protected and inadmissible testimony from an unrelated lawsuit involving different parties and different claims—non-attorney preference claims. This testimony came from an ongoing proceeding in the original jurisdiction of the South Carolina Supreme Court captioned as Vance Boone et al. v. Quicken Loans, Ap. Case. No. 2013-002288 (the "Boone" action). (Order. pp. 2-3, R. 2-3.)

A. Testimony from the Boone action was inadmissible in this case due to the Confidentiality Order.

In the Boone action, Judge Diane Goodstein, sitting as a Special Referee, entered a Confidentiality Protective Order ("Confidentiality Order") due to the confidential and commercially sensitive nature of the testimony and documents at issue. (Confidentiality Order; R. 481.) The Confidentiality Order allowed either party to designate documents and deposition transcripts as confidential so that could not be used for any purpose outside the Boone action. (Id. at ¶ 3; R. 482.) The Estate's attorneys are also the attorneys for the plaintiffs in the Boone action and are, therefore, bound by the Confidentiality Order.

Pursuant to the Boone Confidentiality Order, Quicken Loans designated as confidential pages 10-53 of the transcript of the deposition of Jeffrey Campbell and pages 11-43 of the transcript of the deposition of Jenna Randall, both of whom were Quicken Loans corporate representatives on topics other than attorney preference. (See Letter dated June 22, 2015; R. 466.) At the evidentiary hearing, counsel for the Boone plaintiffs read these confidentially marked deposition excerpts into the record. These confidential deposition excerpts contained the testimony relied upon by the Special Referee in the Order. (See Ex. 8 to Defendant's Appendix to Motion for Partial Summary Judgment; R. 225.) Specifically, the Special Referee's Order in this case relies upon testimony from pages 10-11, 13-29, and 32-35 of the deposition of Jeffrey Campbell and pages 14, 24, 33-36, and 41 of the deposition of Jenna Randal, all of which were designated as confidential in Boone. (See id.) Quicken Loans also designated a Master Services Agreement between Quicken Loans and Title Source, Inc. as Confidential. Over Quicken Loans' objection in this case, the Estate presented the terms of this confidential document to the Special Referee along with testimony of Brian Hughes (who is not an employee or representative of Quicken Loans) discussing those terms—even though the contract was not drafted or executed until over two years after Mrs. Wilson's loan closing. (See id.) The Special Referee relied upon this protected evidence from Boone in his Order in this case. (See Order. pp. 8 & 16, R. 8, 16.)

The fact that the deposition testimony was read during the evidentiary hearing in the Boone action did not remove it from the protections and obligations imposed by the Confidentiality Order. Indeed, the Confidentiality Order expressly states as follows:

> [A]ll material previously designated confidential shall continue to be treated as subject to the full protections of this Order until one of the following occurs:
>
> (1) the party who claims that the documents are confidential withdraws such designation in writing;

> (2) the party who claims that the documents are confidential fails to move timely for an Order designating the documents as confidential as set forth in paragraph 8.b. above; or
>
> (3) the court rules that the documents should no longer be designated as confidential information.

(Confidentiality Order ¶ 8(c).) None of these three events have occurred. The Confidentiality Order further states that "[a]ll provisions of this Order restricting the use of documents designated confidential shall continue to be binding after the conclusion of the litigation unless otherwise agreed." (Id. at ¶ 9(a).)

Courts across the country have repeatedly rejected attempts to offer evidence that was subject to a protective order in an unrelated matter. See e.g., Hunter Eng'g Co. v. Hennessy Indus., Inc., Case No. 4:08 CV 465, 2010 WL 1186454, at *6 (E.D. Mo. Mar. 29, 2010) (enjoining and holding party in contempt for using documents in subsequent litigation which were obtained in prior litigation and subject to confidentiality protective order); see also Wolters Kluwer Fin. Servs. Inc. v. Scivantage, Case No. 07 CV 2352, 2007 WL 1498114, at *9 (S.D.N.Y. May 23, 2007) (enjoining use of documents subject to confidentiality protective order); see also In re Biovail Corp. Sec. Litig., 247 F.R.D. 69, 70 (S.D.N.Y. 2007) (same). Because the deposition testimony submitted by the Estate over Quicken Loans' objection was subject to the Confidentiality Order, the Special Referee erred by considering it.

B. Testimony from the Boone action was inadmissible under the South Carolina Rules of Evidence.

Testimony from the Boone action was also inadmissible pursuant to Rule 404(b) of the South Carolina Rules of Evidence. Rule 404(b) states that that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. "Evidence of similar acts has the potential to be

exceedingly prejudicial." Pope v. Heritage Communities, Inc., 395 S.C. 404, 426-27, 717 S.E.2d 765, 777 (Ct. App. 2011) (citing Branham v. Ford Motor Co., 390 S.C. 203, 230, 701 S.E.2d 5, 19 (2010)). "Accordingly, a plaintiff ***must*** present facts showing the other acts were substantially similar to the event in issue." Id. (emphasis added); see also Whaley v. CSX Transp., Inc., 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005) ("Because evidence of other accidents may be highly prejudicial, [a] plaintiff must present a factual foundation for the court to determine that the other accidents were substantially similar to the accident at issue.").[15]

Here, the Boone action, which is still pending, does not concern attorney preference claims. Moreover, the Estate did not present any evidence concerning the facts that were at issue in the Boone action. In his Order, the Special Referee identified the names and positions of the deponents, but he did not make any findings as to how the facts and issues in the Boone action are substantially similar to the facts of this case. (See Order p. 2, R. 2.) Furthermore, the Estate offered no evidence concerning the people and processes that were actually involved in the origination of Mrs. Wilson's loan. Despite this lack of evidence, the Special Referee simply assumed that the testimony from the Boone action, which comes from people who had no personal involvement with Mrs. Wilson's loan, accurately describes how Mrs. Wilson's loan application was handled and how her preference for an attorney was ascertained. (See id.). Because the Estate did not establish a foundation for how the testimony from the Boone action is substantially similar

[15] Notably, South Carolina Rule of Civil Procedure 32, which governs the use of deposition transcripts as evidence at hearings and trial, does not provide a procedure for using deposition testimony from one action as substantive evidence in an unrelated proceeding. See Rule 32, SCRCP. Furthermore, Quicken Loans' representatives were not identified to give Rule 30(b)(6) testimony on attorney preference issues. Therefore, any testimony from the Boone action touching on attorney preference issues was lay testimony that cannot bind, or be used against, Quicken Loans.

to the instant case, the Special Referee erred by considering that evidence. The Order, therefore, should be reversed.

CONCLUSION

Mr. and Mrs. Wilson benefited substantially from mortgage transaction at issue, obtaining a significant reduction in their interest rate and some $14,000 in cash. The Wilsons signed the AIP Checklist acknowledging their right to select legal counsel and indicating that they would not use the services of legal counsel. They did not express, at any time, a desire for specific counsel of their choice, and did not express any problem with the attorney that ultimately closed the transaction. The loan closed without issue, and the Wilsons indicated they received "excellent" service. They made their payments for nearly three years. The loan only went into default after Mr. Wilson had died, and just before Mrs. Wilson passed away. Every indication is that the Wilsons were satisfied with the transaction.

There was no attorney preference violation in this case. Quicken Loans properly ascertained the Wilsons' preference through the AIP Checklist, in compliance with the safe harbor provisions of the Attorney Preference Statute. Even if the AIP Checklist did not satisfy the safe harbor, there exists a genuine dispute, with the need for additional discovery, as to whether Quicken Loans otherwise satisfied the statute. Moreover, the Special Referee erred in concluding that Quicken Loans' conduct was unconscionable, triggering availability of remedies including refusing to enforce the agreement. The transaction was beneficial to the Wilsons, and there is no indication any attorney preference violation harmed the Wilsons in any way.

For these reasons, and the additional reasons set forth above, this Court should reverse the Special Referee's Order and remand this case so that the parties may complete discovery and conduct a trial.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

B. Rush Smith III
SC Bar No. 012941
E-Mail: rush.smith@nelsonmullins.com
A. Mattison Bogan
SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
Carmen Harper Thomas
SC Bar No. 76012
E-Mail: carmen.thomas@nelsonmullins.com
Brian M. Barnwell
SC Bar No. 78249
E-Mail: brian.barnwell@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Quicken Loans Inc.

Columbia, South Carolina

January 10, 2017

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

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..... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

B. Rush Smith III
SC Bar No. 012941
E-Mail: rush.smith@nelsonmullins.com
A. Mattison Bogan
SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
Carmen Harper Thomas
SC Bar No. 76012
E-Mail: carmen.thomas@nelsonmullins.com
Brian M. Barnwell

SC Bar No. 78249
E-Mail: brian.barnwell@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Quicken Loans Inc.

Columbia, South Carolina

January 10, 2017