THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS

Robert E. Hood, Fifth Judicial Circuit

Appellate Case No. 2017-002639

South Carolina Department of Consumer Affairs, Appellant,

v.

Cash Central of South Carolina, LLC, Respondent.

AMENDED INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On or about April 3, 2015, the South Carolina State Board of Financial Institutions Consumer Finance Division ("BOFI") informed Cash Central of South Carolina, LLC ("Cash Central") of several deficiencies in its business practices as a supervised lender, including the failure to file and post a maximum rate schedule. (Pl. Exh. 9). BOFI demanded, *inter alia*, that Cash Central recast all loans to eighteen percent (18%) Annual Percentage Rate ("APR") and make the appropriate filing with the South Carolina Department of Consumer Affairs ("the Department"). Id. at 2. On April 10, 2015, Cash Central filed its maximum rate schedule with the Department but did not recast loans to 18% APR. (Pl. Exh. 16, p.2).

On May 6, 2016, the Department filed its Complaint with the Court of Common Pleas of the Fifth Judicial Circuit. (Complaint). The Department requested the Court order Cash Central to: (1) recast the finance charges of contracts entered into with South Carolina consumers from

October 24, 2013, through April 10, 2015, to no more 18% APR; (2) refund any excess charges paid by South Carolina consumers for those loans; and (3) pay a civil penalty for repeatedly and intentionally violating certain provisions of the South Carolina Consumer Protection Code ("CPC") pertaining to the consumer credit grantor notification.[1]

On July 20, 2016, Cash Central filed its Answer in which it pled the defense of bona fide error pursuant to S.C. Code Ann. § 37-5-202(7), and on August 18, 2016, filed its Amended Answer, which added a defense of substantial compliance. (Answer, p. 7; Amended Answer, p. 7). On April 24, 2017, Respondent filed a motion to amend its Amended Answer, adding defenses of bona fide error pursuant to Section 37-3-201(6), setoff, and right to recoupment and repayment. (Mot. to Amend Answer; 4/27/17 Second Amended Answer, pp. 5-6). On May 10, 2017, Cash Central filed an Amended Motion to amend its Amended Answer, adding a statute of limitations defense. (Amended Mot. to Amend Answer; 5/10/17 Second Amended Answer, p. 7). Cash Central also removed an admission contained in its original motion that the substantial compliance defense does not apply to the failure to file a maximum rate schedule.

In the meantime, on April 7, 2017, the Department filed a Motion for Partial Summary Judgment arguing, *inter alia*, the applicability of two of Cash Central's defenses. (Department's Motion for Partial Summary Judgment). On May 17, 2017, the Department filed its Memorandum of Law in Opposition to Defendant's Motion for Leave to Amend Its Answer, and on May 18, 2017, the circuit court held a hearing on the Department's summary judgment motion as well as Cash Central's motions to amend its Amended Answer. (Department's Memorandum of Law in Opposition to Defendant's Motion for Leave to Amend Its Answer). On May 24, 2017, the Court

[1] Cash Central did not dispute that during the relevant time period it was required to comply with consumer credit grantor notification requirements of S.C. Code Ann. Sections 37-6-202 and 37-6-203. As such, prior to trial, the parties entered into a Consent Order dismissing the third cause of action. [Consent Order as to Plaintiff's Third Cause of Action.]

issued a Form 4 Order denying the Department's Motion for Partial Summary Judgment and granting Cash Central's Motion to Amend Its Answer. (Form 4 Order).

As a result, Cash Central's Motion for Partial Summary Judgment, which it had filed on May 5, 2017, had not been heard yet. (Respondent's Motion for Partial Summary Judgment). On June 9, 2017, the Department filed a Motion to Alter or Amend the denial of its partial summary judgment motion. (Motion to Alter or Amend). On June 28, 2017, the circuit court scheduled the trial of this case for September 6 and 7. As a result, the parties asked to have a hearing on the two outstanding motions, which the court heard on July 19, 2017. The parties subsequently submitted proposed orders to the circuit court.

On September 6, the first day of trial, the parties each had outstanding motions: the Department's Motion to Alter or Amend and Cash Central's Motion for Partial Summary Judgment. Given that the witnesses were present, including several from out-of-state, and the parties were ready to try the case, the parties agreed to withdraw their outstanding motions. A trial was held on September 6 and 7, 2017, as to liability only. (Transcript from 9/6–7/17 Trial, (hereinafter "9/6-7 Tr."). On September 28, 2017, the circuit court issued its Final Order and Judgment in favor of Cash Central as to all three of its defenses, but ordered Cash Central to pay a civil penalty of fifteen thousand dollars ($15,000.00) to the Department. (9/28/17 Order). On October 12, 2017, the Department filed its Motion to Alter or Amend the final judgment. (Motion to Alter or Amend). On November 28, 2017, the circuit court issued its Final Order denying the Department's Motion to Alter or Amend. (11/28/17 Order). The Department timely served and filed its Notice of Appeal to this Court on December 29, 2017.

STATEMENT OF FACTS

Cash Central of South Carolina, LLC ("Cash Central") is a consumer lender that makes triple-digit interest loans to South Carolinians via its website. (Def. Exh 16). Originally, its website allowed users to pick loan amounts, maturity terms and payment due dates, and view potential interest rates.[2] Id. Cash Central does not have any employees, but instead utilizes those of its parent company Direct Financial Solutions, LLC ("DFS") and grandparent company Community Choice Financial, Inc. ("CCFI"). (9/6-7 Tr. p. 330, lines 16-25; pp. 211-2, lines 21-1; Pl. Exh. 6). CCFI was established in 2011, purchased DFS as its subsidiary in 2012 and launched Cash Central in 2013.[3] (9/6-7 Tr. p. 289, lines 16-25; p. 290, lines 1-6; p. 211, lines 21-25,p. 213, line 25). Cash Central is one of approximately 100 subsidiaries and South Carolina was one of at least 12 states DFS entered in a three year timeframe using a self-described "sprint schedule." (9/6-7 Tr. pp. 285-6 lines 24-1; p. 290, line 1-3; pp. 203-4, lines 23-3; p. 256, line 9). Between October 24, 2013, and April 10, 2015, thousands of South Carolina consumers borrowed money from Cash Central at Annual Percentage Rates ("APR") between 146% and 246.6%. (9/6-7 Tr. p. 401, lines 5-23). During this period of time, however, Cash Central failed to file its maximum rate schedule with the South Carolina Department of Consumer Affairs ("the Department"), a requirement for creditors intending to charge more than 18% APR in consumer transactions. (9/6-7 Tr. p. 109, lines 17-23; p. 110, lines 1-17; p. 111, lines 2-6; Pl. Exh. 9). To illustrate the impact on South Carolina consumers, for a twelve-month loan of $1,000.00 from Cash Central at a rate of 239.99% APR, a

[2] This website feature for South Carolina loans was removed and replaced with the maximum rate certificate after the Department filed this action. Actual interest rates were provided only after a consumer filled out an application, which included source of income, information to establish creditworthiness, and valid checking account information. (9/6-7 Tr. pp. 383-4, lines 17-4; p. 469, lines 17-21).

[3] Cash Central originally was headquartered in North Logan, Utah while its parent company DFS and grandparent company CCFI were headquartered in Dublin, Ohio. In early 2017, Cash Central's headquarters moved from Utah to the Dublin, Ohio address. (9/6-7 Tr. pp. 453-4, lines 1-9].

consumer would pay $1,702.89 in interest rather than $100.16 at the legal rate of 18% APR. (Def. Exh. 16).

In February 2013, CCFI began preparations to offer high-interest consumer loans in South Carolina through its Cash Central subsidiary. (9/6-7 Tr. p. 212, line 12-15). Rebecca Fox, Assistant General Counsel for CCFI, was responsible for ensuring Cash Central's legal compliance by conducting legal research of all statutes, regulations, and licensing requirements applicable to Cash Central's lending operations in a given state. (9/6-7 Tr. p. 205, lines 18-21). To prepare, Ms. Fox:

(1) visited the Department's website and downloaded, saved, printed and placed in her files several documents, including the initial maximum rate schedule filing form and educational guide for businesses on the maximum rate requirement. (9/6-7 Tr. pp. 215-6, lines 21-7; pp. 222-3, lines 19-6; p. 221, line 20-21; pp. 223-4, lines 25-2; Def. Exh. 4 & 5).

(2) completed all areas of the maximum rate filing form except for the APR section. (9/-67 Tr. pp. 223-4, lines 25-2).

(3) researched the South Carolina Code and applicable regulations for laws pertaining to consumer lending, creating a six-page statute summary of legal requirements. (9/6-7 Tr. p. 214, lines 10-13; Def. Exh. 3). On the first page, under a bullet labeled "Interest Rate," Ms. Fox indicated "whatever rate we file with the state so long as it is at least $600 37-3-201(2)(b)." (Def. Exh. 3, p. 1). Later in the summary, under a bullet labeled "Duties of Licensee generally," Ms. Fox noted the requirement to "file and post a max rate schedule, stated as an APR, min 14 pt font 37-3-305 / 28-70-2.305, 3.305" and included the full 127-word disclosure that is required by the statute. (Def. Exh. 3, p. 4-5). Immediately

following, under a bullet labeled "Licensing," Ms. Fox noted the requirement to "file a max rate schedule 37-3-305 & $40 at least annually 37-3-305(8)." (Def. Exh. 3, p. 5).

There is no indication that the statute summary was ever reviewed by anyone other than its creator. (9/6-7 Tr. p. 207, lines 15-17; p. 285, lines 4-9; Def. Exh. 12, p.4). The company did not enlist a South Carolina attorney to assist with the rollout nor did its own General Counsel review, or otherwise participate in the creation of, the document. (9/6-7 Tr. p. 260, lines 4-9). In fact, Ms. Fox's supervisor, General Counsel Bridgette Roman, described the statute summary at trial as not thorough, not complete, and not detailed. (9/6-7 Tr. pp. 283-4, lines 25-6.; p. 316, lines 1-3). Other than the statute summary prepared by Ms. Fox, however, no written documents, policies or procedures existed with respect to implementing the summary or otherwise complying with South Carolina law. (9/6-7 Tr. p. 208, lines 2-5; p. 255, lines 23-25; pp. 339-40, lines 17- 1).

In July 2013, once Cash Central had its interest rate information finalized, it submitted a supervised lending[4] application to the State Board of Financial Institutions Consumer Finance Division ("BOFI"), the state agency responsible for licensing supervised lenders. (9/6-7 Tr. p. 31, lines 14-15, 17-18; p. 32, lines 8-10, 13-15; p. 38, lines 3; p. 225, lines 6-17). The application included some interest rate information. (Def. Exh. 7, p. 50). Ms. Fox testified she and her assistant, Amy Jennings, used the statute summary to prepare the license application. (9/6-7 Tr. p. 228, lines 22-25). At that time, Ms. Fox was not aware or did not recall realizing that interest rates would need to be filed with the Department. (9/6-7 Tr. p. 230, lines 14-17). In September 2013, Cash Central submitted an identical supervised lender license application for its website, www.cashcentral.com, at BOFI's request. (9/6-7 Tr. p. 227, lines 5-6).

[4] A "supervised lender" is a lender authorized to charge more than 12% APR on consumer loans. See S.C. Code Ann. § 37-3-501(1) and (2).

On October 2, 2013, BOFI issued two licenses to Cash Central to operate as a supervised lender in South Carolina: license number S-8208 to do business as Cash Central of South Carolina, LLC, and license number S-8209 to do business as an online lender through its website, www.cashcentral.com. (Def. Exhs. 9 & 10; 9/6-7 Tr. p. 231, line 8). BOFI included a "welcome letter" with new licenses informing lenders about the requirements of filing a maximum rate schedule with the Department and posting the rate schedule, among other legal obligations. (9/6-7 Tr. p. 46, lines 13-17).

On October 24, 2013, Cash Central made its first loan to a South Carolina consumer through its website. (9/6-7 Tr. p. 250, line 13). Ms. Fox reviewed the first loan documents and website, and compared them with her statute summary. (9/6-7 Tr. pp. 236-7, lines 16-10). Ms. Fox realized the website did not contain the statutorily-required 127-word disclosure or the maximum rate schedule even though it was specifically stated in her summary of South Carolina laws. (9/6-7 Tr. pp. 236-7, lined 16–2; p. 241, lines 5–24). Despite knowing this language was absent, Ms. Fox did not require operations to take the page down. (9/6-7 Tr. p. 250, lines 17-23; pp. 282-3 lines 19-16; pp.236-7, lines 4–2; p. 241, lines 5–24). During the twelve days when the statutory disclosure and rate schedule were absent, Cash Central made approximately two hundred forty six (246) loans to South Carolina consumers at triple digit interest rates. (9/6-7 Tr. p. 335, lines 3-5; Pl. Exh. 13).

Cash Central failed to timely renew its supervised lender's license for its website and did not submit a renewal application by the February 1, 2014 deadline or even after BOFI sent the company its standard late notice. (9/6 Tr. p. 45-6, lines 5-8; Pl. Exhs. 7 & 8). Cash Central did not file a renewal application until after receiving the March 26 Notice of Hearing from BOFI, nearly two months after the license expired. (9/6 Tr. pp. 45-6 lines 5-8; Pl Exhs. 7 & 8). On April 1,

2014, BOFI sent an email to Amy Jennings requiring changes to its consumer loan installment agreement. (Pl. Exh. 19). Amy Jennings forwarded the email to Ms. Fox the same day. (Pl. Exh. 19). The first paragraph of the notice tells Cash Central it must post on the website the maximum rate schedule it had filed with the Department:

> **April 1, 2014**
>
> **Cash Central of South Carolina, LLC**
>
> Visit www.consumerfinance.sc.gov under Consumer Lending, Licensing of Supervised Internet Based Lenders, which states a lender conducting business on the internet must post their Supervised Lenders License, and the Consumer Loans Your Rights and Responsibilities pamphlet. Also the Maximum Rate filing must be posted on your website which is filed with the South Carolina Department of Consumer Affairs. Visit www.consumer.sc.gov for instructions.
>
> **Correction:** Post the Consumer Loans Your Rights and Responsibilities pamphlet and the Maximum Rate filing on your website at www.cashcentral.com

(Pl. Exh. 19, p. 2). This was the second time in six months BOFI notified Cash Central in writing of the requirement to file and post a maximum rate schedule. (9/6 Tr. p. 46, lines 13-17; Pl. Exh.19, p. 2). Fox acknowledged this document in an email to herself on April 2, 2014; however, the email is void of any reference to the sentence notifying Cash Central to post on the website the maximum rate filing that had been filed with the Department. (Pl. Exh. 19). Ms. Fox replied to BOFI on May 8, 2014, addressing all requirements except the requirement to file a maximum rate schedule with the Department and post it on Cash Central's website. (Pl. Exh. 20).

On or about April 3, 2015, after a standard examination, BOFI required Cash Central to correct several deficiencies, including the failure to file a maximum rate schedule and consumer credit grantor notification with the Department. (9/6-7 Tr. p. 51, lines 6–10; p. 52-3, lines 2–4; pp. 52-3, lines 24-13; pp. 96-7, lines 9- 4; p. 98, lines 9–19; Pl. Exh. 9). BOFI demanded, *inter alia*, that Cash Central recast all loans to 18% APR. (Pl. Exh. 9) On April 10, 2015, Cash Central filed

a maximum rate schedule with the Department (Pl. Exh. 16), but did not recast the loans made during the prior eighteen months to 18% APR.

ARGUMENTS

The issues on appeal concern the interpretation of state statutes and determination of novel questions of law by this Court. An appellate court may decide novel questions of law with "no particular deference to the lower court." Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 134, 638 S.E.2d 650, 656 (2006); Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000). "Determining the proper interpretation of a statute is a question of law, and [the appellate court] reviews questions of law de novo." Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008); see also Fesmire v. Digh, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009) ("This Court reviews all questions of law de novo."). The appellate court is free to decide issues regarding the interpretation of statutes without any deference to the circuit court. See Sloan v. Greenville Cty., 380 S.C. 528, 534, 670 S.E.2d 663, 667 (Ct. App. 2009) ("The issue of statutory interpretation is a question of law for the court."); Id. ("We are free to decide questions of law with no deference to the trial court.").

An appellate court freely and fully reviews a trial court's decision concerning an issue of law. See Lizee v. S.C. Dep't of Mental Health, 367 S.C. 122, 126, 623 S.E.2d 860, 862 (Ct. App. 2005) ("[W]here the Commission's decision is controlled by an error of law, this court's review is plenary."). "The highly deferential standards statutorily and universally applied in reviewing issues of fact, such as the 'clearly erroneous' and the 'manifest error' standards, have no efficacy in regard to an issue of law." Houston v. Deloach & Deloach, 378 S.C. 543, 552–53, 663 S.E.2d 85, 90 (Ct. App. 2008).

I. THE CIRCUIT COURT MADE AN ERROR OF LAW IN FAILING TO ORDER CASH CENTRAL TO REFUND MILLIONS OF DOLLARS OF ILLEGALLY COLLECTED EXCESS CHARGES PAID BY THOUSANDS OF SOUTH CAROLINA CONSUMERS.

The purposes of the South Carolina Consumer Protection Code ("CPC") include: (1) to provide rate ceilings to assure an adequate supply of credit to consumers; (2) to further consumer understanding of the terms of credit transactions; (3) to foster competition among suppliers of consumer credit so consumers may obtain credit at a reasonable cost; and (4) to permit and encourage the development of fair and economically sound credit practices. S.C. Code Ann. § 37-1-102(b)–(c), (e) (2002). To this end, the CPC delineates the fees and charges a creditor may impose in a consumer credit transaction and provides requirements and restrictions for persons engaging in those transactions with South Carolina consumers. S.C. Code Ann. § 37-1-100 *et seq.*

In accordance with South Carolina law, there were certain prerequisites Cash Central of South Carolina, LLC ("Cash Central") must have accomplished prior to operating as a high interest consumer lender. The first requirement was that Cash Central had to file the applications with the South Carolina State Board of Financial Institutions Consumer Finance Division ("BOFI") to get a supervised lender license for its headquarters and for its website. S.C. Code Ann. §§ 37-3-502 (2002) & 37-3-503(4) (2002). The supervised lender licenses were required for Cash Central to make consumer loans exceeding 12% APR.[5] (Id.; S.C. Code Ann. § 37-3-501(1) (Cum. Supp. 2013); 9/6-7 Tr. p. 32, lines 6–15). Upon receipt of these licenses from BOFI in October 2013,

[5] A consumer lender that makes loans with interest rates not exceeding 12% APR is not required to obtain a supervised lender license but is still subject to the provisions of the Consumer Protection Code. See S.C. Code Ann. § 37-1-201(1) (Code applies to consumer credit transactions); § 37-1-201(7)(b) (consumer credit transaction includes a consumer loan).

Cash Central was authorized to start making loans with interest rates as high as 18% APR. S.C. Code Ann. § 37-3-201(2)(c) (2002).

The CPC specifically caps a loan finance charge a supervised lender may impose to the greater of ***either*** any rate filed and posted pursuant to Section 37-3-305 ***or*** eighteen percent per year on the unpaid balances of the principal. S.C. Code Ann. § 37-3-201(2)(b)-(c) (2002). Based on Cash Central's nationwide business model, however, Cash Central wanted to charge triple digit interest rates as high as 246% APR. (9/6-7 Tr. p. 87, lines 18-20; p. 122, lines 14-21; p. 135, lines 9-17; p. 433, lines 15-20; p. 463, lines 6-9). As the South Carolina Department of Consumer Affairs ("the Department") explained in a 1986 interpretation:

> The decision to make a finance charge in excess of 18% APR is a ***voluntary*** one made by the supervised or restricted lender. ***The law does not require them to charge more than eighteen percent but allows them to do so if they comply with all of the provisions of Section 37-3-305***. The onus of compliance is placed upon the supervised and restricted lenders with the South Carolina Department of Consumer Affairs responsibility limited to filing and certifying properly filed schedules [Section 37-3-305(6)].

S.C. Dep't of Consumer Affairs, Admin. Interpretation No. 3.305-8601 p. 2 (emphasis added).

As such, Cash Central needed to file a maximum rate schedule with the Department before making its first loan to South Carolina consumers on October 24, 2013. (9/6-7 Tr. p. 111, lines 2-6). After Cash Central received a maximum rate schedule certificate from the Department and posted it in a conspicuous place on the Cash Central website, ***then and only then***, would Cash Central have been authorized to make loans to South Carolina consumers above 18% APR. (9/6-7 Tr. p. 111, lines. 2-12).

Unfortunately, Cash Central did not comply with South Carolina law before offering loans at rates exceeding 18% APR. Instead, the company offered and made consumer loans at triple digit interest rates while depriving competitors of knowledge of their presence and loan product

offerings in the South Carolina marketplace and depriving consumers from the information the legislature deemed necessary to enable comparative shopping for credit. The circuit court, therefore, made several errors of law in failing to order Cash Central to refund the excess charges collected from thousands of South Carolina consumers during the first eighteen months Cash Central operated in this state.

A. THE CIRCUIT COURT MADE AN ERROR OF LAW IN FAILING TO ORDER A REFUND OF EXCESS CHARGES WHEN CASH CENTRAL ADMITS IT FAILED TO FILE THE DOCUMENTS REQUIRED TO CHARGE ANYTHING HIGHER THAN 18% APR ON CONSUMER LOANS.

Effective October 2, 2013, when Cash Central of South Carolina, LLC ("Cash Central") became licensed as a supervised lender, South Carolina law permitted Cash Central to contract for and receive a loan finance charge as follows:

1. On loans exceeding six hundred dollars ($600.00), any rate filed and posted pursuant to S.C. Code Ann. Section 37-3-305; or

2. On loans of any amount, up to 18% APR per year.

S.C. Code Ann. § 37-3-201(2)(b)-(c) (2002).[6] The cardinal rule of statutory construction is to ascertain and effectuate the legislature's intent from the plain language of the statute. Burns v. State Farm Mut. Auto Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Hitachi Data Svs. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). The limitations of this statutory provision are clear and unambiguous. Duckworth v. Cameron, 270 S.C. 647, 649, 244 S.E.2d 217, 218 (1978) ("As a general rule, when a statute is plain and unambiguous, it should be applied literally because

[6] Because Cash Central did not offer loans at amounts less than $750.00, the limitations of Section 37-3-201(a) did not apply.

the legislative design is unmistakable."). The plain language of Section 37-3-201(2) provides that the default maximum rate a supervised lender can charge is 18% APR ***unless and until*** the lender files ***and*** posts a rate pursuant to Section 37-3-305. Between October 2, 2013, and April 10, 2015, Cash Central did not have "any rate filed and posted pursuant to Section 37-3-305." S.C. Code Ann. § 37-3-201(2)(b)-(c) (2002); (Requests to Admit).

To legally charge in excess of 18% APR, Cash Central was required to file a maximum rate schedule with the South Carolina Department of Consumer Affairs ("the Department") on or before the date it began making supervised loans to South Carolina consumers and, thereafter, on or before January thirty-first of each year. S.C. Code Ann. § 37-3-305(1) (2002); S.C. Code Ann. Regs. 28-70 (2013). Cash Central admittedly ***did not file*** a maximum rate schedule with the Department prior to making its first loan or for the following eighteen months until notified by the State Board of Financial Institutions Consumer Finance Division ("BOFI"). (Requests to Admit; 9/6-7 Tr. p. 16, lines 18-21; p. 23, lines 12-17; p. 24, lines 3-4; pp. 244-5, lines 24–2; p. 259, lines 13–14; pp. 271-3, lines 24–23; pp. 283-5, lines 17–20; pp. 288-9, lines 25–6; pp. 301-2, lines 22-12). Thus, Cash Central could ***not*** legally offer and make loans to South Carolina consumers at interest rates exceeding 18% APR between October 24, 2013, and April 10, 2015.

During this time, however, Cash Central made thousands of loans to South Carolina consumers at rates as high as 246.6493%. (9/6-7 Tr. p. 87, lines 18-20; p. 122, lines 14-21; p. 135, lines 9-17; p. 433, lines 15-20; p. 463, lines 6-9). It is undisputed that Cash Central collected interest of more than $11 million on these 15,000 loans, more than half of which is attributed to interest assessed above 18% APR. (9/6-7 Tr. p. 459, lines 9-18). Monies received in violation of Section 37-3-201(2) are excess charges and must be returned to consumers as a matter of law. The circuit court, therefore, erred in failing to order Cash Central to refund the excess interest collected

for loans entered with South Carolina consumers during the eighteen months Cash Central admittedly did not accomplish the prerequisite of filing a maximum rate schedule in order to contract for interest exceeding 18% APR. Thus, this Court should reverse the circuit court's ruling.

B. THE COURT MADE AN ERROR OF LAW IN FAILING TO ORDER A REFUND OF EXCESS CHARGES WHEN THE SOUTH CAROLINA CONSUMER PROTECTION CODE DOES NOT PERMIT A LENDER TO RETAIN EXCESS CHARGES.

Statutory provisions of the South Carolina Consumer Protection Code, S.C. Code Ann. Section 37-1-101 et seq. ("CPC") shall be liberally construed as well as applied to promote the Title's underlying purposes and policies. S.C. Code Ann. § 37-1-102(1) (2002); Davis v. NationsCredit Financial Services Corporation et al., 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997). The primary purpose of the CPC is to protect consumers, as evidenced by its relief provisions. Camp v. Springs Mortgage Corp., 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993). Section 37-1-102 further delineates the purposes and policies of the CPC, including to set rate ceilings, foster competition among suppliers, protect borrowers against unfair practices, and encourage fair and economically sound consumer credit practices. See S.C. Code Ann. § 37-1-102(2)(c)–(e) (2002).

The CPC does not permit excess charges to be retained by a creditor. An excess charge is an amount, fee, or charge that is in excess of those permitted by the CPC. (9/6-7 Tr. p. 116, lines 9–17). The Department brought this action pursuant to Section 37-6-113(A), seeking to recover excess charges on behalf of South Carolina consumers as the CPC limits supervised lenders to charging 18% APR in the absence of a maximum rate filing. S.C. Code Ann. § 37-3-201(2) (2002). These sections must be read in light of the other sections of the CPC to ensure they are given the proper effect. See TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998) (citations omitted) ("In construing statutory language, the statute must be read as a

whole, and sections which are part of the same general statutory law must be construed together and each one given effect. The court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something.").

Pursuant to the CPC, a consumer is not obligated to pay, and a creditor is not entitled to retain, an excess charge. See for example:

- S.C. Code Ann. § 37-2-416(3) (2002) (any additional cost or charge to consumer resulting from change in terms of revolving charge account is an excess charge and is subject to the remedies available to the consumer (37-5-202) and to the administrator (37-6-113));
- S.C. Code Ann. § 37-3-408(3) (2002) (any additional cost or charge to debtor resulting from change in terms of revolving loan account that does not comply with this section is an excess charge and is subject to the remedies available to the debtor (37-5-202) and to the administrator (37-6-113));
- S.C. Code Ann. § 37-3-409 (2002) (excess amount of loan finance charge provided for in multiple agreements used with intent to avoid disclosure is an excess charge for purposes of the provisions on the effect of violations on rights of parties (37-5-202) and the provisions on civil actions by administrator (37-6-113));
- S.C. Code Ann. § 37-3-509 (2002) (no lender may use multiple agreements with intent to obtain higher rate of loan finance charge on a supervised loan than would otherwise be permitted; excess amount of loan finance charge resulting from violation of this section is an excess charge for purpose of provisions on rights of parties (37-5-202) and the provisions on civil actions by the administrator (37-6-113);
- S.C. Code Ann. § 37-4-104(2) (2002) (excess amount of a charge for insurance provided for in agreements in violation of this chapter is an excess charge for the purposes of the

provisions on rights of parties (Section 37-5-202) and of the provisions as to civil actions by the administrator (Section 37-6-113);

- S.C. Code Ann. § 37-5-202(2) (2002) (consumer is not obligated to pay a charge in excess of that allowed by this title and has a right of refund of any excess charge paid);
- S.C. Code Ann. § 37-5-202(3) (2002) (if creditor has contracted for or received a charge in excess of that allowed by this title, or if consumer is entitled to a refund and a person liable to the consumer refuses to make a refund within reasonable time after demand, the consumer may recover a penalty from the creditor or person liable in the action);
- S.C. Code Ann. § 37-5-202(6) (2002) (if a violation consists of an excess charge, correction shall be made by an adjustment or refund).

Moreover, a creditor cannot retain excess charges even when the creditor believes it is complying with South Carolina law. The law specifically states:

> ***Except for refund of an excess charge***, no liability is imposed under this title for an act done or omitted in conformity with a rule of the administrator notwithstanding that after the act or omission the rule may be amended or repealed or be determined by judicial or other authority to be invalid for any reason.

S.C. Code Ann. § 37-6-104(4) (2002) (emphasis added). This statute provides a safe harbor for creditors who rely on a rule of the Administrator. However, even if a creditor relies on an Administrator's rule and it is subsequently repealed or deemed invalid, the creditor would still be obligated to return any excess charges that resulted from its actions. The creditor would not be liable for anything else, including a penalty. S.C. Code Ann. § 37-6-506(3) (2002) (no provision of the CPC which imposes any penalty will apply to a creditor acting in reliance on an opinion, interpretation, rule, or statement of the Administrator); See also S.C. Code Ann. § 37-6-104(4) (2002) (a lender who relies on a rule of the Administrator and believes it is complying with South

Carolina law would have to refund excess charges). Extrapolating these provisions to Cash Central of South Carolina, LLC ("Cash Central")'s circumstances, even if Cash Central's legal team believed it had done everything necessary to comply with South Carolina law, the spirit of the CPC and the General Assembly's intent—as evidenced by every law listed above—mandate Cash Central to refund the excess charges it collected from South Carolina consumers.

Excess charges ***must*** be returned to the consumer whether the consumer requests it, the Administrator demands it, or the creditor realizes it on its own. The circuit court, therefore, erred as a matter of law in failing to order Cash Central to refund monies received from charging South Carolina consumers in excess of 18% APR.[7] Thus, this Court should reverse the circuit court's ruling.

Furthermore, our South Carolina Supreme Court has held that permitting an unlicensed business to circumvent licensing requirements by payment of a small fine would defeat the legislative intent of consumer protection statutes. In the case of W&N Construction v. Williams, 322 S.C. 448, 450, 472 S.E.2d 622, 623 (1996), our Supreme Court held that an unlicensed contractor—whose contractor's license had been revoked for failure to pay taxes—may not recover on a contract. 322 S.C. at 450, 472 S.E.2d at 623. The Court reasoned that "such licensing statutes protect the public and to permit unlicensed contractors to circumvent licensing requirements by payment of a small fine would defeat the legislative intent." Williams, 322 S.C. at 450, 472 S.E.2d at 623. As the South Carolina Supreme Court has acknowledged the CPC's consumer protection purpose, the W&N reasoning should be applied to this case. See Camp v. Springs Mortgage Corp., 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) (relief provided in Section

[7] The circuit court further erred in stating the Department's Motion to Alter or Amend dated October 12, 2017, was the first time it argued a lender cannot be excused from refunding excess charges. (11/28/17 Order, p. 2). The Department has advanced this argument in its Complaint (p. 5, ¶ 7), at the original motions hearing (5/18/17 Tr. pp. 56–57), and during trial (9/6-7 Tr. p. 133, lines 8–17; p. 486-8, lines 19-21).

37-10-105 providing for forfeiture of the loan finance charge to the debtor's benefit evidences the purpose of the CPC is to protect consumers); See also Davis v. NationsCredit Fin. Servs. Corp., 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997) (purpose of the CPC is to protect consumers). Based on South Carolina statutes and case law, the circuit court erred as a matter of law in permitting Cash Central to merely pay a small fine for multiple violations of a consumer protection statute. Thus, this Court should overturn the circuit court's decision and order a refund of excess charges.

II. THE CIRCUIT COURT MADE AN ERROR OF LAW IN FINDING CASH CENTRAL WAS NOT REQUIRED TO REFUND EXCESS CHARGES BASED ON THE BONA FIDE ERROR DEFENSE OF S.C. CODE ANN. SECTION 37-3-201(6).

Section 37-3-201(6), which is the only defense available to a lender for failing to file and/or post a maximum rate schedule, requires a lender to:

> ***demonstrate with competent evidence*** that ***(a)*** any failure to post rates properly filed under Section 37-3-305 or failure to properly file these rates under Section 37-3-305 was a result of a bona fide error or excusable neglect, ***(b)*** the rates were properly posted or properly filed when the error or neglect was discovered or brought to the lender's attention, ***and (c)*** that no other failure to post or file rates has been brought to the lender's attention by the Department of Consumer Affairs or by consumers within the previous forty-eight month period, then the maximum rate of loan finance charges assessable by the lender is the rate previously properly filed with the Department of Consumer Affairs, provided, however, the lender that has failed or neglected to post rates or to file rates is subject to a civil penalty of up to $5,000.00 payable to the Department of Consumer Affairs.

S.C. Code Ann. § 37-3-201(6) (2015) (emphasis added). A lender must prove it meets all three elements of the defense to avail itself of the remedy provided in this section. If the lender fails to do so, the lender must recast loans to 18% APR, regardless of whether it failed to file or failed to post. See S.C. Code Ann. § 37-3-201(2)(b)-(c) (2002) and § 37-3-305(8) (2015). After a lender proves the three elements, the lender: (1) would be able to roll back its contracted rates to the rate ***previously properly filed*** with the Department and (2) would be subject to a civil penalty up to

$5,000.00. The remedy includes both parts: rolling back contracted rates ***and*** paying a penalty. The statute does not allow a lender to pick one or the other; the lender must do both.

A. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN FINDING THE "BONA FIDE ERROR DEFENSE" OF S.C. CODE ANN. SECTION 37-3-201(6) IS AVAILABLE TO LENDERS THAT HAVE NOT PREVIOUSLY PROPERLY FILED A MAXIMUM RATE SCHEDULE.

The plain and unambiguous language of Section 37-3-201(6) reveals the General Assembly's intent that this statutory defense is only available to lenders that previously properly filed a maximum rate schedule with the South Carolina Department of Consumer Affairs ("the Department"). The cardinal rule of statutory construction is to ascertain and effectuate the legislature's intent from the plain language of the statute. Burns v. State Farm Mut. Auto Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Hitachi Data Svs. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

The statutory defense expressly provides that if a lender meets all factors set forth therein, the lender would be required to recast the affected loans to the "rate previously properly filed with the Department of Consumer Affairs." S.C. Code Ann. § 37-3-201(6) (2002). The General Assembly clearly enacted this provision to limit the liability of a lender who properly complied with the maximum rate law at one point in time but ***subsequently*** did not comply with one of its requirements as a result of bona fide error or excusable neglect. Kathleen Goodpasture Smith, South Carolina Consumer Protection Code: Text with Comments p. 95 (comment 6) & p. 196 (comment 4) (4th ed. 2001) ("[A]ssuming the specified conditions are met, the creditor can continue to charge rates in accordance with the most recent maximum rate schedule it has filed,

but is nevertheless subject to a civil penalty of up to $5,000[.]"). The plain language presumes the lender ***previously properly filed*** its rates. Thus, a lender would have to properly file and post its maximum rates at some point in time to ever avail itself of this defense in the future. Cash Central of South Carolina, LLC ("Cash Central"), therefore, cannot rely on this defense for loans made on or before April 10, 2015, because Cash Central never filed rates with the Department before that date. (9/6-7 Tr. p. 111, lines 2-6; Requests to Admit).

The circuit court erroneously held Section 37-3-201(6) applies to initial filings as well as renewals. (9/28/17 Order p. 22-24). Specifically, the circuit court states in its Order that "S.C. Code Ann § 37-3-201(6) applies to both initial filings and renewals. Nothing in this statute states that it applies to one instance and not the other." 11/28/17 Order p. 3. This reasoning ignores statutory language and is inapposite to the General Assembly's purpose. See Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) ("A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers."). "Words in a statute must be construed in context." State v. Douglas, 411 S.C. 307, 330, 768 S.E.2d 232, 245 (Ct. App. 2014) quoting Sparks v. Palmetto Hardwood, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013). "Thus, the [c]ourt may not, in order to give effect to particular words, virtually destroy the meaning of the entire context; that is, give the particular words a significance [that] would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent." Id.

This defense permits a creditor to roll back to the previously properly filed rates instead of rolling back to 18% APR as required by Sections 37-3-305(7) and 37-3-201(2). The defense was never intended to limit the liability of a lender who failed to comply with South Carolina law for the first eighteen months it operated in South Carolina. See Duckworth v. Cameron, 270 S.C. 647,

649, 244 S.E.2d 217, 218 (1978) ("As a general rule, when a statute is plain and unambiguous, it should be applied literally because the legislative design is unmistakable."); Davis v. County of Greenville, 322 S.C. 73, 77, 470 S.E.2d 94, 96 (1996) ("A statute must receive such construction as will make all of its parts harmonize with each other and render them consistent with its general scope and object."). To illustrate how the defense is intended to work with respect to a failure to file, imagine Lender A, a supervised lender that offers consumer loans at 36% APR. Lender A properly complies with South Carolina law prior to offering its first consumer loan in this state by filing its maximum rate schedule with the Department and posting the Department-issued certificate conspicuously for any reasonable consumer to see. Lender A misses the January 31st filing deadline the next year. Pursuant to Section 37-3-305(7), Lender A is limited to assessing 18% APR until a maximum rate schedule is filed. See also S.C. Code Ann. § 37-3-201(2) (2002). Assume now, Lender A realizes its violation and files with the Department, showing evidence that it meets the three requirements of the defense provided in Section 37-3-201(6). As such, Lender A must refund monies received in excess of 36% APR, the previously properly filed rate, as opposed to 18% APR. If the 36% cap was not breached, no rollbacks are required. Whether or not a rollback is required, the Department may choose to impose a penalty up to $5,000.00.

In this case, the rationale in the circuit court's Order manipulates the law to come to a conclusion that is contrary to the plain language of the statute as well as legislative intent. Moreover, the circuit court further misconstrued the statute and ignored its plain language in finding that applying it as written would lead to the absurd result of requiring Cash Central to recast loans to 0% APR. (9/28/17 Order at 23). The Department has consistently explained that even if Cash Central proved all three factors of the defense, it would still be required to recast the loans to 18% APR, which is the effective legal rate ***any supervised lender*** would be permitted to

charge in the absence of a filed and posted maximum rate. See S.C. Code Ann. § 37-3-201(2)(b) and (c) (2002); § 37-3-305(7) (2002). Thus, the circuit court erred as a matter of law in finding that literal application of the defense would require Cash Central to recast the loans to 0% APR rather than 18% APR and in finding Section 37-3-201(6) applies to initial filings of a maximum rate schedule. Thus, this Court should reverse the circuit court's ruling.

B. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN FAILING TO ORDER CASH CENTRAL TO ROLLBACK INTEREST RATES TO 18% APR, THUS FAILING TO REQUIRE THE FULL REMEDY PROVIDED IN SECTION 37-3-201(6).

The circuit court erred in finding Cash Central of South Carolina, LLC ("Cash Central") met the requirements of Section 37-3-201(6), ordering Cash Central to pay a $5,000 penalty per failure to file, but failing to order Cash Central to recast all loans to 18% APR. (9/28/17 Order at 24). The cardinal rule of statutory construction is to ascertain and effectuate the legislature's intent from the plain language of the statute. Burns v. State Farm Mut. Auto Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Hitachi Data Svs. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). The statute provides that if a lender meets the three requirements set forth in the statute:

> then the maximum rate of loan finance charges assessable by the lender is the rate previously properly filed with the Department of Consumer Affairs, provided, however, the lender that has failed or neglected to post rates or to file rates is subject to a civil penalty of up to $5,000.00 payable to the Department of Consumer Affairs.

S.C. Code Ann. § 37-3-201(6) (2002). The defense does not provide the alternative of either paying a penalty or recasting loans. The statute clearly requires a lender to recast the loans to "the rate previously properly filed with the Department" but also provides that the South Carolina

Department of Consumer Affairs ("the Department") may impose a penalty. S.C. Code Ann. § 37-3-201(6) (2002). Lenders do not get to pick and choose which part of the remedy is required. The Department has reiterated this fact numerous times throughout this case.[8]

In addition to the plain language of Section 37-3-201(6), when reading this provision in conjunction with other statutes on maximum rate contained within the South Carolina Consumer Protection Code, S.C. Code Ann. Section 37-1-101 *et seq.* ("CPC"), the General Assembly's intent is clear: lenders who fail to file a maximum rate with the Department shall return monies received in violation of the law. See TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998) (citations omitted) ("In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect. The court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something."). Further, "[i]t is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." Joiner v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).

Section 37-3-201(2)(b) and (c) limit a supervised lender to charging "any rate filed and posted pursuant to Section 37-3-305" or 18% APR. See S.C. Code Ann. § 37-3-201(2)(b)-(c) (2002). Section 37-3-305(7) limits a lender's APR to 18% should they, after making an initial filing, fail to file by the January thirty-first deadline. The law states the previous filing is no longer effective. S.C. Code Ann. § 37-3-305(7) (2002). However, should the lender who previously complied with Section 37-3-305 be able to demonstrate it meets the parameters of Section 37-3-

[8] This fact was discussed at several stages of this case during discussions with Cash Central's attorneys, and a motion hearing. (7/19 Tr. p. 52, lines 12–17). The Department informed the circuit court of this as well in its Memorandum of Law In Opposition to Defendant's Motion for Leave to Amend Its Answer, pp. 7–8.

201(6), instead of rolling back to 18% APR, the lender may recast loans to its previously properly filed rate. S.C. Code Ann. § 37-3-201(6) (2002). It is noteworthy the legislature did not provide for loans to be recast to the lender's ***posted*** rates in this scenario but rather to the previously properly ***filed*** rates. Id.[9]

Thus, even if the Court permits Cash Central to assert the bona fide error defense, it would still have to rollback to 18% APR because there is no other previously properly filed rate. To hold otherwise creates an absurd result by imposing a lesser penalty on a company who entered into contracts in violation of public policy and statutes compared to a company who at some point in time, complied with state laws. Statutes should not be construed so as to lead to an absurd result. Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 351, 549 S.E.2d 243, 249 (2001); See also Duke Energy Corp. v. S.C. Dep't of Revenue, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) ("If possible, the Court will construe a statute so as to escape the absurdity and carry the intention into effect."); Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (the court should reject a meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature); See also W&N Construction v. Williams, 322 S.C. 448, 472 S.E.2d 622 (1996) (holding "licensing statutes protect the public and to permit unlicensed contractors to circumvent licensing requirements by payment of a small fine would defeat the legislative intent").

A lender who properly complies with the maximum rate law prior to ever offering loans but who later fails to comply with one of the requirements is required to pay a penalty and recast its loans to the previously properly filed rate if it meets the 37-3-201(6) defense requirements. The

[9] The circuit court erred as a matter of law in finding "the failure to post rates will always be excused if the rates were properly filed." (9/28/17 Order at 23). Indeed the law would require a supervised lender who increases its properly filed rates one year, but fails to post the new rate, to rollback all loans to the previously properly filed rate if it meets the requirements of Section 37-3-201(6).

circuit court's ruling, however, allows Cash Central to keep millions of dollars in excess charges when it failed to properly comply with South Carolina law during the first eighteen months it operated. (9/6-7 Tr. p. 419, lines 4-18). This totally negates the purpose of and the remedy provided in the statutory defense. The court's interpretation further ignores the statutory language, which provides "the maximum rate of loan finance charges assessable by the lender is the rate previously properly filed with the Department," and disregards the CPC's purposes. S.C. Code Ann. § 37-3-201(6) (2002); § 37-1-101(2)(b)–(e) (2002).

The circuit court, therefore, erred as a matter of law by imposing a penalty of $15,000 but failing to order Cash Central to recast its loans to 18% APR, in the absence of a previously properly filed rate. Thus, this Court should reverse the circuit court's ruling.

III. THE CIRCUIT COURT ERRED IN FINDING CASH CENTRAL WAS NOT REQUIRED TO REFUND EXCESS CHARGES BASED ON THE BONA FIDE ERROR DEFENSE OF S.C. CODE ANN. SECTION 37-5-202(7).

A. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN FAILING TO DEFER TO THE DEPARTMENT'S 1986 INTERPRETATION HOLDING THAT THE SECTION 37-5-202(7) BONA FIDE ERROR DEFENSE IS NOT AVAILABLE TO A LENDER FOR FAILURE TO FILE A MAXIMUM RATE SCHEDULE.

The South Carolina Department of Consumer Affairs ("Department") is the state's consumer protection agency responsible for administering, interpreting, and enforcing the South Carolina Consumer Protection Code, S.C. Code Ann. Section 37-1-101 *et seq.* ("CPC"). The purposes of the CPC include establishing rate ceilings, fostering competition, and informing or otherwise protecting South Carolina consumers. S.C. Code Ann. § 37-1-102(b)–(c), (e) (2002); See also Davis v. NationsCredit Fin. Servs. Corp., 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997) (purpose of the CPC is to protect consumers). The courts of this State have long recognized a state agency's ability to interpret the laws it enforces and administers and has granted deference to such

opinions and interpretations. Lexington Law Firm v. S.C. Dep't of Consumer Affairs, 382 S.C. 580, 586, 677 S.E.2d 591, 594 (2009) ("[T]his Court should defer to the Department's findings where there is no compelling reason to reject it.") (citing Faile v. S.C. Employment Sec. Comm'n, 267 S.C. 536, 540, 230 S.E.2d 219, 221–22 (1976) ("The construction of a statute by the agency charged with executing it is entitled to the most respectful consideration and should not be overruled without cogent reasons."). The Department is the sole state agency designated by the General Assembly to construe and provide official legal interpretations of the CPC, which includes the requirements regarding maximum rate filings. One such interpretation speaks directly to the issue of 37-5-202(7) and its inapplicability to a failure to file a maximum rate schedule. S.C. Code Ann. § 37-6-104(1)(b) & (e) (2002); § 37-6-104(3) (2002). The interpretation came before this Court in the matter of Bell Finance Company v. South Carolina Department of Consumer Affairs, 297 S.C. 111, 374 S.E.2d 918 (Ct. App. 1988), cert. denied, 298 S.C. 307, 380 S.E.2d 172 (1989).

In that case, Bell Finance filed a maximum rate schedule one year but failed to file it the following year. 297 S.C. at 112, 374 S.E.2d 919–20. The Department instructed Bell Finance to refund all charges in excess of 18% APR on all loans made by it during the six-month period its maximum rate schedule was not on file with the Department. Id. Bell Finance asserted the defense of Section 37-5-202(7), which provides:

> A creditor may not be held liable in an action brought under this section for a violation of this title if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error ***notwithstanding the maintenance of procedures reasonably adapted to avoid the error***.

In response, the Department issued an Administrative Interpretation, which explained:

> Having failed to comply with Section 37-3-305, a lender charging in excess of 18% APR on a consumer loan makes an excess charge. . . . The suggestion that Section 37-5-202(7) excuses the assessment of excess charges implies that a creditor might retain illegal late charges, illegal attorney fees, illegal default charges, or finance charges in excess of those properly filed and posted, so long as the creditor can

> allege they were assessed by mistake. The General Assembly clearly intended no such result. See H. Haynsworth, The South Carolina Consumer Protection Code, § 5.202, Comment 3 (1982).

S.C. Dep't of Consumer Affairs, Admin. Interpretation No. 3.305-8601 p. 2. Furthermore, the Department stated:

> Even assuming arguendo that the bona fide error defense could apply, it does not help a lender that fails to file through inadvertence or misapprehension of the Code's requirements. . . . Even if such a lender were able to prove the error was unintentional and bona fide, the lender would still have to show the maintenance of procedures reasonably adapted to avoid the error. The maintenance of such procedures would almost certainly result in the proper filing under Section 37-3-305.

Id. at p. 3.

Bell Finance disagreed and litigation ensued. This Court's resulting decision in 1988 did not overturn the Department's Administrative Interpretation. It set the precedent that a lender's ability to impose a finance charge is limited to 18% APR when the lender fails to file an annual maximum rate schedule with the Department as required by Section 37-3-305. Bell Finance Company v. South Carolina Department of Consumer Affairs, 297 S.C. 111, 116, 374 S.E.2d 918, 922 (Ct. App. 1988), cert. denied, 298 S.C. 307, 380 S.E.2d 172 (1989).

In April 1989, the General Assembly introduced House Bill 3933 in obvious response to the Court's decision in the Bell Finance case. The bill that became law on May 30, 1989, only 47 days after being introduced, added a defense for failure to comply with the maximum rate schedule requirements for credit sales (37-2-305) and consumer loans (37-3-305). Act No. 119, 1989 S.C. Acts 316 (codifying S.C. Code Ann. § 37-3-201(6)). When the General Assembly changed the law to provide this specific defense for failure to comply with Section 37-3-305, the legislative changes did not overturn the Department's interpretation but rather supported it.

Where the construction of the statute by officials charged with its administration has been acquiesced in by the legislature for a long period of time, such construction should be given great weight and should not be overruled without compelling reasons. Gilstrap v. S.C. Budget and Control Bd., 310 S.C. 210, 215, 423 S.E.2d 101, 104 (1992); Stone Manufacturing v. S.C. Emp't Sec. Comm'n, 219 S.C. 239, 249, 61 S.E.2d 644, 648 (1951); Etiwan Furniture Co. v. S.C. Tax Comm'n, 217 S.C. 354, 359, 60 S.E. 2d 682, 684 (1950). The General Assembly has acquiesced in the Department's Interpretation for thirty years. As such, the circuit court as well as this Court should afford significant deference to the Department's longstanding interpretation that the Section 37-5-202(7) bona fide error defense is not available to a lender for failure to file a maximum rate schedule pursuant to Section 37-3-305. Cash Central of South Carolina, LLC ("Cash Central") has not provided any cogent reason why the Department's Administrative Interpretation 3.305-8601 should be overruled after thirty years. As such, the circuit court erred as a matter of law and this Court should reverse the lower court's ruling.

B. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN APPLYING THE GENERAL DEFENSE OF SECTION 37-5-202(7) RATHER THAN THE SPECIFIC DEFENSE OF SECTION 37-3-201(6).

The circuit court incorrectly held that Section 37-5-202(7) is a defense to an action based on a failure to file or post a maximum rate in accordance with Sections 37-3-201(2) and 37-3-305 when the legislature provides for a specific, limited defense to such violations. See S.C. Code Ann. § 37-3-201(6) (2002). The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature. State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002). According to the plain meaning rule, it is not the Court's place to change the meaning of a clear and unambiguous statute. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "A law

must be interpreted reasonably and practically, consistent with the purpose and policy of the General Assembly." Hinton v. S.C. Dep't of Probation, Parole and Pardon Servs., 357 S.C. 327, 332, 592 S.E.2d 335, 338 (Ct. App. 2004) (citing Abell v. Bell, 229 S.C. 1, 4, 91 S.E.2d 548, 550 (1956)).

"It is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." Joiner v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000). However, where two statutes are in conflict, the more recent and specific statute should prevail over the earlier, more general statute. Denman v. City of Columbia, 387 S.C. 131, 138, 691 S.E.2d 465, 468 (2010). Furthermore, "[w]here there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." Spectre, LLC v. S.C. Dep't of Health & Envtl. Control, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010).

In 1989, the General Assembly clearly intended to establish the only defense available to businesses that failed to comply with Sections 37-3-201(2) and 37-3-305. The defense is found in Part 2 of the loans portion of the South Carolina Consumer Protection Code, S.C. Code Ann. Section 37-1-101 et seq. ("CPC") (Chapter 3), entitled "Maximum Charges" and specifically provides:

> Notwithstanding subsection (2), if a lender can demonstrate with competent evidence that ***(a)*** any failure to post rates properly filed under Section 37-3-305 or failure to properly file these rates under Section 37-3-305 was a result of a bona fide error or excusable neglect, ***(b)*** the rates were properly posted or properly filed when the error or neglect was discovered or brought to the lender's attention, ***and (c)*** that no other failure to post or file rates has been brought to the lender's attention by the Department of Consumer Affairs or by consumers within the previous forty-eight month period, ***then the maximum rate of loan finance charges assessable by the lender is the rate previously properly filed*** with the Department of Consumer Affairs, provided, however, the lender that has failed or neglected to post rates or

to file rates is subject to a ***civil penalty of up to $5,000.00*** payable to the Department of Consumer Affairs.

S.C. Code Ann. § 37-3-201(6) (2015) (emphasis added). In offering a three-prong defense to the failure to file or post a maximum rate schedule, it is significant to note that the legislature specifically identified only two situations where a lender could avail itself of a maximum rate violation defense. The first situation is where a lender failed to post rates that it had properly filed. For example, a lender may decide to increase its maximum rate schedule above the rates previously properly filed. If the lender properly files those new rates with the South Carolina Department of Consumer Affairs ("the Department") but fails to post the new rates in its place of business, the lender would be permitted to recast loans to the previously properly filed maximum rates—as long as the lender otherwise meets the requirements of Section 37-3-201(6). See S.C. Code Ann. § 37-3-305(8) (2015).

The second situation addressed in Section 37-3-201(6) is where a lender who previously properly filed a maximum rate schedule failed to do so during a "renewal period." In that situation, a lender who met the requirements of Section 37-3-201(6) would be permitted to recast loans to the previously properly filed maximum rates. See Bell Finance Company v. South Carolina Department of Consumer Affairs, 297 S.C. 111, 374 S.E.2d 918 (Ct. App. 1988), cert. denied, 298 S.C. 307, 380 S.E.2d 172 (1989).

It is noteworthy the legislature did not provide for loans to be recast to the lender's ***posted*** rates in this scenario but rather to the previously properly ***filed*** rates. It is also noteworthy that in addition to recasting its loans, a lender would be subject to a penalty up to $5,000.00.

The legislature was deliberate and precise in tailoring this defense, focusing on whether a lender had properly filed rates, properly posted the rates thereafter and concentrated on the lender's history of compliance as well as the lender's promptness in remedying a failure when it was

brought to the lender's attention. The parameters of Section 37-3-201(6) are more stringent than, and contradict, the general, more lenient parameters found in the Remedies and Penalties Chapter of the CPC in Part 2 which is entitled "Debtor's Remedies." Specifically, Section 37-5-202(7), provides:

> A creditor may not be held liable in an action brought under this section for a violation of this title if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

S.C. Code Ann. § 37-5-202(7) (2015).

The provisions of Section 37-5-202(7) set forth a lower bar in determining a lender's liability for failure to comply with the CPC as compared to Section 37-3-201(6), a section nearly triple its length. Further, the result of proving the elements of section 37-5-202(7) is no liability– a total contradiction to the recasting and penalty required of a lender who provides evidence meeting the Section 37-3-201(6) parameters. The placement of each—the general defense in the general Remedies and Penalties section—and the tailored, specific defense in the "Maximum Charges" section of the Loans Chapter further evidences the legislature's intent of providing Section 37-3-201(6) as the sole defense for violations of section 37-3-201 and 37-3-305.

As a result, Section 37-3-201(6) is the sole, effective defense for failure to comply with the CPC's maximum rate provisions rather than the general defense of Section 37-5-202(7). Furthermore, the defenses cannot be read together harmoniously. The circuit court erred as a matter of law in allowing Cash Central to assert the defense of Section 37-5-202(7) for a failure to file a maximum rate schedule. Thus, this Court should reverse the circuit court's ruling.

C. EVEN IF THE SECTION 37-5-202(7) BONA FIDE ERROR DEFENSE IS AVAILABLE TO A LENDER FOR FAILURE TO FILE A MAXIMUM RATE SCHEDULE, THE COURT ERRED IN FINDING CASH CENTRAL PROVED THE ELEMENTS OF THE DEFENSE.

The general bona fide error defense of Section 37-5-202(7) requires the lender to prove: (1) the violation was not intentional; (2) the violation resulted from a bona fide error; and (3) the lender maintained procedures reasonably adapted to avoid the error. The circuit court erred in finding Cash Central of South Carolina, LLC ("Cash Central") proved the second and third elements of this defense. (See 9/28/17 Order at 14). In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed on appeal unless found to be without evidence which reasonably supports the judge's findings. Townes Associates, Ltd. v. Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

Cash Central's failure to file a maximum rate schedule during the first eighteen months it operated does not qualify as a bona fide error. A bona fide error defense is reserved for clerical errors, not errors of law. Although our state courts have not had the opportunity to construe Section 37-5-202(7) to determine what constitutes bona fide error, there is persuasive authority from a fellow Uniform Consumer Credit Code state. See S.C. Code Ann. § 37-1-102(g) (underlying purpose and policy of Title 37 is "to make uniform the law, including administrative rules, among the various jurisdictions"); § 37-6-104(3) (2002) (requiring the Administrator to keep Department regulations in harmony with those of other Uniform Consumer Credit Code States). In First Wisconsin National Bank v. Nicolaou, 113 Wis.2d 524, 335 N.W.2d 390 (Wis. Sup. Ct. 1983), a bank that improperly repossessed a consumer's vehicle asserted the bona fide error defense under Wisconsin's statutory provision, which is identical to Section 37-5-202(7). In relying on federal case law interpreting identical language from the Federal Truth In Lending Act, the Wisconsin Supreme Court held "errors of law, even made in good faith, do not qualify for the defense." Id. at

532, 335 N.W.2d at 394. The court reasoned that errors of law could be prevented and excusing a violation caused by an error of law would hinder compliance with the act. See Ratner v. Chemical Bank New York Trust Company, 329 F. Supp. 270, 281-82 (S.D. N.Y. 1971); Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161, 1167 (7th Cir 1974); Palmer v. Wilson, 502 F.2d 860, 861 (9th Cir. 1974); Thomka v. A. Z. Chevrolet, Inc., 619 F.2d 246, 250-51 (3d Cir. 1980). The court further explained:

> Relatively speaking, the cost of legal assistance may be less for creditors than consumers. Creditors engage in many similar transactions to which the same legal advice may apply. Consumers, on the other hand, only occasionally transact under the WCA. Usually they must obtain legal assistance for each individual transaction. Thus the creditor should bear the responsibility to avoid mistakes of law and resulting WCA violations. Extending the bona fide error defense to errors of law would lessen the incentive for creditors to take precautions which help ensure compliance with the WCA.

Id. at 534, 335 N.W.2d at 395. Wisconsin, a Uniform Consumer Credit Code state, properly relied on federal guidance in holding an error of law is not a bona fide error. See Jerman v. Carllisle, McNellie, Rini, Kramer & Ulrich, L.P.A., 559 U.S. 573, 130 S.Ct. 1605 (2010); Bawa v. Bowman Heintz, Boscia & Vician, P.C., 2001 U.S. Dist. LEXIS 7842, *14, 2001 WL 618966 (S.D. Ind. May 30, 2001). This persuasive authority interpreting provisions identical to Section 37-5-202(7) provides this Court with a strong foundation to hold the same. In fact, this is what our General Assembly envisioned. S.C. Code Ann. § 37-1-102(2)(f) (2002) (CPC requires harmony with the federal consumer protection acts); See also S.C. Code Ann. § 37-6-104(3) (2002).

Testimony by Community Choice Financial, Inc. ("CCFI")'s Assistant General Counsel shows Cash Central knew of the requirements to file and post a maximum rate schedule prior to beginning business in South Carolina. (9/6-7 Tr. p. 219, lines 11-13; Def. Exh. 3). Ms. Fox:

1. Visited the South Carolina Department of Consumer Affairs ("the Department")'s website and downloaded, saved, printed and placed in her files several documents, including the

initial maximum rate schedule filing form and educational guide for businesses on the maximum rate requirement. (9/6-7 Tr. p. 216, lines 3-7; pp. 222-3, lines 19-6; p. 221, lines 20-21; pp. 223-4, lines 25-2; Def. Trial Exh. 4 & 5).

2. Completed all areas of the maximum rate filing form except for the APR section. (9/6-7 Tr. pp. 223-4, lines 25-2).
3. Researched South Carolina Consumer Protection Code, S.C. Code Ann. Section 37-1-101 et seq. ("CPC") and applicable regulations for laws pertaining to consumer lending, creating a six-page statute summary of legal requirements. (9/6-7 Tr. p. 214, lines 10-13; Def. Exh. 3). On the first page, under a bullet labeled "Interest Rate," Ms. Fox indicated "whatever rate we file with the state so long as it is at least $600 37-3-201(2)(b)." (Def. Exh. 3, p. 1). Later in the summary, under a bullet labeled "Duties of Licensee generally," Ms. Fox noted the requirement to "file and post a max rate schedule, stated as an APR, min 14 pt font 37-3-305 / 28-70-2.305, 3.305" and included the full 127-word disclosure that is required by the statute. (Def. Exh. 3, p. 4-5). Immediately following, under a bullet labeled "Licensing," Ms. Fox noted the requirement to "file a max rate schedule 37-3-305 & $40 at least annually 37-3-305(8)." (Def. Exh. 3, p. 5).

According to Ms. Fox, the statute summary was not thought to be "widely circulated." (Def. Exh. 12, p.4). In fact, there is no indication that the summary was ever reviewed by anyone other than its creator. (9/6-7 Tr. p. 242 lines 10-15; p. 293 line 23; p. 294 lines 13-14; p. 298, line 20; Def. Exh. 12, pp. 1-4). The company did not enlist a South Carolina attorney to assist with the rollout nor did its own General Counsel—whom Ms. Fox referred to as "not a micromanager"—review, or otherwise participate in the creation of, the document. (9/6-7 Tr. p. 242, lines 10-15; p. 247, line 15; p. 293 line 23; p. 294 lines 13-14; p. 298, line 20). CCFI's General Counsel Bridgette

Roman, however, testified that Ms. Fox's statute summary "is the written procedure" and that there were no other written procedures. (9/6-7 Tr. pp. 339-40, lines 25–1; See also 9/6-7 Tr. p. 208, lines 2-5; p. 255, lines 23-25).

The sole procedures for South Carolina compliance contained a critical deficiency, thus making the document woefully inadequate. Though the statute summary referenced the requirement to file a maximum rate schedule, it did not indicate to which state agencies various filings should be submitted. (See Def. Exh. 3; 9/6-7 Tr. pp. 283-4, lines 24). Specifically, the license to be a supervised lender must be filed with the State Board of Financial Institutions Consumer Finance Division ("BOFI") while the filings related to the maximum rate schedule must be filed with the Department. The failure to include this essential information in the statute summary—which Cash Central relied upon *in toto* as its procedures to comply with South Carolina law—was an error of law rather than a bona fide error. When questioned about Ms. Fox's statute summary, Bridgette Roman, General Counsel for CCFI and Ms. Fox's supervisor, testified that Cash Central's procedures were "not complete" and "not thorough" and should have been more detailed. (9/6-7 Tr. pp. 283-4, lines 25-6 ; p. 315-6, lines 24-5; p. 340, lines 1–6). When cross-examined, Ms. Roman also testified there was nothing in the statute summary, dubbed by Cash Central as its South Carolina "procedures," establishing specific information about complying with South Carolina law including the identity of the person responsible for filing the maximum rate document each year or the timeframe for reviewing and submitting it. (9/6-7 Tr. p. 340, lines 2-6). The evidence and testimony from Cash Central's own witnesses revealed that the ***only*** procedures maintained by Cash Central were incomplete and inadequate. (9/6-7 Tr. p. 284-5, lines 25-6).[10]

[10] Additional evidence that the statute summary was inadequate includes the failure of Cash Central to renew its supervised lender's license until it received a second notice scheduling a revocation hearing before the Board of Financial Institutions. (9/6-7 Tr. pp. 45-6, lines 2-8). The statute summary never mentions

Based on Cash Central's own evidence and testimony, the circuit court erred in referring to the statute summary as "a detailed compliance outline of the requirements." (9/28/17 Order p. 5). The circuit court also erred in finding that Cash Central's evidence demonstrates "that reasonably adapted policies and procedures ***to ensure compliance*** were in place." (Id. at 15) (emphasis added). Indeed the evidence and testimony provided by Cash Central clearly showed it did not maintain procedures reasonably adapted to avoid the error that repeatedly occurred over the course of eighteen months during which it operated in South Carolina.

Moreover, Cash Central ignored two different notices sent within the first six months from the Board of Financial Institutions, both notifying the company of the requirement to file a maximum rate schedule with the Department. The first notice was a welcome letter from BOFI when the supervised lender licenses were issued in October 2013. (9/6-7 Tr. p. 46, lines 13-17). The second notice was sent by BOFI on April 1, 2014. (9/6-7 Tr. p. 322, lines 12-25; Pl. Exh. 19). The failure for either of these notices to prompt an action, or even an inquiry, by Cash Central's compliance team emphasizes the lack of procedures maintained to comply with state law. In fact, after making its first loan in South Carolina, there is no evidence in the record anyone at Cash Central ever reviewed Ms. Fox's statute summary again, as part of an internal audit or otherwise, until Cash Central was cited for its failure to file a maximum rate schedule in April 2015.

Alternatively, what the record reveals is Cash Central's compliance efforts were one of minimum effort and were lacking. Cash Central does not have any employees, but instead utilizes those of its parent company Direct Financial Solutions, LLC ("DFS") and grandparent company (9/6-7 Tr. p. 201, lines 1-10; Pl. Exh. 6) CCFI. Cash Central is one of approximately 100 subsidiaries and South Carolina was one of at least 12 states DFS entered in a three year timeframe

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the requirement to renew a supervised lender's license and does not even refer to Regulation 28-8, which establishes the February 1 deadline for renewal. S.C. Code Ann. Regs. 28-8(I).

using a self-described "sprint schedule." (9/6-7 Tr. pp. 285-6, lines 24-1; p. 290, lines 1-3; pp. 203-4, lines 23-3; p. 259, line 9). Lack of supervision seemed to be the norm for Cash Central as the statute summary was prepared by Ms. Fox in a vacuum. (9/6-7 Tr. p. 242, lines 10-15; p. 247, line 15; p. 293, line 23; p. 294, lines 13-14; p. 298, line 20; Def. Exh. 12). Further, no procedures were created to implement the albeit deficient compliance outline; all were assumed to know what their role was in complying with South Carolina law, and supervisors assumed it was occurring. (9/6-7 Tr. p. 247, lines 12-15; pp. 271-2, lines 24-6).

It is undisputed that Cash Central never filed the maximum rate schedule with the Department before April 10, 2015, even though the form, the required filing fee, and the annual filing requirement were referenced in Ms. Fox's statute summary and the forms Ms. Fox downloaded from the Department's website indicated they were required to be filed with the Department (Def. Exh. 3; Def. Exh. 5; 9/6-7 Tr. p. 232, line 4). This was not a bona fide error but rather an error of law and a failure in Cash Central's compliance process. Cash Central failed to maintain procedures reasonably adapted to avoid the error of failing to file a maximum rate schedule because its procedures, which it claims was Ms. Fox's statute summary, were woefully inadequate. The circuit court's findings should be reversed because the evidence does not support the court's findings either that (1) Cash Central's repeated failure to file during the first eighteen months was the result of a bona fide error; or (2) Cash Central maintained procedures reasonably adapted to avoid repeated failures to file a maximum rate schedule with the Department.

IV. THE CIRCUIT COURT ERRED IN FINDING CASH CENTRAL WAS NOT REQUIRED TO REFUND EXCESS CHARGES BASED ON A DEFENSE OF SUBSTANTIAL COMPLIANCE.

A. THE COURT MADE AN ERROR OF LAW BY RELYING ON AN UNPUBLISHED OPINION IN VIOLATION OF RULE 268(D)(2), SCACR, TO DEFINE THE TERM SUBSTANTIAL COMPLIANCE.

The Appellate Court Rules provide "[m]emorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." Rule 268(d)(2)[11] SCACR. This Court has held "reliance on an unpublished order is improper." Higgins v. MUSC, 326 S.C. 592, 599, 486 S.E.2d 269, 272–273, (Ct. App. 1997) (holding neither a party nor the court could rely on facts and legal conclusions from unpublished orders) citing Plante v. State, 315 S.C. 562, 446 S.E.2d 437 (1994) (partly discounting a litigant's argument by citing Rule 239(d)(2), SCACR, and holding that the party on appeal could not rely on an unpublished order).

In its Order, the circuit court improperly relied on the unpublished opinion of Responsible Economic Development v. Florence Consolidated Municipal Planning Commission, No. 2005-UP-584, 2005 WL 7084861 (Ct. App. 2005) in holding the "term [substantial compliance] itself has not been specifically defined" and that "substantial compliance is met if the purpose of the statute is achieved." (9/28/17 Order, p. 17). In fact, the South Carolina Supreme Court has acknowledged a different definition of "substantial compliance" in a published opinion. See Brown v. Harper, 410 S.C. 446, 453–454 & fn. 6, 766 S.E.2d 375, 379 & fn. 6 (2014). In considering the concept of substantial compliance, the Supreme Court stated in a footnote "[s]ubstantial compliance has been defined as 'compliance in respect to the essential matters necessary to assure every reasonable objective of the statute.'" Id., quoting Orr v. Heiman, 270 Kan. 109, 12 P.3d 387, 389 (Kan. 2000). As this Court can see, there is a glaring difference between the definitions,

[11] Renumbered from SCACR Rule 239 effective April 29, 2009.

as the one relied upon by the circuit court has a much lower threshold than the one recognized by our Supreme Court.

Even assuming, *arguendo*, that substantial compliance is a proper defense in this case, the circuit court's reliance on the unpublished opinion was an error of law and was material and prejudicial to the South Carolina Department of Consumer Affairs ("the Department")'s rights in this matter. Visual Graphics Leasing Corp. v. Lucia, 311 S.C. 484, 489, 429 S.E.2d 839, 841 (Ct. App. 1993) ("An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant."). Thus, because the circuit court relied on an unpublished opinion and Cash Central of South Carolina, LLC ("Cash Central") was not directly involved in Responsible Economic Development, this Court should reverse the circuit court's conclusion that substantial compliance is met "if the purpose of the statute is achieved." (9/28/17 Order, p. 17).

B. THE DEFENSE OF SUBSTANTIAL COMPLIANCE IS NOT AVAILABLE TO A LENDER FOR FAILURE TO COMPLY WITH S.C. CODE ANN. SECTIONS 37-3-201 AND 37-3-305.

Cash Central of South Carolina, LLC ("Cash Central") did not prove why it should be allowed procedurally to assert the defense of substantial compliance for failure to comply with Sections 37-3-201 and 37-3-305. Instead, throughout trial, Cash Central presented evidence to support ***how*** it believed it substantially complied with the statute. (9/6-7 Tr. p. 232, line 4; pp. 234-5, lines 7-7). Of the two cases cited by Cash Central, neither case is related to a regulatory filing requirement and one is unpublished. See Davis v. NationsCredit Fin. Servs. Corp., 326 S.C. 83, 484 S.E.2d 471 (1997) (upholding the South Carolina Department of Consumer Affairs' interpretation that a lender substantially complied with attorney preference statute by providing notice in a manner that is "substantially similar" to the form distributed by the Department); Responsible Economic Development v. Florence Consol. Mun. Planning Comm'n., No. 2005-UP-

584, 2005 WL 7084861 (Ct. App. 2005) (an unpublished opinion holding Zoning Planning Commission substantially complied with Section 6-29-760(D), which specifically allows for substantial compliance with notice statutes).

The statute at issue in Davis required creditors to ascertain, on the first page of the credit application, the borrower's preference as to the attorney selected to close the loan and the insurance agent selected to provide required insurance coverage. In the Court's decision, it concluded that a lender substantially complies with Section 37-10-102 if the borrower receives a clear and prominent disclosure of the statutorily required information. Id. at 86, 484 S.E.2d at 472. The Davis ruling essentially adopted the Department's 1983 interpretation advising that a creditor's use of a form substantially the same as the one included in the Interpretation complied with the preference requirements. *S.C. Dep't of Consumer Affairs, Admin. Interpretation No.* 10.102(a)-8302 (1983).

In the unpublished opinion of Responsible Economic Development, the statute at issue prohibits a challenge of the government's action if "there has been substantial compliance with the notice requirements..." No. 2005-UP-584, 2005 WL 7084861 (Ct. App. 2005); See S.C. Code Ann. § 6-29-760(D) (2004). The Court ruled in favor of Florence's Planning Commission holding in part that the agency demonstrated substantial compliance with statutory notice requirements. Id.

The two cases relied upon by Cash Central either relate to an agency interpretation or specific statute permitting substantial compliance with the law. Both also focus on the format of the disclosures that must be provided and go to the argument of substantial compliance itself, not whether the defense is available for a regulatory filing that is required ***before*** an entity engages in business in South Carolina. There is no case law, no statute, and no Department interpretation that provides for such defense. In fact, the Supreme Court has indicated such an argument is not

available in regulatory filing matters. W&N Construction v. Williams, 322 S.C. 448, 472 S.E.2d 622 (1996) (unlicensed contractor—whose contractor's license had been revoked for failure to pay taxes—may not recover on a contract); See also Matrix Fin. Servs. Corp. v. Frazer, 394 S.C. 134, 140, 714 S.E.2d 532, 535 (2001) ("Lenders cannot ignore established laws of this state and yet expect this Court to overlook their unlawful disregard."). The same reasoning should be applied in this case.

The complete lack of any statutory language (and the lack of a Departmental interpretation) regarding substantial compliance as it relates to the ***filing and posting of a maximum rate schedule*** indicates a clear intent by the legislature to preclude such a defense. Therefore, the circuit court erred as a matter of law and this Court should reverse the lower court's ruling.

C. EVEN IF A SUBSTANTIAL COMPLIANCE DEFENSE IS AVAILABLE TO CASH CENTRAL, THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN FINDING CASH CENTRAL PROVED THE DEFENSE WHERE THE CLEAR AND UNAMBIGUOUS INTENT OF THE LEGISLATURE WAS NOT ACHIEVED.

The South Carolina Consumer Protection Code, S.C. Code Ann. Section 37-1-101 et seq. ("CPC") is meant to be liberally construed to effectuate its underlying purposes and policies. S.C. Code Ann. § 37-1-102(1); Davis v. NationsCredit Financial Services Corp., 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997). The purposes of the CPC include establishing rate ceilings, fostering competition, and informing or otherwise protecting South Carolina consumers. S.C. Code Ann. § 37-1-102(b)–(c), (e) (2002); See Camp v. Springs Mortgage Corp., 310 S.C. 514,516, 426 S.E.2d 304,305 (1993). The primary rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, S. E. 2d 424 (1980). According to the plain meaning rule, it is not the Court's place to change the meaning of a clear and unambiguous statute. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "[T]he Court should not concentrate on isolated phrases within the statute, but

rather, read the statute as a whole and in a manner consonant and in harmony with its purpose." Duke Energy Corp. v. S.C. Dep't of Revenue, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) (citing CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881(2011)).

In 1982, the prime rate exceeded the interest rates available to South Carolina consumers, which meant there were fewer credit options. See S.C. Code Ann. § 37-3-201(2) (1981) (as codified by Act No. 433, 1980 S.C. Acts 1323); See also S.C. Code Ann. § 37-2-201(2) (1975) (as codified by Act No. 1241, 1974 S.C. Acts 2879); (9/6-7 Tr. p. 150, lines 17–23). In an effort to address this issue, the General Assembly deregulated interest rates by removing the tiered rate structure and replacing it with the maximum rate schedule framework. (9/6-7 Tr. p. 150, lines 17-23). As part of Act 385, Section 37-3-201(2) specifically capped a loan finance charge to the greater of ***either*** any rate filed and posted pursuant to Section 37-3-305 ***or*** 18% APR. S.C. Code Ann. § 37-3-201(2) (1982).[12] The General Assembly also added Section 37-3-305, which required a lender making supervised or restricted consumer loans in South Carolina to:

> ***file*** with the Department of Consumer Affairs ***and***, except as otherwise provided in this section, ***post*** in one conspicuous place in every place of business in this State in which offers to make consumer loans are extended a certified maximum rate schedule meeting the requirements set forth in subsections (2), (3) and (4) of this section.

S.C. Code Ann. § 37-3-305(1) (1982) (emphasis added).

To ensure the changes accomplished the legislature's intent, it mandated the South Carolina Department of Consumer Affairs ("the Department") to report on the effect of the maximum rate framework in 1985. Act No. 385, 1982 S.C. Acts 2283 § 61. The Department's responsibility to report to the General Assembly on the state of credit in South Carolina is an annual requirement that continues to this day. (9/6-7 Tr. p. 127, lines 6–17; S.C. Code Ann. § 37-6-104(5); Pl. Exh.

[12] A later amendment further restricted the loan finance charge that could be assessed on loans of $600.00 or less. See Act No. 135, 1995 S.C. Acts 784.

18). Through the 1982 amendments, the General Assembly did not open up South Carolina for lenders to have unfettered access to our credit marketplace. Rather, the maximum rate schedule framework ensured lenders, as well as other creditors, did not offer interest rates above 18% APR to South Carolina consumers without the knowledge and oversight of the General Assembly and the Department. Further, amendments fell in line with the CPC's general purposes as the Department's Administrator testified that the a maximum rate schedule is meant to: (1) assist consumers when shopping around for credit to be able to see the maximum rate they could potentially pay a creditor; and (2) foster competition by allowing other creditors to see what their competitors are charging, a practice Cash Central of South Carolina, LLC ("Cash Central") employs as testified to by its CEO. (9/6-7 Tr. p. 111, lines 13–22; pp. 184-5, lines 17–21; 9/6-7 Tr. pp. 460-1, lines 8-2; Kathleen Goodpasture Smith, South Carolina Consumer Protection Code: Text with Comments pp. 90-91 (comment 1) (4th ed. 2001) (cross-referenced in 3-201 comment 1, pg. 195–196); S.C. Code Ann. § 37-1-102(b)–(c), (e)).

Thus, beginning more than 35 years ago, a lender who wants to charge in excess of 18% on a consumer loan is required to meet the prerequisites of Section 37-3-305. At the core of Section 37-3-305 is the obligation to file and post a maximum rate schedule that meets the requirements of that section. S.C. Code Ann. § 37-3-305(1) (1982) (emphasis added) (sets forth the requirement to "***file*** with the Department of Consumer Affairs and, except as otherwise provided in this section, ***post*** . . . a certified maximum rate schedule"); § 37-3-305(2) (1982) (emphasis added) (refers to "The rate schedule required to be ***filed and posted*** by subsection (1)"); § 37-3-305(3) (1982) (emphasis added) ("The rate schedule that is ***filed*** by the creditor shall be ***reproduced*** in at least fourteen-point type for ***posting***"); § 37-3-305(4) (1982) (emphasis added)

(provides "A rate schedule ***filed and posted*** as required by this section shall be effective until changed in accordance with this subsection.").

The only way to conclude Cash Central substantially complied with the maximum rate statute and the General Assembly's intent is to ignore the filing requirement entirely and focus only on what Cash Central posted on its website. Here, Cash Central offered loans at rates between 146% APR and 246% APR, well in excess of 18% APR, for eighteen months without ever notifying the General Assembly or the marketplace as a whole, via the Department. The circuit court, therefore, erred as a matter of law in finding that Cash Central substantially complied with the maximum rate statute and the intent of the General Assembly when Cash Central admittedly did not file a maximum rate schedule.

D. EVEN IF THE SUBSTANTIAL COMPLIANCE DEFENSE IS AVAILABLE TO CASH CENTRAL, THE CIRCUIT COURT ERRED IN FINDING CASH CENTRAL PROVED SUBSTANTIAL COMPLIANCE WHEN CASH CENTRAL NEITHER FILED NOR POSTED ITS MAXIMUM RATE.

The circuit court erred in finding Cash Central of South Carolina, LLC ("Cash Central") substantially complied with Sections 37-3-201 and 37-3-305 where Cash Central admittedly never filed a maximum rate schedule and Cash Central's website did not divulge the maximum rate it would charge a South Carolina consumer. See 9/28/17 Order at 20. "[T]he Court should not concentrate on isolated phrases within the statute, but rather, read the statute as a whole and in a manner consonant and in harmony with its purpose." Duke Energy Corp. v. S.C. Dep't of Revenue, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) (citing CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881(2011)). In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed on appeal unless found to be without evidence which reasonably supports the judge's findings. Townes Associates, Ltd. v. Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

Section 37-3-201(2) clearly provides a loan finance charge cannot exceed 18% APR per year on the unpaid balances of principal ***unless and until*** rates are filed and posted pursuant to Section 37-3-305. S.C. Code Ann. § 37-3-201(2). The plain language of the statute requires that the rates be both (1) filed and (2) posted. "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 79, 533 S.E.2d 581, 582 (2000).

Cash Central concedes that the filing requirement and posting requirement are "coequal statutory requirements." (5/18 Tr. p. 29, lines 20-21). Cash Central has admitted throughout these proceedings that it failed to file the maximum rate schedule until it received its third notice from State Board of Financial Institutions Consumer Finance Division ("BOFI") regarding the maximum rate requirement, eighteen months after the company began operations in South Carolina. (Request to Admit; 9/6-7 Tr. p. 16, lines 18-19; p. 16, lines 18-21; p. 23, lines 12-17; p. 24, lines 3-4; pp. 244-5, lines 24–2; p. 259, lines 13–14; pp. 271-3, lines 24–23; pp. 283-5, lines 17–20; pp. 288-9, lines 25–6; pp. 301-2, lines 22-12). Thus, the only way to conclude Cash Central substantially complied is to ignore the filing requirement completely and focus on the posting requirement.

First and foremost, it does not matter what a lender posts until the lender properly files that information with the South Carolina Department of Consumer Affairs ("the Department"). The posting is contingent on what the lender has filed with the Department. The filing must be done first. S.C. Code Ann. § 37-3-305(3) ("The rate schedule that is filed by the creditor shall be reproduced in at least fourteen-point type for posting."). Cash Central's argument about the defense of substantial compliance is based on combining the two requirements—to file and to

post—as if they are one and then arguing Cash Central complied with them by virtue of what it made available on its website. This is inconsistent with Cash Central's own concession that they are "coequal requirements." (5/18 Tr. p. 29, lines 20-21). Nonetheless, if the Court ignores the requirement to first file with the Department, the evidence and testimony at trial revealed Cash Central's posting did not comply with Section 37-3-305 either.

Assuming, *arguendo*, it were possible for Cash Central to substantially comply with the posting requirement separate from the filing requirement, the Department contends Cash Central did not do so. Of the 15,000 loans Cash Central made prior to April 10, 2015, 1,645 loans (nearly 11%) exceeded 239.99%, which was the highest APR a consumer would have seen by simply visiting Cash Central's South Carolina page. (9/6-7 Tr. pp. 122-3, lines 22-11). Further, the highest APR Cash Central charged was 246.6493% for a $750.00 loan. (9/6-7 Tr. pp. 122-3, lines 14-4). Cash Central's CEO Todd Jensen testified that the chart was void of any rate information related to loans in the amount of $750.00. (9/6-7 Tr. pp. 462-3, lines 23-9). He further confirmed that the actual maximum rate that Cash Central charged was nowhere to be found on any of the webpages viewable by South Carolina consumers as the website does not show a maximum APR at all. (9/6-7 Tr. pp. 461-4, lines 16-1). Such was also admitted by Cash Central's Assistant General Counsel at trial and recognized by the judge. (9/6-7 Tr., p. 269, lines 11-20).

Further, the Department testified that what was posted on the website was not compliant with the law. (9/6-7 Tr. p. 173, lines 1–18; p. 175, lines 7–21). Upon reviewing Cash Central's webpages, the Department informed them they were not compliance with Section 37-3-305. The courts of this State have long recognized a state agency's ability to interpret the laws it enforces and administers and has granted deference to such opinions and interpretations. Lexington Law Firm v. S.C. Dep't of Consumer Affairs, 382 S.C. 580, 586, 677 S.E.2d 591, 594 (2009) ("[T]his

Court should defer to the Department's findings where there is no compelling reason to reject it.") (citing Faile v. S.C. Employment Sec. Comm'n, 267 S.C. 536, 540, 230 S.E.2d 219, 221–22 (1976).

Had Cash Central complied with South Carolina law before offering loans to consumers at rates exceeding 18% APR, the Department's standardized maximum rate certificate would have been available on Cash Central's website. (9/6-7 Tr. pp. 110-1, lines 21-6). As such, consumers visiting various lenders' websites would have been able to compare Cash Central's standardized certificate to the standardized certificates available on the other lenders' websites. This would have allowed consumers to compare the cost of credit–apples to apples– for any of the potential creditors the consumer was considering for a loan. (9/6-7 Tr. p. 111, lines 13–22). The standardized certificate with the Department's information also would have alerted the consumers, who happened upon Cash Central's website via an internet search, that they could contact the Department for more information about other lenders offering consumer loans in South Carolina.

Moreover, had Cash Central complied with South Carolina law before offering loans to South Carolina consumers at rates exceeding 18% APR, other supervised lenders would have been aware that Cash Central was operating in South Carolina. Cash Central's competitors could have accessed the Department's list of maximum rate filers on its website or submitted a FOIA request for this information. (9/6-7 Tr. p. 187, lines 2-15). Cash Central's competitors would have had the same advantage Cash Central had of being able to compare "how we measured up against the competitors," as Cash Central's CEO Todd Jensen testified. (9/6-7 Tr. pp. 460-1, lines 8-2). This would have accomplished the purpose of fostering competition among consumer lenders in South Carolina. (9/6-7 Tr. p. 111, lines 13–22); Kathleen Goodpasture Smith, South Carolina Consumer

Protection Code: Text with Comments p. 91 (Comment 1a) (4th ed. 2001) ("disclosure is a most effective means of limiting the price of credit.")

Furthermore, Cash Central admittedly operated its website in violation of South Carolina law for at least twelve days ***after*** its Assistant General Counsel was on notice that the website did not contain the 127-word disclosure statement or the maximum rate as required by Section 37-3-305. (Def. Exh. 12). The trial judge even commented on the absurdity that Cash Central knew it "wasn't playing by the rules on the website and still, instead of taking the whole thing down and refunding Customer No. 1's money, [Cash Central] left it up." (9/6-7 Tr. p. 271, lines 5-13). How does behavior like this warrant a finding that Cash Central "substantially complied" with South Carolina law, even if it were a legitimate defense?

Cash Central admittedly failed to file a maximum rate schedule with the Department repeatedly during the first eighteen months of operating in South Carolina. During this same period of time, Cash Central's website never stated its maximum rate of 246.6493% APR. In light of these undisputed facts, the circuit court erred in finding Cash Central substantially complied with Sections 37-3-201 and 37-3-305. Thus, this Court should overturn the circuit court's ruling.

CONCLUSION

The South Carolina Consumer Protection Code, S.C. Code Ann. Section 37-1-101 et seq. ("CPC") is required to be liberally construed to promote its underlying purposes and policies. S.C. Code Ann. § 37-1-102(1); Davis v. NationsCredit Financial Services Corp., 326 S.C. 83, 86, 484 S.E.2d 471,472 (1997). Reading the CPC as a whole, excess charges are required to be returned to consumers. See e.g., S.C. Code Ann. §§ 37-2-416(3); 37-3-408(3); 37-3-409; 37-3-509; 37-4-104(2); 37-5-202(2), (3) & (6); 37-6-104(4); 37-6-113(A). The law is simple and straight forward:

a lender who fails to file a maximum rate schedule with the South Carolina Department of Consumer Affairs ("the Department") is limited to charging 18% APR. Further, a lender who has never filed the maximum rate schedule must return excess interest received back to the consumers who paid it. The CPC does not permit a company who failed to follow the law to profit from it. Excess charges must always be returned. Period. Even lenders who have previously complied with the maximum rate filing requirement, but later fail to do so must return excess interest received.

The Court's Order allows Cash Central of South Carolina, LLC ("Cash Central") to pay a penalty of $15,000—a mere slap on the wrist—in exchange for keeping millions in excess interest collected from South Carolina consumers in violation of the law. Failing to require Cash Central to recast the 15,000 loans to 18% APR and refund these excess charges results in:

- ignoring statutory language, case law, and legislative intent (S.C. Code Ann. §§ 37-3-201(2); 37-3-201(6); and 37-3-305; W&N Construction v. Williams, 322 S.C. 448, 472 S.E.2d 622 (1996); First Wisconsin National Bank v. Nicolaou, 113 Wis.2d 524, 335 N.W.2d 390 (Wis. Sup. Ct. 1983)); and
- obstructing the CPC's purpose to establish rate ceilings, foster competition, and inform or otherwise protect South Carolina consumers (S.C. Code Ann. § 37-1-102(2)(b) and (c); Camp v. Springs Mortgage Corp., 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993)).

Cash Central admittedly failed to file its Maximum Rate Schedule with the Department during the first eighteen months it offered triple-digit interest rate loans to South Carolina consumers. Unless this Court overturns the circuit court's decision, the $15,000 penalty will be seen as merely a cost of doing business and will eliminate any incentive for a supervised lender to comply with South Carolina law. W&N Construction v. Williams, 322 S.C. 448, 472 S.E.2d 622 (1996); See also

First Wisconsin National Bank v. Nicolaou, 113 Wis.2d 524, 335 N.W.2d 390 (Wis. Sup. Ct. 1983).

As such, this Court should reverse the lower court's ruling.

April 3, 2018

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS

Robert E. Hood, Fifth Judicial Circuit

RECEIVED
APR 04 2018
SC Court of Appeals

Appellate Case No. 2017-002639

South Carolina Department of Consumer Affairs,

Appellant,

v.

Cash Central of South Carolina, LLC,

Respondent.

PROOF OF SERVICE

I certify that I have served the Appellant's Motion for Leave to File an Amended Initial Brief and Amended Designation of Matter to be Included in the Record on Appeal on Respondent, Cash Central of South Carolina, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on April 4, 2018, addressed to its attorneys of record, James Y. Becker and Mary M. Caskey, Haynsworth Sinkler Boyd, P.A., P.O. Box 11889, Columbia, SC 29211.

April 4, 2018

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Celebrating Over 40 Years of Public Service

April 4, 2018

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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RE: South Carolina Department of Consumer Affairs v. Cash Central of South Carolina, LLC
Appellate Case No. 2017-002639

Dear Madam Clerk:

Enclosed please find the original and one (1) copy each of the following in regard to the above-referenced matter:

1. Appellant's Motion for Leave to File an Amended Initial Brief and Amended Designation of Matter to be Included in the Record on Appeal;
2. Amended Initial Brief of Appellant;
3. Amended Designation of Matter to be Included in the Record on Appeal;
4. Proof of Service of Appellant's Motion; and
5. Proof of Service of Appellant's Amended Initial Brief and Amended Designation of Matter.

We ask that you please file the originals and return the clocked-in copies to us via our courier.

Respectfully,

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Enclosures

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