

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable DeAndrea Gist Benjamin, Circuit Court Judge

Case No. 2001-CP-40-4203R
Appellate Case No. 2014-001826

EDWIN M. SMITH, JR. APPELLANT,

vs.

DAVID FEDOR, RESPONDENT.

INITIAL BRIEF OF APPELLANT

James R. Gilreath (S.C. Bar #02133)
William M. Hogan (S.C. Bar #65272)
THE GILREATH LAW FIRM, P.A.
110 Lavinia Avenue (zip 29601)
P.O. Box 2147
Greenville, SC 29602
Telephone: (864) 242-4727

ATTORNEYS FOR APPELLANT

Edward L. Grimsley
Eric William Ruschky
GRIMSLEY LAW FIRM, LLC
1703 Laurel Street (zip 29201)
Post Office Box 11682
Columbia, SC 29211
Telephone: (803) 233-1177

ATTORNEYS FOR APPELLANT

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INTRODUCTION

This case presents the issue of whether the Lower Court, when ruling on a Rule 60(b)(5), SCRCF, motion to discharge a confession of judgment, should consider documents beyond the confession of judgment in determining if the debtor has met his financial obligations to his creditor. More specifically, this case involves the question of whether the Lower Court should have reviewed a written settlement agreement signed by the parties and their counsel during a mediation, where the settlement agreement specified: (1) the debtor-defendant's (Respondent's) payment obligations to the plaintiff (Appellant), and (2) the terms of a confession of judgment to secure the defendant's installment payments to the plaintiff.

In brief, the appellant Edwin M. Smith, Jr. ("Plaintiff") sued respondent David A. Fedor ("Defendant") for fraud and other related causes of action. The parties entered into a written confidential settlement agreement ("Confidential Settlement Agreement") drafted by the mediator David W. Harwell at the conclusion of their mediation on September 17, 2002. The Confidential Settlement Agreement required Defendant to pay Plaintiff \$400,000, payable by an initial payment of \$50,000, followed by ten (10) annual installment payments of \$35,000 beginning the following year on September 1, 2003. To secure the \$350,000 payable in annual installments, the Confidential Settlement Agreement required Defendant to execute a confession of judgment for the \$350,000 balance owed. After the agreed-upon date for the initial \$50,000 payment, Defendant executed on September 26, 2002 the \$350,000 confession of judgment ("Confession of Judgment") which expressly stated it arose pursuant to the parties' Confidential Settlement Agreement.

Beginning the year following the mediated Confidential Settlement Agreement and for the subsequent nine years, Defendant paid \$335,000 of installment payments. After paying an overall total of \$385,000 (\$50,000 down payment plus \$335,000 of installment payments) towards the \$400,000 obligation, Defendant quit paying his installment payments. Plaintiff then filed the Confession of Judgment for the remaining debt of \$15,000 (\$400,000 obligation less \$50,000 initial payment less \$335,000 of installment payments). Defendant claimed since he paid \$385,000 and the Confession of Judgment was for \$350,000, he did not have to make any more payments and was entitled to be relieved from the Confession of Judgment. Defendant argued that the Lower Court could look at extrinsic evidence of the payments he made but was not entitled to review the Confidential Settlement Agreement to determine his payment obligations. Defendant claimed the Lower Court could look only at the Confession of Judgment to determine his payment obligations. The Lower Court agreed, and this appeal followed.

STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge commit reversible error in refusing to consider the terms of the Confidential Settlement Agreement executed by the parties when determining whether Defendant had satisfied his Confession of Judgment arising out of the Confidential Settlement Agreement?
2. Should the Lower Court have considered the merits of Plaintiff's Motion for Reconsideration which was timely mailed to the Clerk of Court and to Defendant's counsel even though an additional copy was not mailed directly to the presiding judge?

3. Is the parties' Confidential Settlement Agreement sufficiently clear, explicit and unambiguous such that this Court should remand this case to the Lower Court with instructions to deny Defendant's Rule 60(b) motion?

STATEMENT OF THE CASE

The history of the proceedings in the Lower Court is as follows:

1. In 2001 Plaintiff filed a lawsuit alleging various fraud related causes of action, legal malpractice and breach of contract against Defendant arising out of the parties' business relationship and Defendant's professional legal services.
(Transcript p. 6:14-17).
2. On September 17, 2002 the parties conducted mediation before former Supreme Court Chief Justice David Harwell. Pursuant to the mediation, the parties entered into a written Confidential Settlement Agreement that date. Both parties and their attorneys signed the Confidential Settlement Agreement written by the mediator.
(Confidential Settlement Agreement; Transcript p. 16:9-21).
3. Under the terms of the Confidential Settlement Agreement Defendant agreed in paragraph 1 to pay Plaintiff "the total sum of \$400,000.00 in complete settlement of all claims..." (Confidential Settlement Agreement p. 1-2).
4. Under paragraph *1.a* of the Confidential Settlement Agreement, the \$400,000 settlement was to be paid by an initial \$50,000 payment to be delivered within three (3) days of the Confidential Settlement Agreement. (*Id.*).
5. Under paragraph *1.b* of the Confidential Settlement Agreement, the balance of \$350,000.00 was to be paid in annual installments of at least \$35,000.00 on

- September 1 of each year beginning September 1, 2003 until paid in full. (Id. at 2-3).
6. Under paragraph 3 of the Confidential Settlement Agreement, Defendant agreed to give Plaintiff an executed Confession of Judgment for \$350,000.00 as security for the remaining \$350,000 balance to be paid in installments. (Id. at 3).
 7. The Confidential Settlement Agreement stated in paragraph 3 the amount of the Confession of Judgment “shall be net of all payments made to date.” Paragraph 3 further stated that the Confession of Judgment would be held by Plaintiff’s attorney in escrow until Defendant defaulted on any payments. (Id.).
 8. The Confidential Settlement Agreement in paragraph 5 required Plaintiff to write a letter to the South Carolina Bar Grievance Committee providing notice that the parties’ case had been resolved to the mutual satisfaction of all parties. (Id. at 4).
 9. Nine days after the mediation Defendant executed a Confession of Judgment dated September 26, 2002. The Confession of Judgment acknowledged that Defendant was indebted to Plaintiff as of September 26, 2002 in the principal amount of \$350,000. The Confession of Judgment further recited that it was executed in consideration for Plaintiff agreeing to release all claims against Defendant and to dismiss with prejudice the subject lawsuit captioned Smith v. Fedor, Docket No. 2001-CP-40-4. (Confession of Judgment at ¶¶ 3-4).
 10. The Confession of Judgment stated: “The indebtedness owed by Defendant to Plaintiff arose pursuant to a confidential Settlement Agreement between Defendant and Plaintiff dated September 17, 2002 in which the lawsuit referenced above was settled.” (Id. at ¶ 5).

11. The Confession of Judgment authorized entry of a judgment against Defendant “in the principal amount of \$350,000.00, less any payment received by Plaintiff from Defendant through the date of filing hereof.” (Id. at ¶ 7).
12. The Confession of Judgment provided that it would not be filed “unless and until there has been a default by Defendant on his payment obligations as set forth in the Confidential Settlement Agreement.” (Id. at ¶ 9).
13. Defendant made an initial payment of \$50,000 as part of the Confidential Settlement Agreement. (Gilreath Aff. at ¶12).
14. From September 1, 2003 through September 1, 2011 Defendant made nine annual installment payments of \$35,000 each for a total of \$315,000 of installment payments, leaving a balance due of \$35,000. (Id. at ¶ 4).
15. On September 1, 2012 Defendant failed to make an installment payment. (Id. at ¶¶ 4-5).
16. Shortly after November 20, 2012 Defendant made a payment of \$20,000. (Id. at ¶ 7).
17. Defendant made total payments to Plaintiff or his attorney of \$385,000 in this case. (Pl. Aff.).
18. On February 27, 2013 Plaintiff’s 2002 trial attorney James R. Gilreath filed the Confession of Judgment, along with a Partial Satisfaction of Judgment, for default in the unpaid balance of \$15,000. (Gilreath Aff. at ¶10).
19. On or about March 26, 2013 Defendant filed a motion pursuant to Rule 60(b)(5), SCRCF, for relief from the Confession of Judgment claiming the debt recited in the Confession of Judgment had been satisfied. (Def.’s 60(b) Mot.).

20. Prior to the date of the hearing on Defendant's motion, Plaintiff's counsel submitted to the trial judge (1) a Memorandum in Opposition to Defendant's Motion to Vacate Judgment which included as exhibits the Confidential Settlement Agreement and the Confession of Judgment, and (2) an affidavit of James R. Gilreath which included the same exhibits as Plaintiff's Memorandum in Opposition. (Mem. Opp'n Def.'s Mot. Vacate J.)
21. The Lower Court, with the Honorable DeAndrea Gist Benjamin presiding, held a hearing on Defendant's Rule 60(b)(5) motion on August 26, 2013. The Lower Court heard oral arguments from counsel for both parties. Counsel for Defendant objected to any inquiry into the Confidential Settlement Agreement on the basis that it was not in the record, was full of scratch-overs and strike-throughs and was not clear upon its face. (Transcript p. 9:20-24).
22. The Lower Court reviewed the Confession of Judgment but declined to review the Confidential Settlement Agreement at the hearing. (Id. at p. 20:3-6).
23. The Lower Court granted Defendant's Rule 60(b)(5) motion by order filed October 31, 2013 ("Order"). The Order stated: "...As a result, the Court will not consider the terms of the confidential settlement agreement executed by the parties." (Order p.3:18-19, Oct. 31, 2013).
24. On November 8, 2013, Plaintiff's attorney timely mailed Plaintiff's Motion for Reconsideration to the Clerk of Court for filing with a duplicate copy to Defendant's counsel. A separate copy of the Motion for Reconsideration was e-mailed to the trial judge's office on June 4, 2014. (Ex. A to (Second) Mot. Recons. filed Aug. 4, 2014).

25. By a form 4 Order dated July 22, 2014, the Lower Court denied Plaintiff's first Motion for Reconsideration stating: "Motion for Reconsideration has been denied because the Court did not receive a copy of the motion within ten days of the motion being filed." (Order, July 22, 2014).
26. Plaintiff, following receipt on July 29, 2014 of the form 4 Order mailed by the Clerk of Court on July 24, 2014, timely served his Notice of Appeal on August 21, 2014. (See Aug. 21, 2014 Notice of Appeal¹ and Order, July 22, 2014).

STANDARD OF REVIEW

"A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief." Perry v. Heirs at Law of Gadsden, 357 S.C. 42, 46, 590 S.E.2d 502, 504 (Ct. App. 2003). ". . . [M]otions for relief under Rule 60(b) are addressed to the discretion of the court and appellate review is limited to determining whether the trial court abused its discretion." Saro Inv. v. Ocean Holiday P'ship, 314 S.C. 116, 124, 441 S.E.2d 835, 840 (Ct. App. 1994). "An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support." Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 555, 658 S.E.2d 80, 85-86 (2008); see also Saro Inv. v. Ocean Holiday P'ship, *supra* (holding trial judge abused its discretion and committed

¹ On August 4, 2014 Plaintiff's counsel filed and served on defense counsel and the trial judge a second Motion for Reconsideration for Lower Court review of the July 22, 2014 order. As of August 21, 2014, no ruling had been made on the second Motion for Reconsideration. Under the filing requirements of Elam v S.C. Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004) and Collins Music Co. v. IGT, 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002) which held that a second post-trial motion did not toll the deadline for filing a notice of appeal, Plaintiff proceeded with this appeal within the appeal deadline related to his first Motion for Reconsideration.

reversible error by not considering Rule 60(b) motion with the view of determining if plaintiff's judgment had prospective application).

“The admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal.” Gamble v. Int'l Paper Realty Corp. of S.C., 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996). “[T]o warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice.” Fields v. J. Haynes Waters Builders, Inc., 376 S.C. at 557, 658 S.E.2d at 86 . Prejudice is a reasonable probability that the fact-finder's determination was influenced by the challenged evidence or the lack thereof. Id.; see also Hill v. S. Carolina Dep't of Health & Env'tl. Control, 389 S.C. 1, 14, 698 S.E.2d 612, 619 (2010).

ARGUMENT

I. THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR IN REFUSING TO CONSIDER THE CONFIDENTIAL SETTLEMENT AGREEMENT EXECUTED BY THE PARTIES WHEN DETERMINING WHETHER DEFENDANT HAD SATISFIED HIS CONFESSION OF JUDGMENT ARISING OUT OF THE CONFIDENTIAL SETTLEMENT AGREEMENT.

The issues in this matter date back to September 17, 2002 when the parties participated in a mediation conducted by David W. Harwell as mediator. That day the parties entered into a “Confidential Settlement Agreement” personally signed by both parties and their attorneys. (Confidential Settlement Agreement p. 4). The Confidential Settlement Agreement was not filed with the Court in 2002. (Transcript p. 10:10-23). On September 26, 2002 Defendant executed a Confession of Judgment for \$350,000 in consideration for Plaintiff's agreement to release all claims against him and to dismiss the

underlying suit with prejudice. (Confession of Judgment, ¶4). According to the Confession of Judgment, the indebtedness it secured “arose pursuant to a confidential Settlement Agreement between Defendant and Plaintiff dated September 17, 2002...” (Id. at ¶5) (emphasis added). In addition the Confession of Judgment stated Plaintiff would not file the confession “until there [was] a default by Defendant on his payment obligations as set forth in the Confidential Settlement Agreement.” (Id. at ¶¶ 9 and 10) (emphasis added).

Ten years after the dismissal of the case, Plaintiff on February 27, 2013 filed the Confession of Judgment and a Partial Satisfaction of Judgment with the Richland County Clerk of Court. The Partial Satisfaction stated that Defendant had paid \$335,000 towards the balance owed under the Confession of Judgment, leaving an unpaid balance of \$15,000. (Gilreath Aff. ¶10). Following the entry of the Confession of Judgment, Defendant filed a motion to be relieved from the judgment pursuant to Rule 60(b)(5), SCRCF.

At the August 26, 2013 hearing before the Lower Court, counsel for Defendant asked the Court to consider only the terms on the face of the Confession of Judgment which provides in part that “[t]he Defendant hereby authorizes the entry of an Order and judgment against Defendant, and in favor of Plaintiff, in the principal amount of \$350,000, less any payments received by Plaintiff from Defendant through the date of filing hereof.” (Confession of Judgment, ¶7). Defendant’s counsel asked the Lower Court to ignore the terms of the Confidential Settlement Agreement specifically referenced in the Confession of Judgment. (Transcript pp. 9:13 – 10:3 and 15:7-16).

Both parties agreed during the hearing that Defendant had paid sums to Plaintiff *in excess of* the \$350,000 amount set forth in the Confession of Judgment. (*e.g.* Transcript pp. 4:13-15 and 21:6-9). However, Plaintiff's counsel pointed out to the Court that Defendant had more than one payment obligation to Plaintiff under the Confidential Settlement Agreement and that not all Defendant's payments were towards the obligation secured by the Confession of Judgment. (Transcript pp. 8:6-8 and 21:1-9). It was therefore necessary to review the referenced Confidential Settlement Agreement to determine if Defendant had met his payment obligations secured by the Confession of Judgment.

In the subject Order, the Lower Court declined to consider the terms of the Confidential Settlement Agreement. (Order p.3:18-19, Oct. 31, 2013). The Order stated that the 2002 version of Rule 43(k), SCRCF, pertaining to the enforceability of settlement agreements, applied to this case and that the 2002 rule prohibited enforcement of the Confidential Settlement Agreement since the agreement was not entered in the court record. (*Id.* pp. 2-3). As a result, the Lower Court held that the payments in excess of \$350,000 satisfied the Confession of Judgment and then granted Defendant's Motion for Relief from the Confession of Judgment.

A. The current version of Rule 43(k) is applied retrospectively, making the Confidential Settlement Agreement enforceable.

Rule 43(k), SCRCF regarding settlement agreements of counsel currently states:

No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel.

Rule 43(k), SCRCF (emphasis added).

The Confidential Settlement Agreement was obviously reduced to writing, was signed by the parties and also by their counsel. The Confidential Settlement Agreement met all three requirements of the current Rule 43(k) underlined above and is thus enforceable under current Rule 43(k).

The Lower Court however held that Rule 43(k), SCRPC as amended in 2009 and currently in effect did not apply to the matter before the Lower Court on August 26, 2013. The Court applied to this case the 2002 version of Rule 43(k) as interpreted by the Supreme Court in 2006 in Buckley v. Shealy, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006). As a result, the Court declined to consider the terms of the Confidential Settlement Agreement the parties executed on September 17, 2002. Under our state's appellate case law, the present version of Rule 43(k) is to be applied to cases currently pending before the trial court, including this matter.

As a rule of procedure, the amended Rule 43(k), SCRPC is to be employed in all actions pending before the court at the time of amendment and in all actions heard by the court thereafter. This precise issue was addressed by this Court in Graham v. Dorchester County School District, 339 S.C. 121, 528 S.E.2d 80 (Ct. App. 2000). The Court upheld the trial judge's ruling that an amendment to the Rules of Civil Procedure, such as Rule 40(j) SCRPC at issue in that case, should be given retroactive application to cases pending at the time of its enactment.

In explaining that amendments to the Rules of Civil Procedure apply retroactively, this Court stated:

In cases dealing with statutory law changes, courts have discussed the general rules of prospective and retroactive application. By analogy, those same principles can be applied to determine whether an amended procedural rule should have prospective or retroactive effect...

Our Supreme Court has held that statutes are presumed to be entitled to prospective construction unless there is an express provision or a clear legislative intent to the contrary. Hercules Inc. v. South Carolina Tax Comm'n, 274 S.C. 137, 262 S.E.2d 45 (1980)(holding a statute which has the effect of tolling a statute of limitations affects the remedy and not the right and is therefore subject to retroactive application). A principal exception is remedial or procedural statutes are generally held to operate retrospectively. *Id.*; see Jenkins v. Meares, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990)(“Our decisions recognize a presumption that statutory enactments are to be given prospective rather than retroactive effect. An exception to this presumption arises when the enactment is remedial or procedural in nature, such as a statute of limitations.”).

The South Carolina Rules of Civil Procedure provide that the rules, which initially took effect on July 1, 1985, would “govern all proceedings in civil actions brought after they take effect.” Rule 86(a), SCRPC. Moreover, the rules also govern “all further proceedings in actions then pending” unless to do so “would not be feasible or would work injustice.” *Id.*; see McGann v. Mungo, 287 S.C. 561, 340 S.E.2d 154 (Ct. App.1986)(holding the new rules of civil procedure apply to all further proceedings in pending actions); James F. Flanagan, *South Carolina Civil Procedure* 583 (2d ed. 1996) (“Rule 86(a) made these rules applicable to cases then pending at the time of [sic] rules were adopted. A similar result follows when new civil rules are promulgated.”).

Graham v. Dorchester Cnty. Sch. Dist., 339 S.C. 121, 124, 528 S.E.2d 80, 81-82 (Ct. App. 2000)² (emphasis added).

Therefore under Graham, Rule 43(k) is to be applied retroactively to all cases pending before the court “unless to do so ‘would not be feasible or would work injustice.’” *Id.* Defendant can make no plausible argument that retroactive application of the 2009 amendment of Rule 43(k) is not feasible or would work an injustice.

When this case was mediated and settled in September 2002, Rule 43(k) at that time was interpreted and applied by the Supreme Court under its ruling in Ashfort Corp.

² See also Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 443 S.E.2d 906 (1994) (holding that the same rules of construction used in interpreting statutes apply in interpreting the South Carolina Rules of Civil Procedure).

v. Palmetto Constr. Group, Inc., 318 S.C. 492, 458 S.E.2d 533 (1995). In Ashfort, the Supreme Court allowed two exceptions to the requirement that agreements between counsel must be entered on the record to be binding. The court stated that “[t]he rule does not apply where the agreement is admitted or has been carried into effect.” Id. at 493-94, 458 S.E.2d at 534 n.1. Therefore in 2002, settlement agreements that (1) had been admitted by the parties, or (2) carried into effect did not have to be entered on the record to be enforceable by the court.

In this case, the Confidential Settlement Agreement has been admitted by the parties since both parties personally signed the agreement along with their counsel. In addition, the case was dismissed with prejudice, and Defendant admittedly made over \$350,000 in payments since then. So the Confidential Settlement Agreement had been carried into effect. Thus under the Ashfort application of Rule 43(k) in effect in 2002, the Confidential Settlement Agreement did not have to be entered on the record and was enforceable without court review when the parties signed their mediated Confidential Settlement Agreement on September 17, 2002.

It was not until 2006 in Farnsworth v. Davis Heating & Air Conditioning, Inc. that the Supreme Court declined to continue following the two exceptions it previously enunciated in footnote 1 in Ashfort. See Farnsworth v. Davis Heating & Air Conditioning, Inc., 367 S.C. 623, 627 S.E.2d 724 (2006). With the Farnsworth and Buckley rulings in 2006, the Supreme Court began requiring “admitted” settlement agreements to be placed before the trial court.

Since the current version of Rule 43(k) follows the same requirements in force in 2002 when the parties executed the Confidential Settlement Agreement, it would work no

hardship on Defendant to apply the present version of Rule 43(k). Defendant should have expected the lawful agreement to be enforceable in 2002 and should expect the same now as well. With no resulting injustice, the current version of Rule 43(k) governs this matter, making the Confidential Settlement Agreement binding on the parties.

B. Exceptions to the parol evidence rule allow admission of the Confidential Settlement Agreement for Court consideration.

The parol evidence rule bars admission of extrinsic evidence if the writing on its face appears to express the whole agreement. Blackwell v. Faucett, 117 S.C. 60, 108 S.E.2d 295 (1921). Conversely, when a document on its face does not appear to express the whole agreement, the parol evidence rule is not applicable. See Lingefelt v. Forest Hills Homes, Inc., 305 S.C. 197, 200-01, 406 S.E.2d 394, 396 (Ct. App. 1991) (allowing admission of parol agreement that was not intended to be replaced by and merged into litigated agreement). As explained below, Defendant's unilaterally signed Confession of Judgment was not intended to be the complete agreement of the parties, making the Confidentiality Settlement Agreement admissible.

1. A confession of judgment is not an integrated agreement barring parol evidence but is a starting point for the investigation of outside evidence.

The Confession of Judgment signed by Defendant is a unilateral statement signed by him alone. Plaintiff is not a signatory to the document. The only document Plaintiff signed is the Confidential Settlement Agreement.

The parol evidence rule is one of substantive contract law, not a rule of evidence. Gilliland v. Elmwood Prop., 301 S.E. 295, 302, 391 S.E. 2d 577, 581 (1990). Since the parties' agreement is embodied in the Confidential Settlement Agreement, the parol evidence rule has no application to the unilateral Confession of Judgment. In fact, the

Confession of Judgment is a document whose very purpose is to guide the reader to extrinsic evidence about the terms of the subject debt or obligations.

South Carolina Code §15-35-360 provides that a Confession of Judgment “must state concisely the facts out of which it arose . . .” S.C. Code Ann. §15-35-360(2)(emphasis added). The South Carolina Supreme Court has stated that “all the statute required was a concise, not a particular or detailed statement of the facts out of which the indebtedness arose.” Weinges v. Cash, 15 S.C. 44 (1881) (emphasis in original). Since the confession of judgment statute required that the statement be a concise statement of facts, the legislature did not intend the confession of judgment to be an all-encompassing, integrated, document. To that same point, the Supreme Court stated “what I think the statute intended [a creditor] should have is sufficient of the facts to enable him to inquire into the transaction and to form his opinion of the honesty of the judgment from the facts he shall ascertain.” Id. (emphasis in original).

The Supreme Court further explained that the concisely stated facts in a confession of judgment are not meant to be the only facts a third party reading the confession of judgment can accept about the debtor’s debt. It is the obligation of the third party reading the confession of judgment to further investigate the circumstances behind the debt. The Supreme Court expounded on that point by stating:

A creditor who was disposed to question this [confession of] judgment would not, of course, accept the debtor’s statement as correct even if it had been full to the minutest detail. All he would want to know would be what was claimed to be the origin and consideration of the debt, and he would inquire for himself into the details.

Id. at 65-66.

The Supreme Court also explained that a third party reading the confession of judgment would use the concisely stated facts out of which the judgment arose to investigate extrinsic evidence to determine how much ought to be due. Id. at 66.

Thereon, the Supreme Court pronounced:

... With these facts furnished to him by the statement, the creditor would have it in his power, by his own investigations, to ascertain how much ought to be due, and it is not to be expected that his action in the premises would be influenced by any details that might be contained in the statement, but by the result of his own investigations, which the facts there stated enabled him to institute...

Id. (emphasis added).

As the Court later stated in the opinion, the confession of judgment is designed to provide the origin and consideration of the debt in order that a third party would then have “such starting point [to] . . . proceed with his own investigations. . .” Id. The purpose of the Confession of Judgment is to direct this Court to extrinsic evidence –in this case to the Confidential Settlement Agreement – to ascertain the amounts due.

2. Collateral agreement exception allows introduction of the Confidential Settlement Agreement as the parties’ larger master agreement.

Closely related to the independent agreement exception to the parol evidence rule is the collateral agreement exception where the litigated agreement (*i.e.*, the Confession of Judgment) is a part of a larger agreement (*e.g.*, the Confidential Settlement Agreement). As stated by the South Carolina Supreme Court:

While it is a general rule that a contract in writing, complete in all its terms, draws into it all parol contracts preceding it, yet . . . if it is only a part of a general whole, it is perfectly competent to supply all those missing qualities by testimony giving all the precedent agreements of the parties.

City of Greenville v. Washington American League Baseball Club, 205 S.C. 495, 32 S.E.2d 777, 782 (1945) (holding oral agreement to provide facilities and lighting for baseball team was the larger agreement out of which real estate lease grew and therefore was admissible parol evidence); see also Parr v. Parr, 268 S.C. 58, 64, 231 S.E.2d 695, 697 (1977)(holding where deed referenced another agreement on “other valuable consideration”, extrinsic evidence was admissible to explain the other agreement referenced in the deed).

This Court has explained how the law in this state construes multiple instruments known to all parties and executed to accomplish an agreed purpose, stating:

In South Carolina, two contracts executed at different times relating to the same subject matter, entered into by the same parties, are to be construed as one contract and considered as a whole...[W]here one of the contracts explains, amplifies, or limits the other, those provisions will be given effect between the parties so that the whole agreement, as actually contracted by the parties, may be effectuated...One contract draws contractual sustenance from the other.

Ellie, Inc. v. Miccichi, 358 S.C. 78, 93, 594 S.E.2d 485, 492-93 (Ct. App. 2004).

The presence of collateral agreements drawing contractual sustenance from each other is precisely the situation existing in this case. The Confession of Judgment in three places references the Confidential Settlement Agreement. It declares that the indebtedness pertaining to the Confession of Judgment “arose pursuant to a confidential Settlement Agreement between Defendant and Plaintiff”. The Confession of Judgment explicitly provides that it is part of an overall larger agreement entered into by the parties. In the words of the Parr court, the Confidential Settlement Agreement is explanatory of what the parties’ overall agreement was. The Confidential Settlement Agreement is

therefore admissible to explain the parties' larger agreement which contains the Confession of Judgment as one of its parts.

3. Inducement exception permits use of Confidential Settlement Agreement.

Parol evidence is admissible to show an outside agreement that was an inducement to the execution of the document at issue. In other words, the Confidential Settlement Agreement is admissible since it was the agreement that induced Defendant to sign the Confession of Judgment. See Knighton v. Des Portes Mercantile Co., 119 S.C. 340, 112 S.E. 343 (1922) (holding that existence of extrinsic agreement between parties, under which one party signed promissory note, may always be shown when enforcement of the obligation is attempted since promissory note would never have been signed without the extrinsic contemporaneous parol agreement).

The South Carolina Supreme Court described the inducement exception as follows:

Further, it is proper to admit testimony in proof of a contemporaneous or independent agreement on the same subject matter, the meaning of which is not at variance with the principle agreement. Especially is this true when the purpose of such contemporaneous or independent agreement was to induce the execution of and entering into the principle agreement.

Gantt v. Van der Hoek, 251 S.C. 307, 317-18, 162 S.E.2d 267, 272 (1968).

The inducement principle stated in Gantt is exactly the circumstance we have in this case. The Confession of Judgment states:

Defendant executed this Confession of Judgment in consideration of the Plaintiff's agreement to release all claims against him and to dismiss with prejudice that certain lawsuit captioned Edwin M. Smith, Jr. v. David A. Fedor, docket number 2001-CP-40-4.

Confession of Judgment, ¶ 4.

Defendant then states in the next paragraph:

The indebtedness owed by Defendant to Plaintiff arose pursuant to a Confidential Settlement Agreement between Defendant and Plaintiff dated September 7, 2002 in which the lawsuit referenced above was settled.

(Confession of Judgment, ¶ 5).

Clearly, the release Defendant received from Plaintiff and the dismissal of the lawsuit he obtained from Plaintiff, as part of the Confidential Settlement Agreement, induced Defendant to execute the Confession of Judgment. As the very inducement for executing the Confession of Judgment, the Confidential Settlement Agreement, as specifically referenced in the Confession of Judgment, is admissible to explain the agreement surrounding the Confession of Judgment. *Cf. Ray v. S.C.Nat'l Bank*, 281 S.C. 170, 173, 314 S.E.2d 359, 360 (Ct. App. 1984) (barring evidence of alleged oral agreement of a condition precedent not expressed in the unconditional promissory note).

4. Parol evidence is admissible to explain ambiguities in the Confession of Judgment.

The Court noted in its order that both parties agreed during the hearing that Defendant had paid an amount in excess of the \$350,000.00 set forth in the Confession of Judgment. (Order at p. 2, October 31, 2013). This begs the obvious question – why did Defendant pay more than \$350,000.00 if he were not obligated to do so? Defendant has made no claim in these proceedings for a refund of the excess, nor has he made a refund claim in any other forum or manner. It is quite apparent there are more terms to the parties' agreement than those contained in the Confession of Judgment. The Confidential Settlement Agreement pursuant to which Defendant was making his payments required him to pay additional sums to Plaintiff over and above the \$350,000.00 secured by the Confession of Judgment. Only a review of the Confidential Settlement Agreement can

explain this discrepancy between the amounts paid and the debt secured by the Confession of Judgment.

The ambiguous nature of the Confession of Judgment is demonstrated by the struggles the Lower Court encountered trying to understand the parties' agreement solely from the Confession of Judgment. At oral argument the trial judge voiced her dilemma stating:

Well, I'm not concerned about the merits. I'm trying to figure out what the agreement was.

Transcript p. 10:4-6.

The Lower Court again showed its inability to comprehend the terms of the parties' settlement from reviewing only the Confession of Judgment, stating:

All right. Let me ask you this, because this happens sometimes... There is a settlement and then there is – I'm trying to figure out, how did we get to the confession being filed in the earlier part of this year? I mean, apparently something – of February 2013... The problem I have is, I don't know if there was some other discussion, but there is a confession that is signed, and it says \$350,000 about 10 years later – 10, 11 years later.

Transcript pp. 16:22 – 17:10.

When the Lower Court applied the terms of the Confession of Judgment, which stated an indebtedness of \$350,000 as of September 26, 2002, with the actual payments of \$385,000 combined with the filing of the Confession of Judgment eleven years after its execution, Defendant's payment obligation became ambiguous. An uncertainty about the amount of Defendant's indebtedness owed to Plaintiff – the subject of the Confession of Judgment – arose when the words of the Confession of Judgment were applied to Defendant's actual payments on the indebtedness. In other words, the Lower Court faced a latent ambiguity when interpreting the Confession of Judgment. See Beaufort Cnty.

Sch. Dist. v. United Nat. Ins. Co., 392 S.C. 506, 526, 709 S.E.2d 85, 95 (Ct. App. 2011)(stating “[a] latent ambiguity exists when there is no defect arising on the face of the instrument, but arising when attempting to apply the words of the instrument to the object or subject described).

When confronted with a latent ambiguity in a contract, this Court has held that parol testimony may be received in construing the instrument containing the latent ambiguity. Id. This Court has further held that this principle applies to documents executed by only one party. See Bob Jones Univ. v. Strandell, 344 S.C. 224, 231, 543 S.E.2d 251, 254 (Ct. App. 2001) (allowing admission of extrinsic evidence to clarify latent ambiguity in a will). Not only does this Court allow the admission of extrinsic evidence to clear up a latent ambiguity, “a court may admit extrinsic evidence to determine whether a latent ambiguity exists.” Id.

In this case the Confidential Settlement Agreement would clarify the ambiguities arising from the Confession of Judgment when applied to the debt payments made by Defendant. Paragraph 1 of the Confidential Settlement Agreement provides that the total settlement amount owed by Defendant is \$400,000, which explains why Defendant paid more than \$350,000 to Plaintiff. Paragraph 1.a specifies that Defendant was obligated to make an initial payment of \$50,000 towards the \$400,000 debt. Paragraph 1.b specifies that Defendant then owed a balance of \$350,000 which was to be paid in annual installments of at least \$35,000 starting in September of the following year, 2003. Paragraph 3 then provided that Defendant would sign a Confession of Judgment for the remaining \$350,000 balance (after payment of the initial \$50,000) which would be held over course of the installment payments until there was a default. With installment

payments of \$35,000 per year, the payments would last 10 years or until September 2012. The specified payment schedule of 10 years combined with the requirement that the Confession of Judgment not be recorded until a default in payments occurs explains why the Confession of Judgment was filed 10 years and 5 months after its execution.

The latent ambiguity contained in the Confession of Judgment is exemplified by the statements of Defendant's counsel at oral arguments before the Lower Court. He stated:

The Defendant acknowledges that he has paid – and it is undisputed -- \$385,000. Now, it is anybody's guess as to why he overpaid whatever. But the confession is for \$350,000. And there is no need to go beyond the corners of this instrument. It speaks for itself. And it says \$350.

Transcript pp. 17:24 – 18:5.

Defendant's payment of \$385,000 is confusing when viewed only in the light of the Confession of Judgment with its \$350,000 stated indebtedness. In actuality, though, it is not anybody's guess why Defendant paid \$385,000 when the Confession of Judgment is examined along with the Confidential Settlement Agreement. The Confidential Settlement Agreement makes it clear there were two payment obligations Defendant owed to Plaintiff -- one being the initial \$50,000 payment and the other being the remaining \$350,000 balance to be paid in annual installments starting in 2003. The collection of the Confession of Judgment is a classic example of a latent ambiguity that is precisely explained by the terms of the Confidential Settlement Agreement.

The latent ambiguities with which the Lower Court struggled at oral argument are easily cleared up by a review of the Confidential Settlement Agreement -- the very document the Confession of Judgment stated it was founded on.

C. Amount stated in the Confession of Judgment is logically consistent with the debt Defendant owed Plaintiff under the Confidential Settlement Agreement.

Defendant's counsel at oral argument argued that if the total debt to be paid was \$400,000, Plaintiff's attorney who drafted the Confession of Judgment "should have put \$400[,000] in the confession". (Transcript p. 14:18-25). Since \$350,000 was stated in the Confession of Judgment, Defendant claims that a total of only \$350,000 must be owed.

But putting \$400,000 in the Confession of Judgment would be illogical. When Defendant made the initial payment of \$50,000 towards the \$400,000 total debt, only \$350,000 was then due. Why would any debtor sign a confession of judgment for \$400,000 when all he owed at the time of signing the confession was \$350,000? A confession of judgment represents money due or to become due, not amounts that have already been paid and are no longer owed. See S.C. Code Ann. §15-35-360(2) (confession of judgment "... must show that the sum confessed therefor is justly due or to become due").

Most importantly, the Confidential Settlement Agreement stated in paragraph 3 that the amount of the Confession of Judgment "shall be net of all payments made to date." (Confidential Settlement Agreement p. 3). Since the initial \$50,000 payment had already been made as of the date of the Confession of Judgment, the parties' Confidential Settlement Agreement called for the Confession of Judgment to state the net balance then due of \$350,000.

II. THE TRIAL COURT SHOULD HAVE CONSIDERED THE MERITS OF PLAINTIFF'S MOTION FOR RECONSIDERATION WHICH WAS TIMELY MAILED TO THE CLERK OF COURT AND TO DEFENDANT'S COUNSEL.

Defendant in his motion for relief under Rule 60(b), SCRCP, did not raise the

The Motion for Reconsideration was timely filed with the Clerk of Court and served on Defendant's counsel. Plaintiff acknowledges that a copy of the filed Motion for Reconsideration was inadvertently not delivered to the presiding judge within ten days of filing. See Rule 59(g), SCRCP ("A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion."); see also Rule 52(d), SCRCP (same). The failure to provide a copy to the presiding judge was an oversight not intended to prejudice any party. Defendant's counsel was mailed a copy of the motion at the same time it was mailed to the Clerk of Court. He was therefore on notice of the issues raised in the Motion for Reconsideration. Plaintiff submits the Lower Court erred in failing to consider the merits of his Motion for Reconsideration.

"The ten day requirement of Rule [59] is... a rule of limitation, not a rule of jurisdiction ... [and] does not affect the jurisdiction of the court." In re Beard, 359 S.C. 351, 358, 597 S.E.2d 835, 838 (Ct. App. 2004) (quoting Standard Fed. Sav. & Loan Ass'n v. Mungo, 306 S.C. 22, 26 n. 1, 410 S.E.2d 18, 20 n. 1 (Ct. App.1991). Rules 52(d) and 59(g) are thus more in the nature of rules designed for the trial court's administrative convenience and are not meant to be inflexible rules of jurisdiction. "The notes to Rule 59, SCRCP, indicate that subsection (g) was added to help insure the judge is promptly notified that the motion has been filed." Gallagher v. Evert, 353 S.C. 59, 63, 577 S.E.2d 217, 219 (Ct. App. 2002)(holding that failure to transmit a copy of the motion to the circuit court does not affect the tolling provision of Rule 203(b)(1), SCACR); cf. Fed. R. Civ. P. 52 and 59 (no requirement for attorney service of motion on presiding judge); cf.

also Rule 59(g), A.R.Civ.P. (“Presentation of any post-trial motion to a judge is not required in order to perfect its making” under Alabama version of Rule 59).

The South Carolina Supreme Court has held that our courts should not apply an overly technical reading of the rules regarding motions for reconsideration where the motion does not prejudice either party and the court is able to deal fairly with the matter raised in the motion. See Camp v. Camp, 386 S.C. 571, 689 S.E.2d 634 (2010)(holding that the appellate court should review a motion for reconsideration not meeting the particularity requirement of Rule 7(b)(1), SCRCP, where the trial court was able to both comprehend the motion and deal with it fairly). Given the lack of prejudice on Defendant, Plaintiff posits that the Lower Court erred in failing to consider his Motion for Reconsideration on its merits. Regardless of whether Plaintiff’s Motion for Reconsideration was improperly denied on procedural grounds of Rule 59(g), this appeal was timely undertaken within thirty days of the Lower Court’s ruling on the Motion for Reconsideration. See Coon v. Coon, 356 S.C. 342, 346, 588 S.E.2d 624, 626 (Ct. App. 2003) (holding appellant was not required to file notice of appeal until after trial court issued its order denying appellant’s motion to reconsider for failure to comply with Rule 59(g)); see also Jones v. State, 382 S.C. 589, 677 S.E.2d 20 (2009) (reversing judgment of trial court where trial court denied appellant’s motion for reconsideration for failure to comply with service requirement of Rule 59(g)).

III. THE CONFIDENTIAL SETTLEMENT AGREEMENT IS SUFFICIENTLY CLEAR, EXPLICIT AND UNAMBIGUOUS SUCH THAT THIS COURT SHOULD REMAND THIS CASE TO THE TRIAL COURT WITH INSTRUCTIONS TO DENY DEFENDANT’S RULE 60(B) MOTION.

The appellate courts of this State have long held that “[o]ne of the cardinal rules of contract interpretation is to ascertain and give effect to the intention of the parties.

S.C. Dept. of Transp. v. M&T Enter. of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667

S.E.2d 7, 12 (Ct. App. 2008). This Court has further explained:

The construction of a clear and unambiguous contract presents a question of law for the court...

* * * *

It is also a question of law whether the language of a contract is ambiguous... Where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it... A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.

Id., 667 S.E.2d at 13.

“If a contract’s language is clear and capable of legal construction, this Court’s function is to interpret its lawful meaning and the intent of the parties as found in the agreement.” Windsor Green Owners Ass’n, Inc. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004).

In this case, the Confidential Settlement Agreement dated September 17, 2002 is clear and unambiguous. Defendant agreed to pay Plaintiff \$400,000 to settle and dismiss the lawsuit between the parties. (“Defendant agrees to pay Plaintiff the total sum of \$400,000 in complete settlement of all claims...”). The \$400,000 sum was broken into two parts – a \$50,000 initial payment to be delivered “within three (3) days of the date of this agreement” and “the balance of \$350,000 to be paid in annual installments of \$35,000” beginning in 2003. “As security Defendant agrees to give to Plaintiff a Confession of Judgment for \$350,000...not to be recorded unless the Defendant defaults on any payments.”

The Confidential Settlement Agreement plainly provides for an indebtedness owed by Defendant to Plaintiff of \$400,000. It is uncontroverted that Defendant paid Plaintiff only \$385,000. Thus Defendant continues to owe Plaintiff \$15,000.

The Confidential Settlement Agreement is a clear and unambiguous contract between the two parties, negotiated with both parties having the benefit of counsel. This Court's function therefore is to enforce the Confidential Settlement Agreement according to its terms.

CONCLUSION

The Confession of Judgment was explicitly founded on the parties' Confidential Settlement Agreement of September 17, 2002. That agreement was enforceable by the Lower Court under Rule 43(k), SCRCF as existed on the dates of the Confidential Settlement Agreement and Confession of Judgment and on the date of Lower Court's hearing on August 26, 2013. In addition, the Confidential Settlement Agreement was a collateral agreement with the Confession of Judgment, thus requiring the Confession of Judgment to be interpreted in conjunction with the Confidential Settlement Agreement. Further, the Confession of Judgment was not an integrated agreement barring extrinsic evidence, but was an instrument containing latent ambiguities only understood in the light of the Confidential Settlement Agreement. The Confession of Judgment, when interpreted in conjunction with the Confidential Settlement Agreement, is clear and unambiguous. This Court should reverse the Lower Court's grant of Defendant's Motion for Relief from the Confession of Judgment and enforce the Confession of Judgment filed for the remaining \$15,000 owed by Defendant to Plaintiff.

Respectfully submitted,

THE GILREATH LAW FIRM, P.A.

By: William M. Hogan
William M. Hogan (S.C. Bar #65272)
James R. Gilreath (S.C. Bar #02133)
THE GILREATH LAW FIRM, P.A.
110 Lavinia Avenue (zip 29601)
P.O. Box 2147
Greenville, SC 29602
Telephone: (864) 242-4727
Fax: (864) 232-4395
bhogan@gilreathlaw.com
jim@gilreathlaw.com

and

Edward L. Grimsley
Eric William Ruschky
GRIMSLEY LAW FIRM, LLC
1703 Laurel Street (zip 29201)
Post Office Box 11682
Columbia, SC 29211
Telephone: (803) 233-1177
egrimsley@grimsleylaw.com
mruschky@aol.com

ATTORNEYS FOR APPELLANT

November 19, 2014
Greenville, South Carolina.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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SC Court of Appeals

The Honorable DeAndrea Gist Benjamin, Circuit Court Judge

Case No. 2001-CP-40-4203R
Appellate Case No. 2014-001826

EDWIN M. SMITH, JR. APPELLANT,

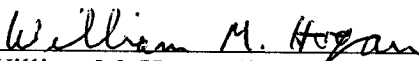
vs.

DAVID FEDOR, RESPONDENT.

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the Appellant in the foregoing matter with a copy of the foregoing **INITIAL BRIEF OF APPELLANT** by Federal Express overnight delivery, addressed as follows:

Leo A. Dryer, Jr., Esquire
DRYER LAW OFFICES
659 Frink Street
Cayce, South Carolina 29033


William M. Hogan (S.C. Bar #65272)
James R. Gilreath (S.C. Bar #02133)
THE GILREATH LAW FIRM, P.A.
110 Lavinia Avenue (zip 29601)
P.O. Box 2147
Greenville, SC 29602
Telephone: (864) 242-4727
Fax: (864) 232-4395
bhogan@gilreathlaw.com

jim@gilreathlaw.com

and

Edward L. Grimsley
Eric Wm. Ruschky
GRIMSLEY LAW FIRM, LLC
1703 Laurel Street (zip 29201)
Post Office Box 11682
Columbia, SC 29211
Telephone: (803) 233-1177
egrimsley@grimsleylaw.com
mruschky@aol.com

ATTORNEYS FOR APPELLANT

November 19, 2014
Greenville, South Carolina.

From: (864) 242-4727
James Gilreath
Gilreath Law Firm
110 Lavinia Avenue
Greenville, SC 29601

Origin ID: LQKA



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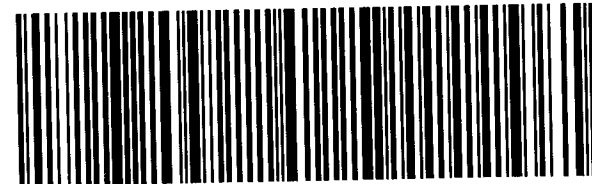
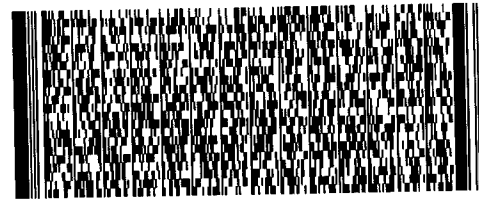
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