RECEIVED
Sep 30 2021
SC Court of Appeals

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.

APPELLANT'S RETURN TO PETITION FOR REHEARING

Pursuant to the Court's letter dated September 20, 2021, the South Carolina Department of Consumer Affairs ("Department") files this Return to Respondent Cash Central of South Carolina, LLC's ("Cash Central") Petition for Rehearing ("Petition"). In the Petition, Cash Central reiterates the arguments it made to the lower court and in its brief and argument to this Court rather than identifying any points this Court may have overlooked or misapprehended in its Opinion. Due to Cash Central's failure to comply with SCACR 221 and for all reasons argued in the Department's briefs and oral argument in this appeal, which are incorporated herein, this Court should deny Cash Central's Petition.

I. This Court correctly applied the de novo standard of review.

This case is about the interplay of Sections 37-3-201(2)(b) and 37-3-305 and whether Cash Central can avail itself of certain statutory defenses found in Sections 37-3-201(6) and 37-5-202(7) or the doctrine of "substantial compliance" as outlined in Davis v. NationsCredit Fin. Servs. Corp., 326 S.C. 83, 85–86, 484 S.E.2d 471, 472 (1997). As this Court stated, "Statutory interpretation is a question of law subject to de novo review." (Op. p. 4–5) (quoting Barton v. S.C. Dep't of Prob. Parole & Pardon Servs., 404 S.C. 395, 414, 745 S.E.2d 110, 120 (2013)). The primary issues in this appeal are questions of law subject to a de novo standard of review. On each of these issues, this Court properly reversed the lower court's decision based on that court's erroneous legal analysis.

The threshold issue is whether Cash Central met the statutory requirements of Sections 37-3-201 and 37-3-305 before it started contracting for and collecting finance charges in excess of 18% APR. The lower court found, "Cash Central does not dispute that it failed to file the required form with the Department between October 24, 2013, when it first began making loans in South Carolina, and April 10, 2015, when the Department first issued a Maximum Rate Schedule for Cash Central." (R. p. 7). This Court can rely on this single, undisputed fact to decide the threshold issue in this appeal. Cash Central failed to file a maximum rate schedule with the Department and, therefore, did not meet the statutory requirements before it started collecting finance charges in excess of 18% APR. This Court accurately concluded, as a matter of law, that the plain language of Sections 37-3-201(2) and 37-3-305 dictates that unless and until a supervised lender complies with the requirements to file and post a maximum rate schedule, the lender is not authorized to contract for or receive finance charges in excess of 18% APR. (Op. p. 8). This Court considered

the filing requirement, which was ignored in the lower court's decision, and properly reversed the lower court on this question of law. As such, the Petition should be denied.

II. The Court correctly considered the purposes of the Code and the purposes of the filing and posting requirements.

In addition to acknowledging the plain language of the statutes, this Court's Opinion fully considered all relevant purposes of the Code including the purposes of the filing and posting requirements. As this Court eloquently stated, "The purpose of filing a maximum rate schedule serves not only to inform consumers, it triggers the Department's oversight of the lender, which is critical to assuring the SCCPC's objectives of protecting consumers, providing rate ceilings, and fostering competition among suppliers of consumer credit." (Op. p. 9). In the absence of Cash Central filing a maximum rate schedule with the Department, it was impossible for this regulatory purpose to be accomplished.

Once again, Cash Central fails to address or even acknowledge there is any purpose served by the filing requirement. (Pet. p. 3–4). Cash Central instead repeats its arguments already made to the lower court and this Court regarding the superiority of what it posted on its website and why that is better for everyone in the State of South Carolina—businesses and consumers alike—than what the General Assembly established in statute. Further, Cash Central continues to minimize the role the Department has in overseeing the availability and the affordability of consumer credit in this state. (Pet. p. 6, n. 3). This Court fully acknowledged the Department's role and the purpose of both the filing and posting requirements, correctly ruled on this question of law, and thus should deny the Petition.

III. The Court correctly ruled that the defense of substantial compliance does not apply in these circumstances.

This Court properly distinguished the Davis v. NationsCredit case when ruling as a matter of law that the defense of substantial compliance does not apply to the statutory requirements of Sections 37-3-201 and 37-3-305. Cash Central again argues liability should be excused "for non-compliance with technical elements of a statute that are not central to accomplishing the primary legislative intent." (Pet. p. 5). Cash Central further states, "South Carolina courts have never limited the scope of the substantial compliance doctrine to hold that it does not apply to a failure to meet a regulatory filing requirement." (Pet. p. 6). The South Carolina Supreme Court, however, ***has*** held the substantial compliance defense does not apply to a bright-line statutory timing requirement. King v. American General Finance, Inc., 386 S.C. 82, 90, 687 S.E.2d 321, 325 (2009) ("[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"). As this Court held in its Opinion, a supervised lender is required to file and post a maximum rate schedule ***first***; "[u]nless and until it complies with this requirement, the lender is not authorized to contract for or receive finance charges in excess of 18% APR." (Op. p. 8). Similar to the Court's language in King, to sanction Cash Central's charging finance charges in excess of 18% APR without first filing a maximum rate schedule would undermine the legislative purpose of the filing requirement.[1]

[1] Cash Central's argument about what it did or did not post on its website is irrelevant to the undisputed fact that Cash Central did not comply with the filing requirement.

This Court properly ruled as a matter of law that the defense of substantial compliance is not available in Cash Central's circumstances. This is the threshold issue that needed to be decided before ever considering Cash Central's facts and arguments about how they believed they had substantially complied.

Furthermore, this Court properly held as a matter of law that the lower court erred by determining Cash Central substantially complied with Sections 37-3-201 and 37-3-305. Specifically, this Court held, "Because the statute requires both filing and posting, Cash Central's compliance with only one of these requirements would have been insufficient to establish this defense." (Op. p. 9). The lower court did not rule that Cash Central substantially complied with the filing requirement but rather acknowledged repeatedly that they did not file. The lower court instead focused its analysis on the posting requirement and determined Cash Central "did in fact comply or substantially comply with the relevant posting requirements." (R. p. 9). This Court does not need to overturn either of these lower court factual findings to hold as a matter of law that Cash Central did not substantially comply with Sections 37-3-201 and 37-3-305, which require both filing and posting. The Court correctly held as a matter of law that Cash Central did not substantially comply with Sections 37-3-201 and 37-3-305 and, thus, should deny the Petition.

IV. The Court correctly decided as a matter of law that the defense provided in Section 37-5-202(7) does not excuse Cash Central from refunding excess charges.

This Court correctly held that the specific defense provided in Section 37-3-201(6) prevails over the general defense of Section 37-5-202. When the Bell Finance situation[2] occurred, the General Assembly could have added to or modified language in Section 37-5-202(7) to make clear any intent for that defense to apply to a failure to file a maximum rate schedule. They didn't.

[2] This is fully briefed in Appellant's Brief pages 25–28 and Appellant's Reply Brief page 8.

Instead, the General Assembly created the defense of Section 37-3-201(6), establishing very specific circumstances under which a lender would be permitted to retain excess charges despite a failure to properly file or post a maximum rate schedule. As this Court stated, "if the defense contained in 37-5-202 were available for the failure to file a maximum rate, section 37-3-201(6) would be superfluous." (Op. p. 12).

Moreover, the Department's longstanding Administrative Interpretation regarding the Bell Finance situation rejected the argument that the defense of Section 37-5-202(7) would allow a lender to retain excess charges when the lender failed to file a maximum rate. *S.C. Dep't of Consumer Affairs, Admin. Interpretation No.* 3.305-8601 (R. p. 724–726). In the thirty-five years since the Department issued this Administrative Interpretation, it has never been overturned or overruled by the General Assembly and still stands after being challenged in court.[3] 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.")).[4] As such, this Court should deny the Petition.

---

[3] 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.

[4] The Department agrees with the Court's analysis regarding Section 37-5-202(7) and certainly understands this Court's decision in footnote 6 not to address the Department's argument regarding its longstanding interpretation. However, in light of Cash Central's Petition for Rehearing, the Department would welcome this Court ruling that the longstanding interpretation still stands.

V. This Court correctly decided as a matter of law that the defense provided in Section 37-3-201(6) does not excuse Cash Central from refunding excess charges.

This Court held the plain language of the statutes require a supervised lender to file and post its maximum rate schedule before charging higher than 18% APR. The Court also held that the exception in Section 37-3-201(6) did not permit Cash Central to retain finance charges in excess of 18% APR because Cash Central did not have a "previously properly filed" rate. (Op. p. 11). Cash Central argues this Court's ruling ignores the legislative intent to excuse a failure to file the maximum rate schedule with the Department. (Pet. p. 11). The plain language of the statute, however, reveals this was not the legislative intent behind Section 37-3-201(6). See Hitachi Data Svs. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (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). The General Assembly clearly intended to excuse a failure to file or post a maximum rate schedule only under very specific, prescribed circumstances as set forth in Section 37-3-201(6). Most importantly, the lender must have previously properly filed maximum rates with the Department in order to benefit from the Section 37-3-201(6) defense. Why would the General Assembly have intended to provide a defense to a business who began operating in South Carolina without first complying with South Carolina law?

Moreover, the General Assembly could have created a broader defense than Section 37-3-201(6). They didn't. Instead, the General Assembly clearly demonstrated an intent to minimize refunds under very specific circumstances when a business that has complied with all South Carolina law slips up and makes a mistake. It is disingenuous to argue that despite the plain language of the statute, the General Assembly intended to treat a compliant business who made a mistake the same as a business that never complied with the identical law in the first place. To reject the plain language of the statute and allow Cash Central to retain finance charges it did not

legally collect would be an absurd result. 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 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). As such, the Petition should be denied.

CONCLUSION

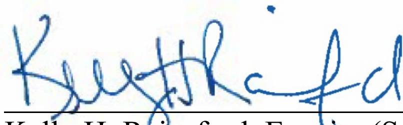
Every holding in this Court's Opinion issued on September 1, 2021, is supported by cogent reasoning and sound interpretation of South Carolina law. This Court properly held:

1. The plain language of Sections 37-3-201(2) and 37-3-305 requires a supervised lender to file and post its maximum rate prior to contracting for and receiving finance charges in excess of 18% APR.
2. The defense of substantial compliance is not available to a lender who must strictly comply with the statutory prerequisites of filing and posting a maximum rate schedule prior to contracting for and receiving finance charges in excess of 18% APR. Moreover, where Cash Central was required to file and post a maximum rate schedule and undisputedly failed to do one of these requirements entirely, Cash Central as a matter of law did not prove substantial compliance.
3. The specific defense provided in Section 37-3-201(6) prevails over the general defense of Section 37-5-202 regarding a failure to file a maximum rate schedule.

4. The defense provided in Section 37-3-201(6) does not permit a lender to retain charges in excess of 18% APR when the lender did not have a previously properly filed rate.

Further, nothing in Cash Central's Petition specifies "points supposed to have been overlooked or misapprehended by the court" in delivering its ruling in this matter. As such, Cash Central's Petition for Rehearing should be denied.

Respectfully submitted,



September 30, 2021

Kelly H. Rainsford, Esquire (S.C. Bar No. 15907)
James C. Copeland, Esquire (S.C. Bar No. 100054)
Post Office Box 5757
Columbia, South Carolina 29250
(803) 734-4200
Attorneys for Appellant

RECEIVED
Sep 30 2021
SC Court of Appeals

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.

PROOF OF SERVICE

I certify that I have served the Appellant's Return to Petition for Rehearing on counsel of record via electronic mail only to the following:

James Y. Becker (jbecker@hsblawfirm.com)

Mary M. Caskey (mcaskey@hsblawfirm.com)

Sarah P. Spruill (sspruill@hsblawfirm.com)

September 30, 2021

Kelly H. Rainsford (S.C. Bar No. 15907)
James C. Copeland (S.C. Bar No. 100054)
Post Office Box 5757
Columbia, South Carolina 29250
(803) 734-4200
Attorneys for Appellant