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.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENTS

In Cash Central's brief, it asks this Court to ignore relevant undisputed facts and important statutory language in order to affirm the circuit court's decision. The most important fact in this case—that Cash Central failed to comply with the maximum rate law prior to making 15,000 consumer loans at rates exceeding 18% annual percentage rate ("APR")—is undisputed.

Cash Central asserts the standard of review "does not require this Court to disregard the findings of the trial court . . . ." (Resp. Br. at 10, fn 9). The standard, however, also does not require this Court to ignore blatant errors in material, factual findings. See State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001) ("[The appellate court is] bound by the trial court's factual findings unless they are clearly erroneous."); see also Anderson v. Bessemer City, 470 U.S. 564, 573 (1985) (citing United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948) ("A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.")). For example, the circuit court erred in finding:

1. The information available on Cash Central's website fulfilled the purposes of the maximum rate law. (R. pp. 9; 18 ¶ 30; 25). This finding ignored the Administrator's undisputed testimony about the various purposes of the filing requirement. (R. pp. 225, l. 13–226, l. 2; pp. 235, l. 6–239, l. 18; pp. 263, l. 17–268, l. 8).
2. The "overwhelming evidence is that all of the information on the Maximum Rate Schedule issued by the Department was in fact posted by Cash Central." (R. p. 21). This finding completely ignored the undisputed testimony, as well as the judge's own observations, that Cash Central entered into 1,645 loans where the APR exceeded the highest rate available on the website of 239.99% APR. (R. pp. 231, l. 10–234, l. 11; pp. 337, l. 7–339, l. 23). The court also ignored Todd Jensen's testimony that a consumer would not be able to see

the maximum APR he actually would have to pay without completing a loan application including providing his banking account information. (R. pp. 451, l. 1–455, l. 21). As such, the highest rate available on Cash Central's website, in the absence of completing a loan application, was not the maximum rate Cash Central charged on almost 11% of the loans contracted for during the relevant time period.

These are just a couple of the errors the circuit court made in its Order.

I. THE DEPARTMENT DOES NOT DEMAND PERFECTION.

Cash Central attempts to compare its failure to file a maximum rate schedule—a prerequisite for operating as a high interest consumer lender in this state—to a Department employee's clerical error of selecting the wrong item in a dropdown box while processing thousands of regulatory filings.[1] (Resp. Br. at 22–23). The Department does not require perfection but can appreciate the difference between a clerical error and a failure to complete all of the steps necessary to legally begin operating in a state. As an example, the filing submitted by Cash Central and received by the Department on April 10, 2015, did not include the attachment of a maximum rate Cash Central intended to charge. (R. pp. 508–514). The Department notified Cash Central of this error. The attachment revealing the maximum rate was not received by the Department until four days after the initial paperwork; however, the Department processed the filing and gave Cash Central the benefit of being filed on April 10 rather than April 14. (Id.; R. pp. 227, l. 19–229, l. 9; p. 274, l. 9–19). Indeed, when Cash Central finally filed its maximum rate schedule, the

[1] Cash Central apparently never noticed this error until preparing for trial and failed to bring it to the Department's attention until two years after the posting was issued. Had Cash Central brought the mistake to the Department's attention, it would have been corrected immediately. (R. pp. 273, l. 15–274, l. 3).

Department determined it had been ***properly***—though not perfectly—filed and processed it. (R. pp. 508–514).

II. CASH CENTRAL'S WEBSITE CONTAINED DISCLOSURES REQUIRED BY FEDERAL LAW, NOT SOUTH CAROLINA'S MAXIMUM RATE LAW.

Cash Central argues that the content on its website provided more and better disclosures than the Department's maximum rate schedule. (Resp. Br. at 15–16). However, Cash Central's website content is aimed at complying with federal disclosure requirements rather than South Carolina's maximum rate law requirements. In 1982, when our General Assembly passed the maximum rate law, the body was aware of the existence of and incorporated the Federal Truth In Lending Act ("TILA") in the Consumer Protection Code. S.C. Code Ann. § 37-3-305 (1982). The purpose of TILA, in pertinent part, is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C.S. § 1601 (LEXIS through PL 115-196, approved 7/7/18). Given the deregulation of interest rates in 1982, the General Assembly obviously believed creditors should be required to do more than simply comply with TILA in order to charge interest rates higher than 18% APR in our state.

As such, the purpose of Section 37-3-201 is "to provide the maximum rates that can be charged in a consumer loan." Act No. 385, 1982 S.C. Acts 2283. The purpose of Section 37-3-305 is to "requir[e] creditors entering into consumer credit transactions in South Carolina to file and post a maximum rate schedule." Id. Sections 37-3-201 and 37-3-305 collectively act as an interest rate cap notwithstanding the ability of a creditor to charge a higher interest rate if it files

its rate with the Department and posts the rate schedule issued by the Department in a conspicuous place pursuant to Section 37-3-305.

On the other hand, TILA mandates meaningful disclosure of credit terms to include, among other items, annual percentage rate, finance charge, amount financed, and total of payments. 12 C.F.R. § 1026.18 (2006). There is neither an interest rate limitation nor a requirement in TILA for a creditor to file any of the credit terms with state or federal government before extending those credit terms to consumers.

In its brief, Cash Central asks this Court to ignore the statutory requirement to file a maximum rate schedule with the Department prior to offering high interest loans to South Carolina consumers. (Resp. Br. at 12–14). According to Cash Central, this is merely a technicality. Nowhere in Cash Central's brief does it acknowledge there is any purpose served by the requirement to file the maximum rate schedule with the Department. Rather, Cash Central focuses on the purpose of the posting requirement and the content of its website to claim substantial compliance with the maximum rate law.

Cash Central offered Victor Stango, Ph.D., Professor of Economics at the University of California–Davis, as an expert witness in the field of consumer and firm behavior in household financial settings. (R. pp. 456, l. 25–457, l. 2). Professor Stango's testimony focused on a comparison of disclosures provided on Cash Central's website versus the disclosures provided on the maximum rate schedule issued by the Department. Cash Central relied on this testimony to support its argument that the disclosures provided on its website were better and more informative for consumers than the Department's maximum rate schedule. Professor Stango specifically referenced APRs, loan amounts, loan start dates, loan periods, repayment frequency, and total finance charges. (R. p. 466, l. 5–16). His testimony shows that the Cash Central website displayed

information required by TILA. However, the Legislature intended solely for the maximum rate to be displayed to a consumer before entering into the transaction. Although it is Professor Stango's expert opinion that what the South Carolina Legislature required by statute is deficient, he admittedly is not an expert on South Carolina's maximum rate law or what the General Assembly's intentions were when passing the maximum rate law. (R. pp. 487, l. 5–488, l. 19). Not only did his testimony ignore the statutory requirement for Cash Central to file its maximum rate schedule with the Department, Professor Stango admittedly had no foundation or expertise to offer with respect to this statutory requirement. (Id.; R. p. 471, l. 9–12).

Sections 37-3-201 and 37-3-305 as they existed throughout Cash Central's first eighteen months of operations in South Carolina reveal that the Legislature's emphasis on filing a maximum rate schedule is more important than the posting—lenders must post what they ***file***. Further, the Department never said the information provided on Cash Central's website violated any law and never demanded Cash Central remove the content. The Department simply said that what was on the website was not a substitute for complying with South Carolina law. (R. pp. 258, l. 8–262, l. 13).

III. THE CASES CITED BY CASH CENTRAL ARE DISTINGUISHABLE FROM THE INSTANT CASE.

Cash Central offers two particular cases to support its argument that substantial compliance should be available as a defense in this case. However, neither is relevant to the current matter.

In Davis v. NationsCredit Financial Services Corporation, 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997), the Supreme Court held that as long as the creditor clearly and prominently disclosed the information required by Section 37-10-102, it would not be a fatal error if said disclosure was not provided on the first page of the credit application. The Court reasoned that such a technicality

would elevate form over substance. Id. at 86, 484 S.E.2d at 472. In that case, the purpose of the statute had been satisfied. Id. at 86–87, 484 S.E.2d at 473. In this case, there are two requirements serving two different, specific purposes. One of the requirements—to file a maximum rate schedule with the Department—was not done at all. As such, the statutory purpose associated with the filing requirement could not be satisfied. Moreover, the content on Cash Central's website did not properly disclose the maximum rate. (R. p. 251, l. 3–16; pp. 447, l. 9–450, l. 25). As such, the statutory purpose associated with the posting requirement was not satisfied either.

The Department asserts the facts and the Supreme Court's analysis in King v. American General Finance, Inc., 386 S.C. 82, 687 S.E.2d 321 (2009) are more in line with the instant case. In King, the lender asserted substantial compliance as a defense for failure to comply with the timing requirement provided in Section 37-10-102. The Court rejected the substantial compliance defense and distinguished Davis from King. The Court explained that "Davis dealt with an issue of form, not one of timing....Timing is a critical issue of informed disclosure." King, 386 S.C. at 86, 687 S.E.2d at 323. The Court ultimately held "[t]he timing feature of section 37-10-102 imposes a bright-line approach which is manifestly at odds with the notion of substantial compliance" and "[t]o permit a construction of section 37-10-102 as sanctioning the lender's furnishing the borrower with the attorney preference disclosure after the application was completed would undermine the legislative purpose to protect borrowers." Id. at 90, 687 S.E.2d at 325. In this case, the requirement to file a maximum rate schedule prior to offering consumers loans in excess of 18% APR is indeed a bright-line rule. Similar to the analysis in King, the timing of satisfying the filing requirement is critical to a lender's ability to ***legally*** charge in excess of 18% on consumer loans. This is a bright-line test that Cash Central failed.

Cash Central also offers a Washington state case to assert that the defense of substantial compliance should apply to a failure to meet a regulatory filing requirement. The case of Williamson, Inc. v. Calibre Homes, Inc., 106 Wash. App. 558, 23 P.3d 1118 (Wash. Ct. App. 2001), however, is distinguishable from the current case. In Williamson, Masters, Inc. had a contract to be the exclusive real estate broker for Calibre Homes but was permitted to appoint Williamson, Inc. as the real estate agent. Betsy Williamson and Curtis Williamson, who were the sole shareholders of Williamson, Inc., were licensed real estate sales people in the State of Washington. The only entity that was not licensed to do real estate sales was Williamson, Inc. In that case, the court determined that because the Williamsons were both licensed, were the only sales people performing the work, and were the sole shareholders of Williamson, Inc., the purposes of the statute at issue were accomplished. Id. at 570, 23 P.3d at 1125.

Here, no entity or person associated with Cash Central was licensed or authorized to charge in excess of 18% APR on consumer loans in South Carolina. Cash Central, however, charged triple digit interest rates on more than 15,000 loans prior to completing the requirements to legally do so. Furthermore, as discussed in Appellant's Brief at page 17, our Supreme Court 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. W&N Construction v. Williams, 322 S.C. 448, 450, 472 S.E.2d 622, 623 (1996). This is the exact situation applicable here.

IV. THE COURT OVERTURNED THE DEPARTMENT'S LONGSTANDING ADMINISTRATIVE INTERPRETATION WITHOUT COGENT REASON.

Cash Central asserts in its brief that the Department's reliance on 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) is misleading and demonstrably incorrect. (Resp. Br. at 19). The Department's discussion of the Bell Finance case in its brief served two purposes. One purpose is to illustrate how the Section 37-3-201(6) defense came about. The other purpose is to make the Court aware of a current, longstanding administrative interpretation that is on point with the issues in this case. It is clear from filings at the circuit court that the defense set forth in Section 37-5-202(7) was asserted in the Bell Finance case even though this was not part of the appeal to the Court of Appeals. However, at the end of the day, when the Court of Appeals issued its decision in Bell Finance, the Department's interpretation was upheld *in toto*. The Legislature did not overturn it but rather created a specific defense for lenders. Moreover, other courts in UCCC states have ruled in line with the interpretation.

That interpretation has been in full force and effect for more than thirty years. In the absence of a cogent reason, the circuit court cannot overturn a longstanding administrative interpretation that has consistently been applied by a state agency. Greystone Catering Co. v. South Carolina Dep't of Revenue & Taxation, 326 S.C. 551, 554, 486 S.E.2d 7, 7 (1997) ("If an administrative agency has consistently applied a statute in a particular manner, we cannot overturn the agency's construction absent a cogent reason."); Edisto Fleets, Inc. v. South Carolina Tax Com., 256 S.C. 350, 355, 182 S.E.2d 713, 715 (1971) ("[An agency's] long standing construction must be recognized and may not be overruled without cogent reason."). Thus, this Court should reverse the circuit court's ruling.

V. CASH CENTRAL'S FAILURE TO FILE A MAXIMUM RATE SCHEDULE DOES NOT QUALIFY AS EXCUSABLE NEGLECT.

Cash Central argues in its brief that it proved the defense provided in Section 37-3-201(6) in part because its failure to properly file the rate schedule with the Department qualifies as excusable neglect.[2] Cash Central offers a definition for excusable neglect from Black's Law Dictionary as "[a] failure—which the law will excuse—to take some proper step at the proper time . . . not because of the party's own carelessness, inattention, or willful disregard of the court's process, but because of some unexpected or unavoidable hindrance or accident." (Resp. Br. at 25). However, Cash Central does not meet this definition either. Simply because the failure was a result of human error, it does not automatically qualify as excusable neglect.

Even though the procedures Rebecca Fox created were inadequate, Cash Central failed to follow what was specifically included. Ms. Fox's procedures referenced the ability to charge "whatever rate we file" along with the requirement to file the maximum rate schedule and pay the $40 fee at least annually. (R. pp. 552, 555–556). Yet Cash Central failed to file the maximum rate. The procedures included the 127-word disclosure that was required by statute. Yet Cash Central's South Carolina page stayed live for at least the first twelve days of its operations even though Cash Central knew the disclosure was missing. (R. pp. 310, l. 4–316, l. 9; pp. 337, l. 7–339, l. 23). The failure to actually file the maximum rate schedule before offering consumer loans in excess of 18% APR and at least annually is nothing more than carelessness or inattention.

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

[2] The Department addressed why Cash Central did not prove its failure to file was a bona fide error in the Appellant's Brief at pages 32–37.

when the supervised lender licenses were issued in October 2013. (R. p. 211, l. 13–17). The second notice was sent by BOFI on April 1, 2014. (R. p. 380, l. 12–25; R. p. 546). The failure to take action in response to either of these notices is carelessness and inattention.

The facts and circumstances at hand do not support a finding of excusable neglect. 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. (R. pp. 552–557; R. pp. 559–560; R. p. 306, l. 4). The only explanation for Cash Central's failure to file is carelessness and inattention to detail on the part of the employees who rolled out the loan product in South Carolina and handled ongoing compliance. There was no "unexpected or unavoidable hindrance or accident" that prevented Cash Central from making the required filings for the first eighteen months of operations. Even Cash Central's excuse that they experienced turnover does not bear out. (Resp. Br. at 5). Rebecca Fox left in December 2014. (R. p. 317, l. 14–15). Amy Jennings transitioned from the legal department to the compliance department in early 2014, though she "kept a foot in each department for a bit of time to make sure that bases were adequately covered." (R. pp. 365, l. 2–367, l. 16; p. 300, l. 7–22). Neither of these changes in personnel excuses Cash Central's failure to file a maximum rate schedule around October 2013 or by January 31, 2014.

VI. CASH CENTRAL'S READING OF SECTION 37-3-201(6) IGNORES THE PLAIN LANGUAGE CONTAINED IN THE STATUTE AND THE PRACTICAL, CONSISTENT APPLICATION OF THE REMEDY TO ALL CONSUMER LENDERS OPERATING IN THIS STATE.

Cash Central asks this Court to ignore an important portion of the statutory remedy if a lender can show it meets the three requirements of the Section 37-3-201(6) defense. Cash Central

misstates the remedy as limiting monetary liability to a civil penalty of up to $5,000. (Resp. Br. at 24).

Cash Central argues that the Department's reading and application of Section 37-3-201(6) would result in additional liability for lenders who failed to comply. (Resp. Br. at 30). Practical application of the statute shows otherwise. As provided in Section 37-3-201(2), the maximum rate a lender can charge is 18% APR in the absence of a rate filed and posted pursuant to Section 37-3-305. Section 37-3-201(6) provides that "[n]otwithstanding subsection (2)" if a lender qualifies for the defense, the lender can rollback to the previously properly filed rate—rather than 18% APR—and pay a civil penalty up to $5,000. Depending on the number of contracts and the lender's interest rates, it is sometimes less liability for lenders to simply rollback to 18% APR. Section 37-3-201(2) is the default remedy; however, a lender who qualifies for the defense under Section 37-3-201(6) can avail itself of that remedy if the total monetary liability would be less.

In the Appellant's Brief, the Department explained the application of this defense and how it would limit liability for Lender A who had previously properly filed rates with the Department, maintained the same rate, but forgot to file by the January 31st deadline. (App. Br. at 20–21). If Lender A had increased its rates to 45% APR during the period it had not filed rates with the Department, Lender A would have been required to rollback contracts to the previously properly filed rate of 36% APR, rather than 18% APR, and pay a civil penalty. In the current case, the Department has not sought a civil penalty from Cash Central but instead has asked that Cash Central rollback contracted rates to the legal rate of 18% APR in the absence of a previously properly filed rate.

Cash Central also incorrectly argues that the failure to post rates will always be excused if the rates were properly filed. (Resp. Br. at 28). To illustrate the defense with respect to a failure

to post, imagine Lender B, a supervised lender that offers consumer loans at 60% APR. Lender B properly complies with South Carolina law prior to offering its first consumer loan in this state. Lender B properly files a maximum rate schedule each year by the January 31st deadline and posts the Department's certificate conspicuously for any reasonable consumer to see. In 2017, Lender B properly files a maximum rate schedule by January 31, 2017, establishing a higher self-imposed maximum rate of 75% APR, but fails to post the new certificate. This failure to post is discovered during an onsite examination on April 1, 2017, and Lender B immediately posts the correct certificate. Upon investigation by the Department, Lender B shows evidence that it meets the three requirements of the defense provided in Section 37-3-201(6). In this scenario, Lender B would be required to rollback all loans made February 1, 2017, through April 1, 2017, to 60% APR, the previously properly filed rate, in addition to paying a penalty up to $5,000.00.[3] Based on this scenario, it is apparent 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." (R. p. 28).

To go along with any of Cash Central's arguments regarding the Section 37-3-201(6) defense requires this Court to not only ignore the statutory language but also disregard the practical application of the defense.

CONCLUSION

This Court should overrule the circuit court's ruling. There is a difference between a lender who complied with South Carolina law prior to ever operating in this state and a lender who started operating without first complying with our laws.

[3] Again, if it is less liability for the lender to rollback to 18% APR, the lender would be able to do that instead of rolling back to 60% APR and paying a civil penalty to the Department. S.C. Code Ann. § 37-3-201(2) & (6).

Throughout the trial and Respondent's brief, Cash Central of South Carolina, LLC ("Cash Central") has asked the courts to recognize the company as a legitimate and scrupulous creditor. Scrupulous is defined as "careful, thorough, and extremely attentive to details." Oxford English Dictionary, *available at* https://en.oxforddictionaries.com/definition/scrupulous (last visited July 30, 2018). Cash Central's failure to comply with South Carolina law on numerous occasions evidences it is not a scrupulous creditor whose interests should be considered above those of South Carolina consumers. In addition to the failure to file a maximum rate schedule with the Department during the first eighteen months it offered consumer loans in excess of 18% APR, Cash Central:

1. Failed to take its website offline for at least twelve days after its attorney, Rebecca Fox, realized it was not in compliance with South Carolina law (R. pp. 310, l. 4–316, l. 9; pp. 337, l. 7–339, l. 23);
2. Failed to renew its supervised lending license for the website until after it received a notice setting a revocation hearing (R. pp. 210, l. 2–211, l. 8; R. p. 496; R. p. 497);[4]
3. Failed to make the correction of posting the maximum rate filing on its website even after receiving two different notices from the Board of Financial Institutions;
4. Failed to include the existence of two different state agencies with differing requirements in its statute summary—the very "procedures" Cash Central relied upon to comply with South Carolina law and now try to use to justify its failure to comply. (R. pp. 552–557).

[4] Ms. Roman did not mention this failure to make a regulatory filing during her testimony (R. pp. 378, l. 7–379, l. 18) and Cash Central did not acknowledge the failure in its brief (Resp. Br. at 5, fn 6).

These are not examples of a lender who acts carefully, thoroughly, and extremely attentive to details. These are undisputed instances that occurred when Cash Central rushed to start doing business in South Carolina along with at least eleven other states during a three-year timeframe. (R. pp. 277, l. 23–278, l. 3; pp. 352, l. 24–353, l. 1; p. 357, l. 1–3; p. 327, l. 9).

There were more than 1,400 other supervised lender licensees operating in South Carolina during the relevant time period in this case (R. p. 215, l. 8–10; p. 216, l. 5–18). The supervised lenders who comply with the maximum rate law are disadvantaged by those who do not, which is why the Legislature imposes stiff penalties for noncompliance. Cash Central is exactly the business the Legislature intended to penalize for failing to comply with the maximum rate law prior to offering loans at rates exceeding 18% APR. This Court should overturn the circuit court's ruling in order to accomplish the Legislature's intent and effectuate the plain language of the statutes.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

In accordance with Rule 211, SCACR, the undersigned hereby certifies that the Final Reply Brief of Appellant is identical to the Initial Reply Brief with the exception of inclusion of citations to the Record on Appeal, updates of page numbers in the Table of Contents and Table of Authorities, and correction of obvious typographical errors.

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