

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

RECEIVED

DEC 08 2017

SC Court of Appeals

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.

**RESPONSE BRIEF OF APPELLANT TO THE SOUTH CAROLINA
DEPARTMENT OF CONSUMER AFFAIRS' AMICUS CURIAE BRIEF**

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.

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STATEMENT OF ISSUES ON APPEAL AND OF THE CASE

Quicken Loans Inc. (“Quicken Loans”) hereby responds to the Amicus Curiae Brief filed by the South Carolina Department of Consumer Affairs (“the Department”). Quicken Loans hereby adopts and incorporates by reference the statement of issues on appeal and statement of the case set forth in its Final Brief of Appellant.

INTRODUCTION

As noted in previous filings, the Department is using the Court’s amicus provisions to circumvent the normal adjudicative process that governs it. It is also attempting to offer expert opinions on behalf of the Estate. In addition to these procedural deficiencies, the Department’s brief is substantively flawed for numerous reasons. Like the Special Referee below, the Department relies heavily upon evidence from an unrelated case captioned as *Boone v. Quicken Loans, Inc.*, 420 S.C. 452, 803 S.E.2d 707 (2017). Nevertheless, the Department asks this Court to make findings that are inconsistent with the South Carolina Supreme Court’s 5-0 decision in that case. The Department cannot ask this Court to rule contrary to the Supreme Court.

In addition to the *Boone* record, the Department relies upon information from its own investigations concerning unrelated parties. This information is not in the record on appeal, and Quicken Loans has not been able to examine and verify the information first hand. Information that is not in the record and issues that were not briefed by the parties cannot support the Special Referee’s order granting summary judgment for the Estate (the “Order”).

Next, the Department asks this Court to act as an enforcement agency by shifting the burden of proof onto Quicken Loans to establish compliance. This is not the law. As the claimant in a civil action, the Estate had the burden of proof to establish a violation. The Department also asks this Court to impose obligations on lenders that do not exist in the Attorney Preference Statute.

Neither the Department, nor the Court, have the authority to usurp the role of the General Assembly in such a manner.

Finally, the Department asks this Court to combine numerous, unrelated provisions of the Consumer Protection Code to create a new unconscionability remedy for attorney preference violations. Again, the Department does not have authority to create law. It also cannot show that the record evidence indisputably supports a finding of unconscionability.

The Department's brief is not supported by the record or the law. It should be rejected, and the Special Referee's Order should be overruled.

ARGUMENT

I. THE DEPARTMENT ASKS THIS COURT TO MAKE FINDINGS INCONSISTENT WITH *BOONE*.

The Department's brief relies heavily on testimony from *Boone*. As explained below, this inadmissible evidence is not part of the record before this Court, cannot be considered on appeal, and cannot be used to support summary judgment in favor of the Estate. Regardless, however, evidence from *Boone* does not support the Department's position or the Special Referee's Order.

In *Boone*, the plaintiffs argued that Quicken Loans' refinance loan origination process constitutes the unauthorized practice of law ("UPL"). *Boone*, 420 S.C. at 455, 803 S.E.2d at 709. The South Carolina Supreme Court carefully reviewed the same evidence the Department asks this Court to rely upon and found that "licensed South Carolina attorneys were involved at every critical step of these refinancing transactions, as required by our precedents." *Id.* The Court "also f[ou]nd that requiring more attorney involvement would not effectively further our stated goal of protecting the public from the dangers of UPL." *Id.* The Supreme Court appreciated that Quicken Loans consulted with knowledgeable South Carolina attorneys to make sure its practices complied with our laws before expanding its business into this State:

Prior to expanding into the South Carolina market, Quicken Loans engaged South Carolina attorneys—*with expertise in real estate transactions* and knowledgeable of our UPL jurisprudence—to review the Quicken Loans refinance procedure. After reviewing the procedure, the attorneys opined that the procedure would not constitute UPL, as evidenced by the sufficient involvement of a South Carolina lawyer at each critical step.

Id. at 456, 803 S.E.2d at 709 (emphasis added).

The Department asks this Court to ignore the findings in *Boone* and to strike down an origination process that the Supreme Court has already approved. This is improper. Quicken Loans relied on opinions from experienced South Carolina lawyers on how to comply with our State’s laws regarding real estate transactions. *Boone*, 420 S.C. at 456, 803 S.E.2d at 709. South Carolina lawyers then supervised every critical step of the origination and closing process. *Id.* Quicken Loans relied upon these attorneys to do their jobs and the holding in *Boone* shows that Quicken Loans complied with the law in doing so. *Boone*, 420 S.C. at 455, 803 S.E.2d at 709. It is wrong for the Department to adopt the Estate’s unfounded argument that this process equates to a *per se* violation of the Attorney Preference Statute or unconscionability.

If the Court does decide to rely on the *Boone* testimony, it must rule in favor of Quicken Loans and overturn the Special Referee. Looking at this same evidence, the Supreme Court found that Quicken Loans informed each borrower that “he or she has the right to select legal counsel to represent him or her in the transaction and asked whether he or she has a preference as to a specific attorney.” *Boone*, 420 S.C. at 456, 803 S.E.2d at 709 (citing S.C. Code Ann. § 37-10-102). When it denied the plaintiffs’ petition for rehearing, the Supreme Court noted that this statement from *Boone* was not intended to bar “further inquiry *in other litigation* nor amount to a final

determination of compliance.”¹ *Boone v. Quicken Loans, Inc., et al.*, Ap. No. 2013-002288 (Order dated Sept. 13, 2017) (emphasis added). This qualifier, which allows a borrower to present evidence that Quicken Loans failed to apply the process that the Supreme Court blessed in his or her specific transaction, does not apply here. The Department and the Estate’s attorneys are not inquiring about an attorney preference violation based on a new record and evidence from the Wilsons’ transaction. Rather, they are relying on the same evidence from *Boone* that the Supreme Court held was compliant with South Carolina law. This Court cannot rely upon the *Boone* record to rule contrary to the Supreme Court, and the record on appeal in this case does not support the Special Referee’s Order granting summary judgment in favor of Wilson.

II. THE DEPARTMENT RELIES UPON EVIDENCE THAT IS NOT PROPERLY IN THE RECORD FOR THIS CASE.

Summary judgment may only be based on the record created in the case in which it is sought. Rule 56(c), SCRPC (“The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”) Materials offered in support of a motion for summary judgment “must set forth facts which would be admissible in evidence.” Rule 56(e), SCRPC; *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.”).

¹ The Court did so because it makes a case-by-case determination on UPL matters. *See In re Unauthorized Practice of Law Rules Proposed by S.C. Bar*, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992).

Additionally, Rule 213 states that an amicus curiae brief “*shall* be limited to argument of the issues on appeal as presented by the parties.” Rule 213, SCACR (emphasis added). An “appellate court will not consider any fact which does not appear in the Record on Appeal.” Rule 210(h), SCACR.

A. EVIDENCE FROM *BOONE* CANNOT SUPPORT SUMMARY JUDGMENT.

As explained in prior briefing, summary judgment should not have been granted because discovery was not complete, and the Estate did not establish a record to support its claims. (Quicken Loans’ Br. Part I.B.2.) The Estate, and now the Department, try to mask this deficiency by relying upon evidence in a record from a different case, involving different issues and different parties with individual factual inquires.

As an initial matter, these materials are subject to a confidentiality order entered in *Boone* and are not publicly available. (Quicken Loans’ Br. Part V.A.) The Estate only has this information because its lawyers gave the materials to it in violation of the confidentiality order. (*See id.*). Indeed, United States District Court Judge Michelle Childs recently held that these exact materials are still subject to the confidentiality order entered in *Boone*. *See e.g., Messex v. Quicken Loans Inc.*, No. 2:15-cv-04773-JMC at Dkt. Nos. 134-35 (Minute Orders entered Dec. 5, 2017). The Estate should not have been allowed to use these materials below, and the Department should not be allowed to use them here to argue for the affirmance of the Special Referee’s Order.

Moreover, South Carolina common law does not allow the use of deposition testimony taken in one proceeding to be offered as evidence in unrelated proceedings between different parties. *Holden v. Cantrell*, 88 S.C. 281, 70 S.E. 815 (1911). Likewise, South Carolina Rule of Civil Procedure 32, which governs the use of deposition transcripts in hearings and trial, does not provide for the use of deposition testimony in unrelated proceedings. *See* Rule 32, SCRPC. Even

under Federal Rule 32(a)(8), a deposition taken in an earlier action may only be used in a later action if it involves “the same subject matter between the same parties.”

The Estate and the Department were not parties to *Boone*, and Quicken Loans’ witnesses in *Boone* were not designated under Rule 30(b)(6) to testify on attorney preference issues. Therefore, neither party had the opportunity to examine and cross-examine the witnesses on the issues relevant to this case. As such, testimony from *Boone* cannot be used to support the Special Referee’s Order. *See Labelle v. Philip Morris Inc.*, 243 F. Supp. 2d 508, 520 (D.S.C. 2001) (testimony from another case was inadmissible where parties in the case it was offered in did not have opportunity to develop testimony on the relevant issues). Because the Department’s brief relies almost exclusively on evidence from *Boone*, the Court should not consider it.²

B. NEW ISSUES RAISED IN THE DEPARTMENT’S AMICUS BRIEF CANNOT SUPPORT THE SPECIAL REFEREE’S ORDER.

The Department’s brief also relies on information from its own unrelated investigations of *other parties*—information that Quicken Loans has not been able to examine or verify first hand. Such information is not in the record on appeal before this Court and was not before the Special Referee below:

- On page 3, the Department states it has issued “more than one hundred Administrative Interpretations.” These interpretations are not identified in the brief, are not in the record on appeal, and were not briefed by the parties.
- On pages 4-5, the Department discusses evidence that it gathered and considered in other, unrelated cases involving the Attorney Preference Statute. These cases are not identified by the Department, nothing from, or about, these cases is in the record on appeal, and issues pertaining to them were not briefed by the parties.

² The *Boone* evidence is also inadmissible because the Estate did not lay a foundation to establish that the issues in *Boone* are substantially similar to the issues in the instant case. (Quicken Loans’ Br. Part V.B. (citing Rule 404(b), SCRE).)

- On pages 7-8, 13, and 15 the Department discusses Administrative Interpretation 10.102(a)-9301. The parties did not brief any issues concerning A.I. 10.102(a)-9301, and in any event, it is not relevant to this case.
- On page 10, the Department discusses its “experiences” with closings occurring prior to 1996. Nothing pertaining to the Department’s pre-1996 closing “experiences” is in the record on appeal, and these experiences were not briefed by the parties.
- On pages 12-13, the Department speculates about what the Wilsons knew or did not know concerning their loan closing and consumer rights. The Department does not cite to anything in the record on appeal to support these speculations because there is none.
- On page 14, the Department again references evidence from other, unrelated investigations while arguing that Quicken Loans violated the statute. Nothing concerning these investigations is in the record on appeal, and they were not briefed by the parties.
- On pages 16-17, the Department makes generalizations concerning unspecified borrowers and lenders. It also speculates about what Quicken Loans and the Wilsons did and thought during the subject loan’s origination. None of these generalizations or speculations are supported by evidence in the record on appeal.
- On pages 17-20, the Department argues that a statute regulating debt collection activity supports a finding that the loan contract is unconscionable. *See* S.C. Code Ann. § 37-5-108(2). The Estate did not make this argument below, and the Special Referee did not rely upon it in the Order.

The Department’s heavy reliance on information from its ongoing investigations is particularly troublesome. Again, neither Quicken Loans nor the Special Referee had the opportunity to consider or verify this information, which concerns other parties. By interjecting those investigations into this appeal, the Department is improperly seeking an advisory opinion on matters that are reserved for the administrative law court. *See* S.C. Code Ann. § 37-6-414(A) (stating that any person aggrieved “by the [Department’s] administrator’s determination *is entitled* to a contested case hearing before the Administrative Law Court” (emphasis added)). The advisory opinion sought by the Department should not, and indeed cannot, be issued by this Court. *See*

O'Shields v. McLeod, 257 S.C. 477, 482, 186 S.E.2d 408, 409 (1972) (“The courts of this State . . . are without authority to issue advisory opinions.”).

Because the Department’s amicus brief is not based on the record in this case, it cannot support the decision below and should not be considered by the Court.

III. THE DEPARTMENT ASKS THIS COURT TO APPLY INCORRECT STANDARDS AND TO IMPOSE OBLIGATIONS ON LENDERS THAT DO NOT EXIST IN THE ATTORNEY PREFERENCE STATUTE.

A. THE DEPARTMENT WRONGLY ASKS THIS COURT TO SHIFT THE BURDEN OF PROOF ONTO QUICKEN LOANS AND TO MAKE CREDIBILITY DETERMINATIONS AT THE SUMMARY JUDGMENT STAGE.

The Department argues that Quicken Loans had the burden of proof to establish compliance with the Attorney Preference Statute. It claims, without support, that “[l]enders who elect to use a method different from that set forth in the Administrative Interpretation 10.102(a)-8302 do not have the privilege of the safe harbor and must undertake the burden of proving compliance with the statute.” (Dept. Br. p.11; *see also id.* p. 14 (arguing Quicken Loans did not meet its burden because it allegedly misused the disclosure form).) The Department makes this assertion despite acknowledging that lenders may comply via methods other than use of the disclosure form. (*Id.* at p.14.) It also urges this Court to make credibility determinations at the summary judgment stage and suggests a methodology for doing so. (*Id.* at p.14 (discussing how the Department weighs the credibility of evidence in its enforcement investigations). These are misstatements of the law and of the standard of review applicable to this appeal.

The Attorney Preference Statute does not place the burden on the lender to prove compliance. S.C. Code Ann. § 37-10-102; *see also Tatum v. RJR Pension Inv. Comm.*, 761 F.3d. 346, 362 (4th Cir. 2014) (“[W]hen a statute is silent, the default rule provides that the burden of proof rests with the plaintiff.”). The Estate, therefore, had the burden to establish that Quicken

Loans violated the statute in the Wilsons' transaction. *See Thompson v. Bearden*, 200 S.C. 519, 21 S.E.2d 189, 191 (1942) (claimant bears burden of proof in civil action). Further, this Court can only affirm the Order if, viewing the evidence in the light most favorable to Quicken Loans, there are no issues of material fact. Rule 56(c), SCRCP; *see also Fleming v. Rose*, 350 S.C. 488, 493–94, 567 S.E.2d 857, 860 (2002). The Department ignored all of the evidence presented by Quicken Loans that, at the least, established genuine issues of material fact preventing summary judgment.

Quicken Loans' representative Guy Brusca asked the Wilsons' who their preferred attorney was during their initial telephone interview on November 7, 2011. (Order p.2; R. 2; 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.) The Department argues the form did not satisfy the statute's safe harbor provisions because Mr. Brusca recorded this information on the form. It ignores the fact that the language Mr. Brusca recorded was based on information provided by the Wilsons. (*Id.*) Rather, the Department contends this evidence is not credible because it was not in the Wilsons' handwriting. At the summary judgment stage, a court cannot make credibility determinations. *True v. Monteith*, 327 S.C. 116, 120, 489 S.E.2d 615, 617 (1997) (“[M]atters of credibility should not be determined at the summary judgment stage.”). Because the AIP Checklist creates an issue of material fact as to whether there was a violation, the Special Referee erred in granting summary judgment.

In addition to the disclosure form, 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.

The Department also ignores the fact that discovery was not complete. The Estate filed its motion for partial summary judgment less than three months after it finalized its counterclaims and before any depositions were taken. 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.*)

The Department admits that the evidence outlined in Quicken Loans' Rule 56(f) affidavit is relevant to determining whether there is a violation of the statute. (Dept.'s Br. p.14 (acknowledging safe harbor form is not only method of compliance).) Nevertheless, it contends the Special Referee's premature granting of summary judgment should be affirmed. The Department is merely acting as an advocate for the Estate and not as a friend of the Court. Its amicus brief should not be relied upon in this appeal. *See Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C. 1974) (amicus must not serve as advocates).

B. THE DEPARTMENT ASKS THIS COURT TO IMPOSE OBLIGATIONS ON LENDERS THAT DO NOT EXIST IN THE ATTORNEY PREFERENCE STATUTE.

In its role as the State's consumer protection agency, the Department purports to have the authority to declare what the law is and how this Court should apply it in this case. The Department does not have such authority, and its arguments should be rejected.

Specifically, the Department claims Quicken Loans violated the statute because its representative recorded "N/A" in section 1(b) of the AIP Checklist rather than providing a list of

attorneys. (Dept.'s Br. pp. 12-14.) It makes this argument despite acknowledging that the statute does not require a lender to provide such a list. (*Id.* at p.13.) Rather, it bases its position solely upon its Administrative Interpretation No. 10.102(a)-803 (1983) (the "A.I."). (*Id.*) This is the same A.I. that the Special Referee relied upon in holding that the disclosure form was the *only* method of compliance—a position that the Department agrees is incorrect. (Order pp. 5-6 & 8-10, R. 5-6, 8-10; *see also* Dept. Br. p. 14.) Because the statute does not require a lender to provide a list of attorneys in section 1(b), the Department cannot create such a requirement through its A.I. *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"); (*see also* Quicken Loan's Br. pp. 15-17 (explaining that General Assembly chose not incorporate the A.I. or its list requirement into the statute when it amended it in 1996).)

Indeed, both the United States District Court of South Carolina and the South Carolina Supreme Court and have approved forms that did not provide a list of attorneys. In *Green v. Household Fin. Corp.*, United States District Judge Joseph F. Anderson found that a "creditor need not require the customer to designate an attorney in order to comply with the attorney-preference provision." 3:02-2436, 2004 U.S. Dist. LEXIS 32558, at *10 (D.S.C. Jan. 12, 2004). The statute's safe harbor provision merely requires "notice to the borrower of the preference information." *Id.* "While the form distributed by the [Department] contains a provision suggesting that creditors refer customers to a list of acceptable attorneys in the event the customer is unsure of which attorney to select, the statute clearly does not require this extra step." *Id.* To do so "would turn [the statute] into a referral mechanism as opposed to a disclosure measure." *Id.*

Likewise, in *Davis v. NationsCredit Financial Services Corp.*, 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. 326 S.C. 83, 84, 484 S.E.2d 471, 471 (1996) (finding no violation).

Specifically, the form in *Davis* 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: <u>NationsCredit Financial Services Corp.</u> | |
| | _____ 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 <u>NONE</u> | <u>Mary E. Davis</u> |
| | Attorney's Name | Borrower/Buyer's Signature |
| | | <u>NA</u> |
| | | Borrower/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 | |
| | <u>NA</u> | |
| | Attorney's Name | |

The Department does not distinguish *Davis* or *Green*. Its thirty-four year old A.I. cannot create, expand upon, or replace the statutory and common law of this State. *Ahrens*, 392 S.C. at 349, 709 S.E.2d at 58. Nor can the Department dictate how this Court applies the law to the facts. *See Banerjee v. Bd. of Trustees of Smith Coll.*, 648 F.2d 61, 65 (1st Cir. 1981) (“While, presumably, an amicus’ position on the legal issues coincides with one of the parties, this does not mean that it is to engage in assisting that party with its evidentiary claims.”); *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970) (“[A]n amicus who argues facts should rarely be welcomed.”).

IV. THE DEPARTMENT ASKS THIS COURT TO CREATE A REMEDY THAT IS NOT AVAILABLE FOR ATTORNEY PREFERENCE VIOLATIONS.

Part II of the Department’s brief adopts the Estate’s argument that an alleged attorney preference violation amounts to per se unconscionability. As explained in prior briefing, the plain language of Sections 37-10-102 and 37-10-105 make clear that the only available remedy for an attorney preference violation are the statutory penalties and actual damages provided under Section 37-10-105(A). (Quicken Loans’ Br. Part II.) The Department ignores the language of these

statutes and does not address any of the arguments presented by Quicken Loans. It does not cite any case law to support its position. Instead, it attempts to blend various unrelated portions of the Consumer Protection Code together to create a new remedy. Specifically, it cites Section 37-1-107, an anti-waiver statute, and Section 37-5-108(2), which applies only to unlawful debt collection practices. The Department is not making a statutory construction argument. It is attempting to combine unrelated statutes to create new law. Additionally, the record does not support the Department's position even if it were legally valid. The Department's arguments must be rejected.

A. THE COURT SHOULD REJECT THE DEPARTMENT'S REQUEST FOR IT TO CREATE A NEW REMEDY.

1. SECTION 37-1-107 DOES NOT APPLY TO ATTORNEY PREFERENCE VIOLATIONS.

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 for an agreement. 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. The waiver statute is not a duplicative protection of the attorney preference right already guaranteed by Section 37-10-102. Nor does the waiver statute automatically allow unconscionability remedies for simple attorney preference violations, which would render superfluous the General Assembly's decision to allow a \$7,500 maximum penalty for such violations. *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.”).

No court has ever held that a defective attorney preference disclosure form constitutes a violation of Section 37-1-107 or waives the borrower's right to a closing attorney, as the Department argues. (Dept. Br. p. 16.) To the contrary, the Supreme Court found that licensed South Carolina attorneys supervise every critical step of Quicken Loans' refinance loan transaction process. *Boone*, 420 S.C. at 455, 803 S.E.2d at 709. The Court should reject the Department's attempt to merge these two unrelated statutes together.

2. SECTION 37-5-108(2)'S DEBT COLLECTION PROVISIONS DO NOT APPLY.

Next, the Department argues that if Quicken Loans violated Section 37-1-107, its "conduct" violates the unlawful debt collection provisions of Section 37-5-108(2). Note, this is a departure from the Estate's argument that the AIP Checklist was part of an unconscionable "agreement or transaction," which is governed by Section 37-5-108(1). Quicken Loans already explained why the Estate's argument is wrong, and the Department's inability to rebuke those arguments is telling. (*See* Quicken Loans' Br. Part II.)³ Also, its attempt to argue an issue that was not briefed below is prohibited by the South Carolina Appellate Court Rules. Rule 213, SCACR (stating that an amicus brief "shall be limited to argument of the issues on appeal as presented by the parties"). Even if this argument was properly before the Court, it is wrong.

Section 37-5-108 has provisions governing two different situations. Subsection 1 applies to an "agreement or transaction" that is unconscionable. While Subsection 2 applies to "unconscionable conduct" engaged in by a lender during the debt collection process. The Department argues there is no difference in these two sections, that the specific factors enumerated

³ The AIP Checklist was not part of an agreement and did not render any part of the agreement or transaction unconscionable under the common law or statutory factors listed in Section 37-5-108(4).

for each section are merely “guidelines,”⁴ and that their distinct remedy provisions can be applied interchangeably. The Department has no support for this argument because it contradicts every tenant of statutory construction.

“[I]n construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.” *State v. Leopard*, 349 S.C. 467, 470-71, 563 S.E.2d 342, 344 (Ct. App. 2002). “[A] court cannot rewrite a statute and inject matters into it which are not the legislature’s language.” *Id.* at 471, 563 S.E.2d at 344. Also, “[a] statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.” *State v. Sweat*, 379 S.C. 367, 377, 665 S.E.2d 645, 651 (Ct. App. 2008).

Subsection 1 expressly states that it applies to an “agreement or transaction [found] to have been unconscionable at the time it was made.” S.C. Code Ann. § 37-5-180(1)(a). It creates a specific set of remedies, which include refusing to enforce all or part of the agreement plus actual damages. “In applying subsection (1), consideration *must* be given to” five factors enumerated in the statute. S.C. Code Ann. § 37-5-108(4)(a). The Court can also consider other factors it considers relevant. *Id.* The Department fails to analyze any of the mandatory factors.

Subsection 2 expressly applies to “unconscionable conduct in collecting a debt.” S.C. Code Ann. § 37-5-180(2). Its remedies include an injunction, actual damages, and a statutory penalty. *Id.* It also has its own set of factors that “shall be given” consideration by the Court. S.C. Code Ann. § 37-5-108(5). The Department points to the third factor in this list, which is “using fraudulent, deceptive, or misleading representations in connection with the collection of a

⁴ The Department is wrong to call these factors “guidelines.” The statute states that the Court “must” give consideration to these factors. S.C. Code Ann. § 37-5-108(4)(a).

consumer credit transaction.” S.C. Code Ann. § 37-5-108(c). However, the Department ignores that this factor is limited to certain kinds of debt collection conduct: “Such false representation *shall* include: the legal status of the debt, services rendered or fees, claiming that the creditor is an attorney, claiming non-payment will result in arrest, and accusing the consumer of committing a crime.” *Id.* The record does not support any of these factors.

At every stage—their scope, liability factors, and remedies—the plain language of these statutes makes it clear that they apply to different situations. The Department is wrong to claim a portion of one factor relevant to debt collection activities in Subsection 2 can establish that the entire loan is unconscionable under the provisions of Subsection 1. If the General Assembly had intended this result, it would have made one statutory scheme instead of two. *Hainer v. Am. Medical Intern., Inc.*, 328 S.C. 103, 106, 492 S.C. 128, 134 (1997) (“[I]f Legislature had intended certain result in statute, it would have said so.”). The Department’s argument must be rejected.

B. THE DEPARTMENT’S WAIVER ARGUMENT ALSO FAILS BECAUSE THE RECORD DOES NOT SUPPORT IT.

The Department’s waiver analysis relies on a series of speculations about what the Wilsons “could” have thought. (Dept. Br. p.16.) These arguments cannot support affirmation of the Special Referee’s Order. *See Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 299, 701 S.E.2d 742, 744 (2010) (summary judgment cannot be based on speculation).

Waiver is a fact issue, and there is no evidence it occurred here. *See King v. James*, 388 S.C. 16, 29, 694 S.E.2d 35, 42 (Ct. App. 2010) (“A waiver is a voluntary and intentional abandonment or relinquishment of a known right.”). The Wilsons 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.) In discussing the language recorded below this disclosure,

the Department ignores the fact that it comes from what the Wilsons told Quicken Loans when it asked if they had a preference during the application call. (Order p.2; R. 2; AIP Checklist; R. 346.). Moreover, discovery was not complete, and the Department's speculations about what the Wilsons "could" have thought cannot support summary judgment.


Because the record does not indisputably show that Quicken Loans violated the Attorney Preference Statute or the anti-waiver statute, summary judgment was improper. Additionally, even if Quicken Loans had violated Section 37-1-107, the result is that the Wilsons' attorney preference rights remained—not unconscionability or any other remedy.

CONCLUSION

For the reasons set forth above, the Court should reject the arguments presented by the Department. Further, this Court should reverse the Special Referee's Order.

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
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