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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Case No. 2016-CP-40-02859

South Carolina Department of Consumer Affairs .... Respondent,

v.

Cash Central of South Carolina LLC .... Petitioner

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Cash Central of South Carolina LLC ("Cash Central") certifies that a petition for rehearing was made on September 16, 2021 and finally denied by the Court of Appeals on October 26, 2021.

QUESTIONS PRESENTED

1. In this case seeking statutory remedies under the South Carolina Consumer Protection Code, did the Court of Appeals err by ignoring statutory language and this Court's precedent in *Davis v. NationsCredit Fin. Servs. Corp.*, 326 S.C. 83, 484 S.E.2d 471 (1997) to find that Cash Central was not entitled to any defense?

2. Did the Court of Appeals err in applying a *de novo* standard of review to all aspects of this case, including the trial court's factual determinations?

2. Did the trial court correctly find that Cash Central had proven its entitlement to three affirmative defenses (substantial compliance, bona fide error/ excusable neglect pursuant to S.C. Code Ann. § 37-3-210(6), and bona fide error pursuant to S.C. Code Ann. § 37-5-202), and did the Court of Appeals err in finding that none of these defenses were available to Cash Central?

INTRODUCTION

This Petition arises from a published opinion of the Court of Appeals ("Opinion") reversing the trial court's legal rulings and substituting its own factual findings for those of the trial court, which concluded that Cash Central was entitled to the protection of three defenses excusing its inadvertent and unintentional failure to file a single form with the South Carolina Department of Consumer Affairs ("Department") at the onset of doing business in South Carolina and the resulting failure to post a certificate "issued by the Department" in a conspicuous place in Cash Central's business premises, which is a website. The Opinion ignores the General Assembly's command that the South Carolina Consumer Protection Code ("Code") be interpreted "*having due regard for the interests of legitimate and scrupulous creditors*." S.C. Code Ann. § 37-1-102(2)(d) (emphasis added). The Opinion also ignores this Court's command to eschew "elevating form over substance in consumer protection cases" by "strongly [construing the Code's] provisions against borrowers who were not misled by a lender's disclosure but merely seek a penalty for finding a technical problem with the loan form which could not have conceivably influenced his choice of credit." *Davis v. NationsCredit Fin. Servs. Corp.*, 326 S.C. 83, 87, 484 S.E.2d 471, 473 (1997) (quoting *General Motors Acceptance Corporation v. McMinn*, 285 S.C. 67, 328 S.E.2d 472 (1985)).

As found by the trial court, there is no evidence in the record that Cash Central did not attempt in good faith to fully comply with the Code's requirements. Even the Department acknowledges that the failure to file resulted from innocent, human error, and that there is no other instance of statutory non-compliance. In addition, there is no evidence that any of Cash Central's borrowers were misled by Cash Central's loan disclosures, or that the failure to file the required form with the Department or to post the Department's required certificate negatively influenced any borrower's choice of credit. Moreover, the trial court found that "[i]n all meaningful respects,

Cash Central's [loan information disclosure] was equivalent to or superior than the [Department's required disclosure] for achieving the statutory purpose of promoting consumers' informed use of credit." (R. at 7). Nevertheless, the Department has pursued this litigation seeking a substantial and ruinous forfeiture amounting to millions of dollars and maintained that there is no defense available to a first time supervised lender *for simply failing to timely file and post a particular form*.

The Opinion effectively overrules *Davis* by finding that a defense of substantial compliance is simply not available in *this* instance and also writes two statutory defenses (S.C. Code Ann. § 37-5-202(7) and S.C. Code Ann. § 37-3-201(6)) out of the Code. If allowed to stand, the Opinion will cause confusion regarding how general and specific legislative commands in a given statutory scheme such as the Code are to be given effect. The Opinion's treatment of these two code sections presents a novel question of law for purposes of triggering this Court's review under Rule 242(b)(1), SCACR.

The Opinion also misanalysed the standard of review as to the trial court's factual determinations and treated the entire case as subject to *de novo* review. Based on this erroneous standard of review, the Court of Appeals usurped the trial court's fact-finding role in direct violation of precedent. This approach will encourage future litigants to seek appellate fact-finding and give rise to confusion in any case raising questions of statutory construction.

At its core, the Opinion works a forfeiture in this case where the trial court found there was no evidence of any harm to consumers and no evidence that Cash Central's inadvertent error could have influenced any consumer's choice of credit. Such a result is flatly inconsistent with *Davis* and the Code. For all of these reasons, this Court must grant of discretionary review pursuant to Rule 242, SCACR.

STATEMENT OF THE CASE AND FACTS[1]

Cash Central is a web-based lender, which provides short-term and medium-term loans ranging from $750 to $5,000. (R. at 9 ¶ 1; 629; 647). During the time period at issue, it was a wholly owned subsidiary of Direct Financial Solutions LLC, a wholly owned subsidiary of Community Choice Financial Inc. ("Community Choice"). (R. at 9 ¶ 1; 394:20-24).

Cash Central began preparing to do business in South Carolina in early 2013. (R. at 287:23-25). In doing so, Cash Central utilized a task force of individuals familiar with Cash Central's products to complete the steps necessary to do business in South Carolina.[2] (R. at 278:19-279:11). Early in this process, Rebecca Fox, the Regional Counsel for Community Choice, prepared a detailed compliance outline based on South Carolina law. (R. at 10 ¶ 3; 279:15-282:5; 552-557). The compliance outline was part of Cash Central's well-established procedure for doing business in a new state and included information covering topics such as licensing, marketing, default procedures, and collections. (R. at 291:20-293:10; 359:3-22; 364:12-19).

To complete the outline, Fox researched South Carolina's statutes, regulations, and licensing requirements for Cash Central's intended lending operations, and saved copies of the relevant statutes, blank forms, and guides from the Department website to her computer. (R. at 9-10 ¶¶ 3-4; 288:8-291:5; 549-551). Her compliance outline, which others on the task force used as a roadmap for operations in South Carolina, included the requirements for supervised lenders, and specifically referenced the filing and posting requirements with the Department for the maximum rates to be charged as set forth in the Code. (R. at 10 ¶ 3; 284:6-285:13; 293:1-294:14; 552-557).

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[1] Cash Central incorporates its statement of the case and facts from its Respondent's brief.

[2] Rebecca Fox testified that the task force that was engaged in commencing operations in South Carolina was the same task force that she had worked with throughout her time at Cash Central, and they had a well-established procedure for commencing operations in different states. (R. at 278:14-279:21; 284:6-285:13). That process began with her compliance outline.

In February 2013, in accordance with the compliance outline she prepared, Fox prepared drafts of the Department's maximum rate schedule and Consumer Credit Grantor Notification forms for filing, and worked with Amy Jennings, then Director of Compliance, to ensure the forms were complete and ready for filing at the appropriate time. (R. at 295:15-297:20; 558-559). The documents were not submitted to the Department at the time they were first prepared because Fox was waiting for management approval of the loan rate chart to include with the forms. (R. at 297:21-299:15).

In the meantime, Fox and Jennings were also working on an Application for a Supervised Lender License with the South Carolina Board of Financial Institutions ("Board"), and there was some overlap between the documents prepared for the Board and those to be filed with the Department. (R. at 299:16-300:18; 570-628). In September and October of 2013, the license application was sent to the Board, which included the same loan rate charts that Cash Central intended to file with the Department. (R. at 10-11; 302:22-304:13; 619-627). Given the similar filings and the fact that over five months had passed since they originally prepared the forms, Fox and Jennings failed to file the maximum rate schedule with the Department when they submitted the license application to the Board, even though they previously intended to do so. (R. at 11 ¶ 6; 319:16-320:2). Fox testified that she had every intention of filing the maximum rate schedule because "[t]here's nothing to be gained by shortcutting." (R. at 319:1-19). It was simply human error that the filing was not made. (R. at 319:11-14).

The Board approved Cash Central's Application for a Supervised Lender License on October 2, 2013. (R. at 217:18-22; 304:18-19). Fox took the receipt of the license as a "green light" for Cash Central to do business in South Carolina because her experience was that a requirement for additional filings after a license was issued was unusual. (R. at 305:15-306:1).

Believing that Cash Central had completed all of its required filings to begin operating in South Carolina, Fox worked with Dan Vinton, the Online Marketing Manager, and Lisa Vittorini, the Senior Vice President of Compliance, to review and approve all maximum rate and other required disclosures that would be disclosed to South Carolina customers on Cash Central's website. (R. at 12 ¶ 7; 310:1-316:9; 641-647). Fox specifically discussed the South Carolina requirement of posting a maximum rate schedule with Vinton to ensure that the online disclosures were compliant and appropriately visible to applicants. (*Id*). Fox obtained various versions of the webpage with notes referring to minimum font size, certain disclosures, and a screen shot of a "test environment" showing what a consumer would see when viewing the website. (R. at 12 ¶ 7; 306:15-307:13; 309:17-23; 640). She also reviewed the website and confirmed that it included all of the elements set forth in her compliance outline—a description of the type of loans made, the loan amount, the range of loan amounts offered, and the maximum rate that would be charged to a customer for a given loan. (R. at 317:2-13).

Fox left Cash Central in December 2014. (R. at 317:14-15). When she left, she did not know that the initial maximum rate schedule had not been filed with the Department.[3] (R. at 318:24-319:10). Around the time of Fox's departure, Cash Central began restructuring its compliance department, and new individuals were placed in charge of licensing and renewals. (R. at 365:2-367:8; 375:15-25). Responsibility for Cash Central's licensing and annual state filings transitioned from Amy Jennings, who had been handling retail licensing for many years, to Jennifer Flowers. (R. at 354:4-16; 374:14-20). In addition, Cash Central implemented the use of License HQ, software that assisted in applying for and renewing state licenses. (R. at 16 ¶ 22;

[3] The Department conceded that there was no evidence of any intentional failure to file. (R. at 18 ¶ 27).

351:21-353:23; 374:8-20). However, the effectiveness of License HQ relied on the initial license information being documented within the software so that reminders would be triggered. (R. at 353:7-15). The employees responsible for compliance waited until a license was returned from the regulatory body, and then entered the relevant information concerning the renewal into License HQ. (R. at 353:16-23). Cash Central never received a certified copy of the maximum rate schedule from the Department because the initial filing was not made, and as a result, the renewal deadline was not entered into License HQ. (R. at 16-17 ¶ 23; 374:21-375:17). In addition, Fox's compliance outline did not indicate that filing was required with both the Board and the Department, and so those relying on her outline were unaware of the additional filing requirement for renewals. (R. at 352:4-20; 355:13-24; 384:18-385:1). Thus, the subsequent failures to renew the maximum rate schedule were the direct result of the initial, inadvertent failure to file the maximum rate schedule. (R. at 355:25-356:6; 336:24-337:4; 376:19-378:6).

Even though a maximum rate schedule was not on file with the Department, the public, including customers and competitors, had direct and easy access to a South Carolina specific web page titled "South Carolina Fee Schedule" with statutorily compliant disclosures and an interactive, customizable loan calculator for selection and disclosure of all significant financial terms for a specific loan.[4] (R. at 648-670). The loan calculator produced a custom rate correlating to the terms sought by the customer. (R. at 308:7-309:7; 383-384; 412-415). This loan calculator

[4] Fox testified that on October 25, 2013 (two days after the first loan had been made by Cash Central), she realized that the rate chart and 127-word disclosure had not been posted to the website. (R. at 310:25-311:10). This error was corrected by November 5, 2013. (R. at 641-647). After this correction, Cash Central believed the website complied with South Carolina law. (R. at 316:6-9; 390:6-19).

could be used by any visitor to the website before entering any personal information or applying for a loan. (R. at 334:4-335:16).[5]

On or about April 3, 2015, the Board advised Cash Central of its failure to file and post a maximum rate schedule. (R. pp. 498-502). On April 10, 2015, Cash Central filed its maximum rate schedule with the Department. (R. p. 509). On May 6, 2016, the Department brought this action, seeking an order (1) requiring Cash Central to recast the finance charges of contracts entered into with South Carolina consumers from October 24, 2013, through April 10, 2015 to no more than 18% APR; (2) refunding any excess charges paid by South Carolina consumers for those loans; and (3) payment of a civil penalty as allowed by the South Carolina Consumer Protection Code ("Code"). In its final amended answer, Cash Central included the following defenses: (1) failure to state a claim; (2) bona fide error/ excusable neglect pursuant to S.C. Code Ann. § 37-3-210(6); (3) bona fide error pursuant to S.C. Code Ann. § 37-5-202(7); (4) substantial compliance with the Code; (5) set-off, (6) recoupment/ repayment, and (7) statute of limitations. (R. 153-59).

A bench trial was held on September 6 and 7, 2017, as to liability only. (R. pp. 197-491). There has not been any damages determination. Instead, the trial court found that Cash Central proved its entitlement to invoke the defenses of substantial compliance and bona fide error/

[5] Professor Victor Stango, a behavioral economist and expert in the field of consumer behavior and decision making, testified that Cash Central's disclosures and website tools were more comprehensive, specific, and consumer-friendly than the maximum rate schedule issued by the Department and that the Department claims should have been posted in lieu of Cash Central's disclosures. (R. at 466-472; 704-722). Specifically, "because the disclosures provided by Cash Central are both interactive and customizable, those disclosures provided comprehensive and specific terms of any Cash Central loan about which a consumer wanted to become more informed, for the purposes of using credit or comparing terms across lenders." (R. at 710 ¶ 17; 466-472). In contrast, he testified that the maximum rate schedule issued by the Department did not provide complete information, did not provide information specific to any consumer, and did not promote the informed use of credit. (R. at 467:21-471:24; 710-711 ¶¶ 18-22). The Department did not rebut Stango's testimony.

excusable neglect under S.C. Code Ann. § 37-3-210(6) and § 37-5-202(7) and ordered that Cash Central pay a civil penalty of fifteen thousand dollars ($15,000) to the Department. (R. p. 5-29). On October 12, 2017, the Department filed a motion to alter or amend, which was denied by the trial court. (R. pp. 168-188, 30-34).

The Department appealed on December 29, 2017. In its Opinion, the Court of Appeals reversed the trial court's findings as to whether Cash Central could invoke the defenses of substantial compliance and bona fide error/ excusable neglect under § 37-3-210(6) and § 37-5-202(7), essentially finding for the first time that there is no defense whatsoever to a failure to file and post a maximum rate schedule with the Department. Ignoring prescribed standards of construction, the Opinion eliminates the asserted statutory defenses under the Code and finds the defense of substantial compliance does not apply. Cash Central sought rehearing, arguing that the Opinion applied an incorrect standard of review to the trial court's factual determinations, that the Opinion failed to fully consider the purposes of the Code and its filing and posting requirements, that the Opinion directly conflicts with *Davis*, and that the Opinion incorrectly construed § 37-3-210(6) and § 37-5-202(7). The Court of Appeals denied the petition.

ARGUMENT

I. The Opinion erroneously applies a *de novo* standard of review to obviate the unequivocal factual findings of the trial court with respect to statutory and common law defenses.

It is axiomatic that questions of statutory construction are subject to *de novo* review.[6] The Court of Appeals, however, took this general truism as a broad mandate to read specific statutory

[6] This statement does not end the inquiry where there are also factual questions involved. Factual issues must still be reviewed under the applicable standard (law, equity, or other as set by statute). *See, e.g., Hopper v. Terry Hunt Const.,* 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct. App. 2007) ("Certain situations involve a mixed question of law and fact. Statutory interpretation is a question of law. But whether the facts of a case were correctly applied to a statute is a question of fact[.]") (citation omitted). In considering the evidence, the trial court correctly found that this is an action

defenses out of the Code and to ignore plainly applicable precedent. The Court of Appeals further took license to find its own set of facts and disregard the detailed findings of the trial court. The availability of specific defenses within the Code combined with the legislature's general command in S.C. Code Ann. § 37-1-102(2)(d) that the Code be interpreted with "due regard for the interests of scrupulous creditors" means that the trial court and the Court of Appeals were required to grapple with the interplay between consumers' rights and the interests of Cash Central against the backdrop of the facts of the case. The trial court did so. The Court of Appeals did not.

What was required of the Court of Appeals was to apply the law to the trial court's factual findings. The law provides certain defenses, which, as *Davis* teaches, are not to be read penuriously, particularly in the absence of consumer harm, which, in this case, is tied solely to a customer's decision to enter into a loan contract. The trial court found that Cash Central's customers' decisions were not influenced by the inadvertent missteps described above and, on top of that, the consumers received more effective disclosures than those mandated by the Department. Thus, the Court of Appeals should have accepted the trial court's finding of a lack of consumer harm and the inadvertent and technical nature of the failure and worked from there. Instead, it

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at law. *See Jones v. Barco, Inc.*, 250 S.C. 522, 525, 159 S.E.2d 279, 281 (1968) ("Plaintiffs' action to recover the statutory penalty for usury and to recover damages for the defendants' tortious conduct in conspiring to exact usurious charges from them is an action at law."). This is consistent with the standard applied to appeals involving other consumer protection statutes. *See Brown v. Dick Smith Nissan, Inc.*, 414 S.C. 101, 105, 777 S.E.2d 208, 210 (2015); *Payne v. Holiday Towers, Inc.*, 283 S.C. 210, 215, 321 S.E.2d 179, 182 (Ct. App. 1984). The Department appears to agree that this is an action at law. (App. Brief at Sections III(C), IV(D)). In the event the Court determines this matter sounds in equity, the findings of the trial court are supported by the preponderance of the evidence and would also require affirmance under the equitable standard of review. *See Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976). Whether the Department's claims are legal or equitable, the review of the facts in this case would not be *de novo*.

waved away the careful work of the trial court, the relevant statutory language, and this Court's precedent and accepted the Department's argument in full.

The Opinion, however, determined that the *entire appeal* was subject to a *de novo* standard, disregarding the specific, detailed factual findings made by the trial court. Compounding this error, the Court of Appeals impermissibly substituted its own factual findings with respect to all of the defenses raised by Cash Central. Specifically, the Court applied a *de novo* review to the facts surrounding substantial compliance (at the end of section II(A) of the opinion) and the facts relating to whether Cash Central's failures were a result of a bona fide error and whether it "maintained procedures reasonably adapted to avoid the error" (in section II(C)). This plain error is highlighted by comparing the referenced sections of the Opinion with the Findings of Fact in the trial court's order (R. at 9-19). With respect to factual issues, the review by the Court of Appeals *should have been limited to determining only* whether the trial court's rulings were supported by *any* evidence. When the correct standard is applied, the trial court's order must be affirmed.

II. The Opinion is in direct conflict with *Davis v. NationsCredit Fin. Servs. Corp.*, 326 S.C. 83, 484 S.E.2d 471 (1997). The trial court correctly determined that the defense of substantial compliance applied and found that Cash Central met its burden of proving entitlement to this defense.

In the Opinion, the Court of Appeals found that there is no substantial compliance defense to a failure to meet the filing and posting requirements of S.C. Code Ann. §§ 37-3-201 and -305. The Court of Appeals also impermissibly substituted its own factual findings for the trial court's finding of substantial compliance.

In interpreting statutory requirements and applying them to specific cases, South Carolina courts have adopted the doctrine of substantial compliance to excuse liability for non-compliance with technical elements of a statute that are not central to accomplishing the primary legislative

intent. *See Davis*, 326 S.C. at 85–86, 484 S.E.2d at 472; *Brown v. Baby Girl Harper*, 410 S.C. 446, 453, 766 S.E.2d 375, 379 (2014) ("Substantial compliance has been defined as 'compliance in respect to the essential matters necessary to assure every reasonable objective of the statute.'"). In *Davis*, this Court addressed the issue of whether a lender substantially complied with S.C. Code Ann. § 37-10-102 (the "attorney preference statute"). Recognizing that the purpose of the attorney preference statute was to protect borrowers by requiring disclosure of their rights to legal counsel of their choice contemporaneously with their loan application, this Court held that NationsCredit substantially complied with the statute by using a separate piece of paper to make the disclosure, rather than following the statute's express language requiring the disclosure on the "first page" of the loan application. *Id*. The Court concluded that to find otherwise "would elevate form over substance." *Id*. The *Davis* court further quoted approvingly from an earlier decision interpreting requirements of the federal Truth in Lending Act stating: "this court will strongly construe [the Act's] provisions against borrowers who were not misled by a lender's disclosure but merely seek a penalty for finding a technical problem with the loan form which could not have conceivably influenced his choice of credit." *Id.*, 326 S.C. at 87, 484 S.E.2d at 473 (citing *General Motors Acceptance Corporation v. McMinn*, 285 S.C. 67, 328 S.E.2d 472 (1985). 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 or posting requirement.[7]

[7] With respect to the filing requirement of S.C. Code Ann. § 37-3-305, Cash Central filed a schedule of maximum rates with the Board in 2013 that it is nearly identical to the schedule ultimately filed with the Department in 2015. As a practical matter, while the § 37-3-305 filing requirement "registers" a supervised lender with the Department, the primary supervision, periodic auditing, and annual licensing of supervised lenders is conducted by the Board. Thus, the filing with the Board could be deemed to be "substantial compliance," given the trial court's factual findings. The posting requirement, not the filing requirement, promotes consumer protection through information disclosure. (R. at 466-472; 704-722; 482:4—446:11). On that point, the trial

Based on this precedent, the trial court properly determined that Cash Central substantially complied with S.C. Code Ann. § 37-3-201 because it found that the evidence showed that Cash Central provided more and better information to the public than was required by the Code and shown on the Department's form. Every consumer and any competitor of Cash Central could access information concerning the type of loans made by Cash Central, the amount of the loans offered, the cost of credit, and the interest rate. (*See, e.g.,* R. at 648-670). The information that was available was more comprehensive and better promoted the consumer's informed use of credit than if Cash Central had simply filed and posted the maximum rate schedule issued by the Department. (R. at 712-715). Contrary to settled law and the facts of this case as found by the trial court, the Opinion leaves no room for anything but strict, literal compliance with all statutory requirements on the pain of forfeiture.

The concept of substantial compliance is inherent in statutory schemes in South Carolina. Indeed, the purpose of the doctrine of substantial compliance in this case dovetails with the Code itself: "*having due regard for the interests of legitimate and scrupulous creditors*." S.C. Code Ann. § 37-1-102(2)(d) (emphasis added). Here, the failure to allow this defense results in a ruinous forfeiture without any evidence of any harm to any borrower or the public. The principles in *Davis* should *a fortiori* apply in this case, which involves thousands of loans and zero customer complaints or showing of harm, to avoid an overly harsh result that is plainly contrary to the clearly expressed intent of the General Assembly.

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court looked at all of the information available to Cash Central's customers and found that Cash Central had provided more and better information than that required by the Code.

III. The Opinion fails to fully consider the purposes of the Code and the filing and posting requirements.

In interpreting the Code, "[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible." *Mitchell v. City of Greenville*, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015). A statutory provision should be given a reasonable construction consistent with the purpose and policy expressed in the statute. *Jackson v. Charleston Cty. Sch. Dist.*, 316 S.C. 177, 181, 447 S.E.2d 859, 861 (1994).

Section 37-1-102(1) declares that the Code "shall be liberally construed and applied to promote its underlying purposes and policies." One of the primary purposes of the Code is to "*further consumer understanding of the terms of credit transactions*" and to "protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit, *having due regard for the interests of legitimate and scrupulous creditors*." S.C. Code Ann. § 37-1-102(2)(c), (d) (emphasis added). The primary, if not the only, legislative purpose of the posting requirement in S.C. Code Ann. § 37-3-305 is clearly stated in subsection (3): "The purpose of this requirement is to assist you [the consumer] in comparing the maximum rates that creditors charge, thereby *furthering your understanding of the terms of consumer credit transactions and helping you to avoid the uninformed use of credit*." (Emphasis added).

The trial court rightly focused on disclosures to consumers and concluded that, under the law and the facts presented at trial, Cash Central's customers' decisions to enter into their loans were not compromised by Cash Central's failure to file the maximum rate form with the Department (as the rate chart had already been filed with the Board) and that the information provided on Cash Central's website better promoted full disclosure of actual loan terms and the consumer's informed use of credit than the maximum rate certificate issued by the Department. In contrast, the Opinion ignores the degree to which Cash Central's website disclosures promote the

primary purpose of consumer information disclosure, fails to provide due regard for the interests of legitimate and scrupulous creditors, and ignores the factual findings made by the trial court. This overly narrow focus led the Court of Appeals to strip Cash Central of any defense in this case.

IV. The Opinion errs in its interpretation of S.C. Code Ann. § 37-5-202(7) and applies an incorrect standard of review to the trial court's factual determinations.

The Opinion strikes out a portion of the Code in finding that the defense provided by S.C. Code Ann. § 37-5-202(7) is inapplicable here. This erroneous conclusion is based on the Opinion's construction of S.C. Code Ann. § 37-3-201(6) and its ruling that the defense in § 37-5-202(7) does not apply to the remedy of S.C. Code Ann. § 37-5-202(2). In doing so, the Opinion fails to acknowledge that these rulings leave the first time supervised lender defenseless, regardless of the reasons for any failure to file or post. And if the Court's interpretation is correct, why would § 37-5-202(7) be included within the Code? As noted above, the Code is not exclusively for the benefit of consumers but also for the protection of "*the interests of legitimate and scrupulous creditors*." S.C. Code Ann. § 37-1-102(2)(d) (emphasis added).

Statutes must be read as a whole, and sections which are part of the same general statutory scheme must be construed together and given effect, if that can be done by any reasonable construction. *Higgins v. State*, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992). Here, these sections are not mutually exclusive and each must be given its full effect.

First, the requirements for asserting the defenses provided in § 37-5-202(7) and § 37-3-201(6) are manifestly different, and, second, the result of each defense, assuming it applies, is also different. Section 37-3-201(6) imposes a civil penalty of $5,000 per violation, in lieu of the requirement to refund finance charges exceeding 18% per annum. Section § 37-5-202(7) imposes no penalty and excuses any excess charges, and that makes sense in the absence of customer harm or, as framed by this Court, where a customer's choice of credit was not adversely affected.

Moreover, by its plain language, § 37-5-202(7) provides a defense "***in an action brought*** ***<u>under this section</u> for a violation of this title***[.]" (Emphasis added). The Opinion inexplicably finds § 37-5-202(7) does not apply to excess charges under § 37-5-202(2), a part of the same statutory section. If the General Assembly had intended that result, it would have said so. Instead, it provided a defense for any action under § 37-5-202, which would include all of its subparts. Thus, the Opinion errs in finding that § 37-5-202(7) does not provide a defense against the refund of excess charges under § 37-5-202(2). These provisions are not mutually exclusive, but rather balance the interests of all parties under the Code, which is exactly what the Legislature intended and *Davis* requires.

The Opinion finds that the existence of a remedy in § 37-5-202(2) means there is no defense.[8] This ruling is directly refuted by the plain language of the Code and the prior decisions of this Court. Based on the evidence presented at trial, the trial court correctly found that § 37-5-202(7) was applicable and, under the facts of the case, is a defense available to Cash Central. The Court of Appeals erred in finding this defense does not apply as a matter of law, and further failed to harmonize statutory subsections (2) and (7). Because substantial compliance, bona fide error, and excusable neglect concepts are a part of common law and the Code itself, it must follow that entitlement to recovery of excess charges is subject to the established defenses. In this case, to require a substantial forfeiture from a lender where its customers' choice of credit was fully informed and not compromised in any way by an unintentional failure to strictly comply with a statutory filing requirement simply writes the defenses out of the Code and the common law.

Further, the Opinion errs in substituting its view of the facts for that of the trial court. As found by the trial court and fully briefed by Cash Central, ample evidence shows that any violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures

[8] This is nonsensical—there would be no need for a defense without a remedy.

reasonably adapted to avoid the error. Among other things, the Opinion incorrectly suggests that the outline prepared by Rebecca Fox was the only evidence of policies and procedures reasonably adapted to avoid the errors here. To the contrary and as found by the trial court, the evidence shows there were significant efforts related to compliance, including meetings, oversight, and software, all of which, when combined with the written outline, created a policy and procedure intended to avoid the error. (R. at 16-22; *see, e.g.,* R. at 204-2011 & 549-57 (describing process and procedure of team meetings among key stakeholders to review process for beginning business in new state, supported by compliance outline); 232:17-243:13 & 640-53 (discussing company procedure of using a test environment for the website and having legal review all components prior to launch); 266:4-17 (explaining that a customer can use the custom calculator to see all the rate information before they enter financial information and that the customer could, at all times, see the maximum rate for the loan they are considering); 284-288 & 313-314 (describing company policy of using License HQ software to log and track required licenses and ensure timely renewals); 295:10-299:7 (describing compliance culture at company and procedures around developing and reviewing compliance procedures); 358:1 - 364:5 & 671-72 (discussing compliance commitment of the company, including the procedures concerning compliance committees and employee training procedures).

In addition, and even assuming *arguendo* that bona fide error concepts do not include an error of legal judgment, Cash Central did not make an error of legal judgment, but instead, *as the trial court found, made a clerical error*. The compliance manual prepared by Cash Central personnel specifically identified the statutory sections with the filing and posting requirements. Cash Central's original failure to file the Department's required form, which Cash Central personnel filled out and prepared in February 2013, resulted from failing to mail it. It is difficult to reasonably conclude that this was anything but a clerical error. Based on the above evidence and as found by the trial court, it

would be unreasonable and contrary to the intent of the General Assembly not to allow a defense in this case. One error should not result in a penalty as extreme as the one proposed by the Department.

Given the Opinion's error as to the applicability of § 37-5-202(7) and the overwhelming weight of the uncontradicted evidence, the trial court's factual findings on the issue of whether there was a bona fide error under this code section required affirmance under the appropriate standard of review. This Court should exercise its discretion to address these issues, construe the statutes, and clarify that the rule in *Davis* is applicable in all cases where the same logic applies.

V. The Opinion misinterprets S.C. Code Ann. § 37-3-201(6).

As further protection for "*the interests of legitimate and scrupulous creditors*" as set forth in S.C. Code Ann. § 37-1-102(2)(d) (emphasis added), the General Assembly has limited any monetary liability for Cash Central's failure to file the Department's maximum rate schedule form by operation of S.C. Code Ann. § 37-3-201(6) "to a civil penalty of up to $5,000" for an inadvertent failure to either file or post rates, provided that all three conditions in the subsection are satisfied, as they are here.[9] The three requirements are: (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 . . . within the previous forty-eight month period."

The trial court found that the uncontradicted evidence showed each of these elements was satisfied. (R. at 25-29). The Opinion erred in finding that despite these well-supported findings of the trial court, Cash Central, as a newly licensed supervised lender, was barred from collecting any interest above 18% for the noncompliance period, a finding which has absolutely no support in the plain language of the Code.

[9] Cash Central did not appeal the portion of the trial court's order assessing the maximum civil penalties allowed under § 37-3-201(6) for an inadvertent failure to file and post rates.

The trial court correctly applied this defense in this case. First, as fully briefed, the failure to properly file the rate schedule with the Department, was a good faith error, and it also qualifies as excusable neglect. Moreover, Cash Central complied with the requirement to "post" or disclose rate information to its customers from almost the moment it began offering loans to South Carolina residents as discussed in its brief and the trial court's order.

Section 37-3-201(6) also states that if a lender demonstrates with competent evidence that it satisfied all three conditions 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." (Emphasis added.) In this instance, because Cash Central had just begun to do business in South Carolina, and failed to file its initial maximum rate schedule prior to April 10, 2015, there is no "previously properly filed" rate.[10] The Opinion finds that this means all loans must be recast to 18%.

This ruling ignores the indisputable fact that Cash Central, as a first time supervised lender in South Carolina, had not previously filed a rate of 18%, or any rate. It also ignores the legislative intent behind this provision, *which unequivocally demonstrates a willingness to excuse a failure to file the maximum rate schedule with the Department*. "[I]f the literal text of an act is inconsistent with legislative meaning or intent, or leads to an absurd result, a statute is construed to agree with the legislative intention." 2A *Sutherland Statutory Construction* § 46:7 (7th ed.) (internal citations omitted). This Court has held that a court must reject a statute's literal wording when adopting such a meaning would lead to absurd results. *Fulghum v. Bleakley*, 177 S.C. 286, 181 S.E. 30, 32 (1935) (internal citations omitted).

[10] This information was on file with the Board, just not with the Department.

If there is no "previously properly filed" rate, then literal application of the statutory language compels the logical conclusion that the maximum rate of loan finance charge Cash Central could have assessed was 0.00%. Such a result is plainly absurd, and would mean that all of the interest charged by Cash Central was subject to refund, even though the statutory scheme does not place any ceiling on the rate of interest that can be charged and does not require a lender to file a maximum rate schedule for interest rates of 18% or less. The Court of Appeals has inexplicably found that strict compliance is required, but also that the loans should be recast to 18% (although there is no previously properly filed rate).

Literal application of the "previously properly filed" language would also yield vastly differing results for essentially identical conduct. A lender that initially filed its maximum rate with the Department, but then failed to re-file for 18 months (or even more), would be excused for its failure to file, assuming all other conditions of subsection (6) were satisfied. However, a lender like Cash Central, whose failure to file occurred at the onset of its business in South Carolina, would not be excused. The statutory language should be interpreted to avoid such a forfeiture, especially since there is no indication in the Code that the Legislature intended to limit liability for failing to make a *subsequent* maximum rate filing under the stated conditions but did not intend to provide any defense for a failure to make an *initial* maximum rate filing.

Finally, "'[w]ords in a statute must be construed in context . . . [t]hus, the court 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.'" *State v. Douglas*, 411 S.C. 307, 331, 768 S.E.2d 232, 245 (Ct. App. 2014) (internal citations omitted). Here, the unmistakable legislative intent of the subsection is clear when interpreted in its full context: if a lender meets the three

conditions set forth in the statutory language, then liability for a failure to post *or* file is limited to a civil penalty of up to $5,000. Because the failure to post rates will always be excused if the rates were properly filed, the legislature's intent could not possibly have been to excuse a failure to file only if the lender missed the *subsequent* rather than the *initial* rate filings. The Code does not express any indication that first time supervised lenders should be treated more harshly than existing lenders, and doing so here does not comport with the Code.

In addition, if the Court of Appeals was correct in its interpretation of § 37-3-201(6), then it almost certainly erred in its construction of S.C. Code Ann. § 37-5-202(7) and its ruling on substantial compliance. Nothing in the Code or at common law suggests that the General Assembly intended to impose the severe sanctions urged by the Department in a case like this, where no one was hurt or misled, there were no complaints, and the trial court found that any error was not intentional and occurred despite procedures reasonably adapted to avoid the error and, most importantly, that the information Cash Central provided to its customers better promoted the informed use of credit than that required by statute.

CONCLUSION

As argued above, the Court of Appeals applied the wrong standard of review in this case in a published opinion, resulting in needless confusion as to the appropriate standard to be applied in cases raising questions of statutory interpretation. Moreover, the opinion renders Cash Central's failure to file and post a maximum rate schedule a matter of strict liability, notwithstanding the clear conflict with *Davis*, the plain language of the statutes at issue, and the fact that no consumer was harmed. Cash Central asks that this Court grant review as to the questions presented and consider this appeal fully on its merits under the correct standard of review.

Respectfully submitted,

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Dated: November 24, 2021

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Case No. 2016-CP-40-02859

South Carolina Department of Consumer Affairs .... Respondent,

v.

Cash Central of South Carolina LLC .... Petitioner

PROOF OF SERVICE

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., do hereby certify that I have this 24th day of November, 2021, caused the forgoing *Petitioners' Petition for Writ of Certiorari* to be served via electronic mail only, on counsel of record at the email addresses shown below:

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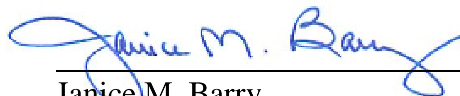

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November 24, 2021

RECEIVED
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SC Court of Appeals

VIA EMAIL (supctfilings@sccourts.org) AND U.S. MAIL
The Honorable Patricia A. Howard
Clerk of Court, South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

Re: *SC Department of Consumer Affairs v. Cash Central*
Appellate Case No. 2017-002639

Dear Ms. Howard:

This firm represents Petitioner Cash Central of South Carolina LLC in the above matter. Enclosed for filing is the Petitioner's Petition for Writ of Certiorari and Proof of Service of same together with our firm's $250 check to cover the cost of the filing fee (with mailed copy).

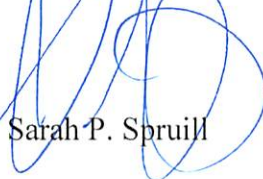
By copy of this letter, I am serving a copy of the Petition on all counsel of record as well as the Clerk of the Court of Appeals.

If you have any questions, please give me a call.

Thank you for your assistance in this matter.

Sincerely yours,

HAYNSWORTH SINKLER BOYD, P.A.



Sarah P. Spruill

SPS/jmb
Enclosures

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