

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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

REPLY IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The South Carolina Department of Consumer Affairs (“Department”) does not address Rule 242, SCACR in its return. Instead, it again presents a narrative at odds with the trial court’s detailed factual findings. The Department argues that strict compliance is required for the Department’s filing and posting requirements and that there is no defense as a matter of law for the first time supervised lender that fails to file and post with the Department. However, this approach is directly contrary to this Court’s precedent and the plain language and underlying policies of the South Carolina Consumer Protection Code (“Code”).

This Court and the Code contemplate that even “legitimate and scrupulous creditors” will not get things right 100% of the time, even when a lender has adopted policies and procedures reasonably adapted to avoid compliance errors. The published opinion of the Court of Appeals (“Opinion”) reversing the trial court’s legal rulings and, in places, substituting its own factual findings for those of the trial court ignores this Court’s precedent and the statutory defenses provided by the Code because the Court of Appeals apparently did not feel itself bound by the trial court’s determination of the facts as supported by the evidence.

This Court should grant the Petition to clarify that “strict compliance” is not the standard for liability under the Code. This is especially true in a case like this one where there is no evidence that the failure to comply harmed any consumer or influenced any borrower’s choice of credit. The divergence of opinion between the trial court and the Court of Appeals indicates that these issues are not as cut and dried as the Department contends and that this appeal warrants further review by this Court.

ARGUMENT IN REPLY

Without repeating the arguments in the Petition, Cash Central of South Carolina LLC (“Cash Central”) presents this short reply. As an initial matter, the Department once again seeks

to assert its own version of the facts in this case rather than the facts as found by the trial court. This alone shows why the Petition should be granted.

The General Assembly does not limit the interest rates that can be charged by a supervised lender such as Cash Central. *See* S.C. Code Ann. § 37-3-210. The Court of Appeals ventured into legislating when it incorrectly heightened the required level of compliance based on the amount of interest charged. That is not the law. Nothing in the Code or this Court’s precedent requires the level of compliance urged by the Department, which is perfect compliance in all respects. An honest mistake was made, and in this case, the law provides protections against the massive forfeiture the Department seeks.

I. The facts matter in this case, and as a result, so does the Standard of Review.

The Department does not address this issue head on. Instead, it dodges and asserts that the standard of review as to the facts does not matter because the trial court erred as a matter of law as to all three of the defenses it applied in Cash Central’s favor. The reason for this avoidance is obvious—if any one of these defenses is available to Cash Central, then the trial court’s judgment that these loans are not required to be recast to 18% APR must be affirmed if there is any evidence supporting that ruling (and there is supporting evidence). Even after insisting the facts do not matter, the Department once again presents its own version of the facts throughout its Return. The Department does not argue that the trial court’s findings are not supported by any evidence in the record. The Department just disagrees with the trial court, and its Return is at odds with itself.

Similarly, the Court of Appeals erred in substituting its own view of the facts after it proclaimed that this entire appeal was subject to *de novo* review. This Court should use this opportunity to provide additional guidance on the applicable standard of review for mixed issues of law and fact. *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). When the correct standard is applied and the defenses are considered by this Court, Cash Central is confident that the judgment of the trial court will be affirmed and that the Opinion will be reversed, at least in part.

II. This Court and the General Assembly both understand that consumers can be protected without requiring strict compliance with the Code under certain circumstances and that the interests of legitimate and scrupulous creditors must be taken into account.

The plain language of the Code indicates that strict compliance by lenders is not required. Among other things, the Code commands that due regard be given “*for the interests of legitimate and scrupulous creditors.*” S.C. Code Ann. § 37-1-102(2)(d) (emphasis added). The Code also includes safe harbors in certain instances for creditors that have not strictly complied with its terms. The trial court found that S.C. Code Ann. § 37-5-202(7) and S.C. Code Ann. § 37-3-201(6) provided defenses in this case based on the language of the statutes and the evidence presented at trial.

In addition, this Court has recognized that requiring strict compliance in every instance elevates form over substance, and it will construe “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)). This is not a timing issue like *King v. Am. Gen. Fin., Inc.*, 386 S.C. 82, 687 S.E.2d 321 (2009), where the primary statutory purpose was disclosure of the borrower’s attorney preference right *at the time of application* for the loan and, as this Court found, that purpose could not be achieved by disclosure after the fact. Instead, as in *Davis*, this is a case where a plaintiff seeks to invoke a technicality to

recast certain loans even though the borrowers were fully informed *before* they entered into their loan agreements. The Department does not dispute that no borrowers were misled or lacked full information either before or at the time the loans were made. Nor does the Department present any evidence that Cash Central's failure to file and post with the Department somehow disadvantaged any other lenders. Moreover, it is not true that Cash Central did not file its maximum rates, and the Department is in error to the extent it says otherwise in its Return. Cash Central filed those rates with the South Carolina Board of Financial Institutions ("Board") to obtain its supervised lending license as required by S.C. Code Ann. § 37-3-305. (R. at 10-11; 302:22-304:13; 619-627). It simply failed to file with the Department due to a good faith error.

As such, the trial court correctly found that the doctrine of substantial compliance applied and determined that it provided a defense in this case based on the evidence presented. The Court of Appeals erred in finding that the doctrine could not apply as a matter of law.

With respect to the statutory defenses, the Court of Appeals has not harmonized the Code's provisions. Nor has it interpreted them liberally to promote its underlying purposes and policies as required by S.C. Code Ann. § 37-1-102(1), one of which is to protect scrupulous creditors. Instead it narrowly construed the defenses, ignored their plain language, and reached an absurd result such that a first time supervised lender has no defense to a failure to file and post with the Department as a matter of law, regardless of the facts, the good faith nature of the error, the absence of harm, or the degree of forfeiture that might result to the lender. This, notwithstanding the ruling in the Opinion that an existing lender who has previously filed and posted its maximum rate may be excused from the same conduct by operation of S.C. Code Ann. § 37-3-201(6). This inconsistent result is contrary to the Code and its stated purposes as well as the holding in *Davis*.

The Department's Return states "[i]t 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." This statement, however, shows that the Department intends different consequences for the same activity depending on whether a lender has previously filed with the Department. This raises the specter of discrimination against any out-of-state newcomer to the supervised lending market in South Carolina. A good faith mistake is a good faith mistake. It is unreasonable to assume the legislature intended such vastly different consequences for the same conduct.

CONCLUSION

Here, the trial court found that Cash Central's customers were not harmed and that Cash Central's failure to file and post with the Department did not affect any customer's decision to enter into a loan agreement with Cash Central. Thus, the massive forfeiture sought by the Department is, based on the facts of this case, contrary to law and statute.

Additionally, the Code requires that "due regard for the interests of legitimate and scrupulous creditors" must be taken into account. Here, the trial court found the mistake was an honest one and that Cash Central had sound procedures in place to mitigate against this type of error. Thus, Cash Central was a "legitimate and scrupulous creditor" entitled to the solicitude that the Legislature intended.

Instead of grappling with the trial court's factual findings, the Department invites this Court to engage in appellate fact finding, to ignore the plain language of the statutes, and to ignore the well-supported findings of the trial court. The Department even goes so far as to make a naked appeal for results-oriented decision making by referencing the interest rates charged by Cash Central. Consumer protection, as it is understood under the Code, does not include the Department's economic paternalism. The trial court reached the correct result. The technical

violations resulted in the statutory fines, but Cash Central proved entitlement to defenses against the harsh penalty of forfeiture sought by the Department.

This Court should grant the Petition to address the standard of review, the application of the defenses set forth in the Code in the context of the Code's stated purpose, and the doctrine of substantial compliance. The Opinion confuses all of these issues and should be reversed.

Respectfully submitted,

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