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**SC Court of Appeals**

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

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

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EDWIN M. SMITH, JR. .... APPELLANT,

vs.

DAVID FEDOR, .....RESPONDENT.

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**RETURN OF APPELLANT TO RESPONDENT'S  
MOTION RULE 210(C)**

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Respondent has moved to exclude from the Record on Appeal a document known as and titled "Confidential Settlement Agreement" dated September 17, 2002. The central issue in this appeal is whether the Lower Court erred in failing to consider the Confidential Settlement Agreement when deciding if the Confession of Judgment should be vacated. The admissibility of the Confidential Settlement Agreement was also the core dispute between the parties before the Lower Court. The Lower Court ruled: "...the Court will not consider the terms of the confidential settlement agreement executed by the parties." (Ex. A – Order of October 31, 2013 at 3).<sup>1</sup> Appellant contends the failure of

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<sup>1</sup> The Record on Appeal has not yet been filed; however, all documents attached hereto have been included in the Appellant's Designation of Matter to be Included in the Record

the Lower Court to review and consider the Confidential Settlement Agreement was reversible error. Appellant properly presented the Confidential Settlement Agreement to the Lower Court, and the Court should review on appeal. If the document is not included in the Record on Appeal, this Court will be unable to conduct a full review of the fundamental issue before it.

The Lower Court litigation was initially filed in 1998 and subsequently restored to the docket in 2001 under Rule 40(j), SCRCPP. The underlying litigation was subsequently settled in 2002 when the parties signed the Confidential Settlement Agreement at the September 17, 2002 mediation. The Respondent executed a Confession of Judgment shortly thereafter on September 26, 2002. The Confession of Judgment states that Appellant may file the Confession of Judgment when “there has been a default by [Respondent] on his payment obligations as set forth in the Confidential Settlement Agreement.” (Ex. B, Conf. of J., ¶ 9). Appellant has alleged Respondent in 2013 defaulted on his payments specified in the Confidential Settlement Agreement and, by incorporation, the Confession of Judgment. (Ex. C, Tr. at 7:22 - 8:3).

To preserve a ruling on an evidentiary issue for appeal, South Carolina Rule of Evidence 103 provides as follows:

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . .

(2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context.

SCRE 103(a).

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on Appeal without objection from Respondent and were part of the Lower Court proceedings. (Ex. E, Aff. of William M. Hogan pursuant to Rule 240(c)(3), SCACR).

Respondent has moved to exclude the Confidential Settlement Agreement on grounds that the Confidential Settlement Agreement was not before the Lower Court. The record however shows the Confidential Settlement Agreement was proffered to the Lower Court on multiple occasions and should be considered by this Court on appeal.

Prior to the motion hearing before the Lower Court, Appellant's trial counsel<sup>2</sup> submitted the Confidential Settlement Agreement to the court and to Respondent's counsel by attaching it as Exhibit A to Appellant's Memorandum in Opposition to Defendant's Motion to Vacate Judgment. (Ex. D, Mem. Opp. Def.'s Mot. Vacate J., ¶ 1 and cover letter from Edward Grimsley to Hon. Robert Hood (July 3, 2013)).

At the hearing, Appellant's counsel submitted the Confidential Settlement Agreement in person to the Lower Court judge as follows:

[APPELLANT'S  
COUNSEL]: We have the confidential settlement  
if you'd like to see it, Your Honor.

THE COURT: Yes.

(Complies.)

Ex. C, Tr. at 9:13-16.

After Respondent's counsel objected to introduction of the Confidentiality Settlement Agreement, the Lower Court noted the Confidential Settlement Agreement was not part of the record during the prior court proceedings from 2001-2002. (Ex. C, Tr. at

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<sup>2</sup> Appellant's appellate counsel did not serve as trial counsel in the 2013 Lower Court proceedings.

9:20-24 and 10:17-22). The Lower Court was reluctant to consider the Confidential Settlement Agreement and make it part of the record since it was not previously filed, stating:

THE COURT: Well, there is an agreement that you all -- and he doesn't want it -- I understand he doesn't want it -- it is confidential. He doesn't want it a part of the record. I'm not sure how I can consider it if it is not a part of the record.

Ex. C, Tr. at 12:5-10.

Appellant's trial counsel offered in open court to file it under seal and emphasized "it is imperative that the Court see this Confidential Settlement Agreement." (Ex. C, Tr. at 12:11 and 19:4-8). The Lower Court judge responded: "I'm not going to look at it at this point until I get some authority that says -- or I am able to look at some case law about confidentiality agreement." (Id. at 20:3-6).

Appellant's counsel, on the record, described to the Lower Court the essential terms of the Confidential Settlement Agreement as follows:

[APPELLANT'S  
COUNSEL]:

. . . a confidential settlement [ ] agreement. . . was reached through the mediation of a retired Chief Justice of the Supreme Court.

The original settlement was \$400,000, with \$50,000 paid down upfront, and a judgment, a signed confession of judgment, for the balance of \$350[,000] to be reserved against failure to pay the total \$350[,000].

(Ex. C, Tr. at 7:8-15.)

Appellant's counsel further described the document as a:

[APPELLANT'S  
COUNSEL]:

. . . 4-page document, which is entitled Confidential Settlement Agreement, because of the term *confidential* at the top of the handwritten document.

It bears the signature of Mr. Fedor, his attorney, the Plaintiff, and the Plaintiff's attorney. And it is dated [September] 17th, 2002.<sup>3</sup>

(Ex. C, Tr. at 11:10-16).

A month before the hearing, Appellant also provided the Lower Court and Respondent a similar written description of the Confidential Settlement Agreement in his Memorandum in Opposition to Defendant's Motion to Vacate Judgment. (Ex. D, Mem. Opp. Def.'s Mot. Vacate J., ¶¶ 1,7 and 9).

The first condition for asserting an error on a ruling of evidence is that a substantial right of the complaining party be adversely affected. Rule 103(a), SCRE. In this case, a substantial right of appellant is squarely impacted by the failure to consider the Confidential Settlement Agreement. Respondent contends he has paid \$385,000 to Appellant which should all be allocated towards satisfaction of the Confession of Judgment. (Ex. C, Tr. at 21:17-20). To the contrary Appellant argued before the Lower Court:

[APPELLANT'S  
COUNSEL]:

...it is necessary for the Court to see this document if the Court is going to consider the legitimacy of [Respondent's counsel's] argument that \$385,000 has been paid towards the confession of judgment.

\* \* \* \* \*

[THE COURT]:

You don't dispute that a total of \$385,000 has been paid?

[APPELLANT'S  
COUNSEL]:

Towards \$400,000, no. We don't dispute that he has paid \$385[,000]. He has paid \$385[,000], but it includes \$50,000 that was paid before the confession of judgment was signed.

Ex. C, Tr., at 11:17-20 and 21:4-9.

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<sup>3</sup> Appellant's counsel initially misstated the date of the Confidential Settlement Agreement as December 17, 2002 but subsequently corrected the date to September 17, 2002. (Ex. C, Tr. at 16:20-21).

Thus the first condition of Rule 103(a), SCRE, regarding the impact on a substantial right, has been met.

As described above, Appellant provided an offer of proof of the Confidential Settlement Agreement pursuant to Rule 103(a)(2), SCRE, though the Lower Court refused to allow the document into the record. This Court has explained the necessity of a proffer of excluded evidence to preserve it for review, stating:

It is well-settled that a reviewing court may not consider error claimed in the exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been. . . . However, this rule regarding proffers has been relaxed where the appellate court is able to determine from the record what the testimony was intended to show and that prejudice clearly exists.

Jamison v. Ford Motor Co., 373 S.C. 248, 260, 644 S.E.2d 755, 761 (Ct. App. 2007)  
(internal citations omitted).

The Supreme Court has likewise described the standard for consideration of excluded evidence as follows:

Ordinarily, this Court will not review alleged error of the exclusion of testimony unless a proffer of testimony is properly made on the record. . . . However, where the trial court refuses to allow the proffer, but we can determine from the record, as here, what the testimony was intended to show, we will address the merits.

State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402-403 (1986) (internal citations omitted); see also, Legrande v. Legrande, 178 S.C. 230, 182 S.E. 432, 436 (1935) (outlining methods to preserve evidence for appellate consideration, including description by counsel of evidence on record showing fairly what rejected evidence would have been); see also, Ellis by Ellis v. Niles, 316 S.C. 516, 523, 450 S.E.2d 631, 634 n.6 (Ct. App. 1994) (where appellant made every attempt to proffer relevant evidence, appellate court will not

deem issue unpreserved)(aff'd in part, vacated in part on other grounds 324 S.C. 223, 479 S.E.2d 47 (1996)).

Since the written and oral record before the Lower Court fairly reveals what the Confidential Settlement Agreement would show, the Confidential Settlement Agreement has been preserved for consideration for this Court on appeal. Therefore, Appellant asks this Court to allow the Confidential Settlement Agreement in the Record on Appeal.

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](mailto:bhogan@gilreathlaw.com)  
[jim@gilreathlaw.com](mailto:jim@gilreathlaw.com)

February 19, 2015  
Greenville, South Carolina.

**EXHIBIT A**

**ORDER OF**  
**OCTOBER 31, 2013**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )  
 )  
EDWIN M. SMITH, JR., )  
 )  
PLAINTIFF, )  
 )  
vs )  
 )  
DAVID FEDOR )  
 )  
 )  
DEFENDANT. )  
\_\_\_\_\_ )

**COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT**

Case Number. 2001-CP-40-4203

**ORDER**

RICHLAND COUNTY  
FILED  
2013 OCT 31 AM 10:21  
JENNETTE W. HENRIQUE  
C.C.P. & G.S.

This matter came before the Court on August 26, 2013 at a hearing on Defendant's motion to be relieved from a confession of judgment. Present at the hearing were Eric Ruschky, Esquire, counsel for Plaintiff, and Leo A Dryer, Esquire, counsel for Defendant. After considering the law, the memoranda submitted by the parties, the arguments of counsel, and all matters submitted, Defendant's motion to be relieved from the confession of judgment is **GRANTED.**

**BACKGROUND**

This case dates back to the filing of the summons and complaint on December 12, 1998. However, the underlying merits of the suit are not presently at issue. After several years of litigation, the Court was informed by a letter filed on September 26, 2002 that a "mediated settlement had been reached in the case." Subsequently, on November 4, 2002, an Order of Dismissal (with Prejudice) signed by The Honorable G. Thomas Cooper was filed with the Court. Thereafter, on September 17, 2002, the parties and their attorneys executed a written instrument titled "Confidential Settlement Agreement." This document was never recorded with the Court. The Defendant also executed a Confession of Judgment in consideration for the

Plaintiff's agreement to release all claims against him and to dismiss the underlying suit with prejudice.

Nearly eleven years after the dismissal of the case, on February 27, 2013, the Plaintiff filed the Confession of Judgment and a Partial Satisfaction of Judgment with the Court. Following the entry of the Confession of Judgment, the Defendant filed a motion pursuant to Rule 60(b)(5), SCRCP to be relieved from judgment. This motion was filed on April 23, 2013.

At the hearing held on August 26, 2013, Counsel for the Defendant urged the Court to consider only the terms on the face of the Confession of Judgment, which provides, in pertinent part, that "[t]he Defendant hereby authorizes the entry of the Order and judgment against Defendant, and in favor of Plaintiff, in the principal amount of \$350,000.00, less any payments received by Plaintiff from Defendant through the date of filing hereof. Thereafter, post-judgment interest shall accrue as allowed by law, until the judgment is paid in full."

Both parties conceded during the hearing that the Defendant has paid an amount in excess of the \$350,000.00 set forth in the Confession of Judgment. However, Counsel for the Plaintiff urged the Court to also consider certain provisions set forth by the parties in the confidential settlement agreement referenced above. According to Plaintiff's Counsel, the terms of the settlement agreement would demonstrate to the Court that the Defendant failed to satisfy his obligations, as set forth in the settlement agreement; thus, making the entry of the Confession of Judgment proper.

## DISCUSSION

### I. Confidential Settlement Agreement

At the time the settlement agreement was executed in 2002, Rule 43(k), SCRCP provided in relevant part that "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." Reed v. Associated Investments of Edisto Island, Inc., 339 S.C. 148, 152, 528 S.E.2d 94, 96 (Ct. App. 2000); Rule 43(k), SCRPC was later amended in 2009 to provide a third method for creating an enforceable settlement agreement, which permits parties to a settlement to reduce the agreement to a writing signed by the parties and their counsel.

In this matter, the parties acknowledged that the 2002 confidential settlement agreement was never entered into the record. Consequently, the parties failed to adhere to the version of Rule 43(k), SCRPC in effect at the time of the execution of the settlement, which renders the purported confidential settlement agreement not binding on this Court. See Buckley v. Shealy, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006) ("Because the purported agreement the parties reached following mediation was neither entered into the court's record nor acknowledged in open court and placed upon the record, Rule 43(k), SCRPC, plainly provides that the agreement is unenforceable."). Assuming arguendo that 2002 confidential settlement agreement complied with the 2009 amendment of Rule 43(k), SCRPC because it was reduced to writing and signed by the parties and their counsel, the agreement is still unenforceable because the amendment was prospective and not retrospective in nature. See Hercules Inc. v. S.C. Tax Comm'n, 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980) (statutes are to be construed prospectively unless there is an express provision or a clear legislative intent to the contrary). As a result, the Court will not consider the terms of the confidential settlement agreement executed by the parties.

## II. Confession of Judgment

Confessions of judgment share the legal significance of a judgment entered by the Court. "Though no adjudication is in fact required in entering a judgment of confession without action, it has all the qualities, incidents, and attributes of other judgments, and cannot be valid unless

entered in a court which might have legally pronounced the same judgment in a contested action." Triangle Auto Spring Co. v. Gromlovitz, 270 S.C. 386, 389, 242 S.E.2d 430, 431 (1978) (quoting Ex parte Ware Furniture Co., 49 S.C. 20, 27 S.E. 9 (1897)). Rule 60(b)(5), SCRCP provides that a judgment can be set aside if the judgment has been satisfied. Perry v. Heirs at Law of Gadsden, 357 S.C. 42, 48, 590 S.E.2d 502, 505 (Ct. App. 2003).

The confession of judgment at issue provides that "[t]he Defendant hereby authorizes the entry of the Order and judgment against Defendant, and in favor of Plaintiff, in the principal amount of \$350,000.00, less *any* payments received by Plaintiff from Defendant through the date of filing hereof." At the hearing, both of the parties agreed that the Defendant has in fact paid more than \$350,000.00. Thus, I find that the judgment was satisfied, and the Defendant is entitled to be relieved from the confession of judgment.

**ORDER**

For the foregoing reasons, Defendant's Motion for Relief from the Confession of Judgment is **GRANTED**.

**AND IT IS SO ORDERED.**



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DeAndrea Gist Benjamin  
Presiding Judge

October 30, 2013  
Columbia, South Carolina

**EXHIBIT B**

**CONFESSION OF  
JUDGMENT**



5. 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

6 Defendant has no defense to the payment of, or right to set off against, the indebtedness, debt, or liability, and Defendant waives, and will not assert or allege, any defense or right to set off with respect to the judgment confessed herein

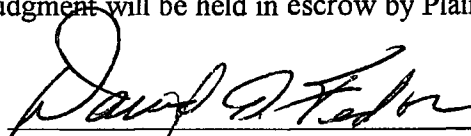
7 The Defendant hereby authorizes the entry of an Order and judgment against Defendant, and in favor of Plaintiff, in the principal amount of \$350,000.00, less any payments received by Plaintiff from Defendant through the date of filing hereof. Thereafter, post-judgment interest shall accrue as allowed by law, until the judgment is paid in full

8. The undersigned represents that he signs this Confession of Judgment of his own free will, and that he fully understands the meaning and legal effect hereof

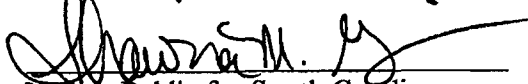
9 This Confession of Judgment may not be filed unless and until there has been a default by Defendant on his payment obligations as set forth in the Confidential Settlement Agreement

10. This Confession of Judgment may 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 Pending such a default, this Confession of Judgment will be held in escrow by Plaintiff's attorney,

James R. Gilreath, Esquire

  
David A Fedor

SWORN TO BEFORE ME this 26<sup>th</sup>  
day of September, 2002.

  
Notary Public for South Carolina  
My Commission Expires. 10/17/2003

**EXHIBIT C**

**TRANSCRIPT OF RECORD**

**August 26, 2013**

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STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

COURT OF COMMON PLEAS  
2001-CP-40-4203

Edwin M. Smith, Jr., )  
Plaintiff, )  
vs. )  
David Fedor, )  
Defendant. )

TRANSCRIPT OF RECORD

August 26, 2013  
Columbia, South Carolina

B E F O R E:

THE HONORABLE DEANDREA G. BENJAMIN, JUDGE.

A P P E A R A N C E S:

ERIC WILLIAM RUSCHKY, ESQ.  
Attorney for the Plaintiff

LEO A. DRYER, JR., ESQ.  
Attorney for the Defendant

DEBORAH M. McCURDY, RPR  
Official Court Reporter

1 and therefore inquiring or describing the merits,  
2 and so forth, I would object to.

3 THE COURT: All right. In regard to his  
4 objection?

5 MR. RUSCHKY: As I was saying, that lawsuit  
6 was mediated, which resulted in -- and I've been  
7 instructed and do solicit the Court's guidance  
8 regarding what has been termed and described as a  
9 confidential settlement of agreement. It was  
10 reached through the mediation of a retired Chief  
11 Justice of the Supreme Court.

12 The original settlement was \$400,000, with  
13 \$50,000 paid down upfront, and a judgment, a signed  
14 confession of judgment, for the balance of \$350 to  
15 be reserved against failure to pay the total \$350.

16 Mr. Fedor made his annual payments up until  
17 the last year, when he did not pay the final  
18 \$35,000.

19 The parties negotiated. Neither the Grimsley  
20 Law Firm nor Mr. Dryer were involved in all of  
21 those negotiations.

22 Our position is that Mr. Fedor did not make  
23 his final \$35,000 payment, but in fact made a  
24 \$20,000 payment, leaving \$15 due on the last  
25 payment.

1           When that was not paid ultimately by February  
2 of this year, the Plaintiff and his attorney filed  
3 the confession of judgment.

4           Now, I understand the Defendant's position  
5 that -- and we concede that he has paid a total of  
6 \$385,000, but that includes the initial \$50 paid  
7 upfront before the confession of judgment for \$350  
8 was signed.

9           As I said, with all due respect to Mr. Fedor,  
10 his affidavit, which we received Friday, in which  
11 he says that he has paid to Plaintiff or his  
12 attorney the sum of \$385,000, we agree with that,  
13 that sum being in excess of the sum recited in the  
14 Defendant's confession of judgment. The confession  
15 of judgment does recite the \$350, Your Honor. And  
16 the confession of judgment should be deemed  
17 satisfied.

18           However, we rely on this confidential  
19 settlement, which obviously, because it all arose  
20 out of an allegation of malpractice, was treated  
21 very confidentially. This case was settled for  
22 \$400,000. And so Mr. Fedor still owes \$15,000.

23           I submit that Mr. Fedor's affidavit stretches  
24 the limit of credulity. If Mr. Fedor thought that  
25 he only owed \$350,000, then why were there

1 negotiations last year regarding the final payment  
2 of \$35,000? At that point he had overpaid the  
3 judgment of \$350,000.

4 MR. DRYER: Your Honor, I object to any  
5 paraphrasing of negotiation from last year. I  
6 believe at best it is hearsay and not supported by  
7 any affidavit.

8 MR. RUSCHKY: Your Honor, I believe we  
9 submitted an affidavit of James Gilreath, who was  
10 the attorney for the Plaintiff.

11 THE COURT: I saw that. Let me ask you this.  
12 Okay. So -- I'm trying to find the --

13 MR. RUSCHKY: We have the confidential  
14 settlement if you'd like to see it, Your Honor.

15 THE COURT: Yes.

16 (Complies.)

17 THE COURT: He is saying he paid \$385.

18 MR. RUSCHKY: Well, he has, including the  
19 initial \$50.

20 MR. DRYER: I would renew my objection as to  
21 inquiring of the merits, which is this settlement  
22 agreement, which is not in the record and is full  
23 of scratch-overs and strike-throughs. It is not --  
24 it is not clear upon its face.

25 But, again, we are going behind the confession

1 and we are again sorting through the merits, which  
2 I don't believe is appropriate. The confession is  
3 as far as we need to go.

4 THE COURT: Well, I'm not concerned about the  
5 merits. I'm trying to figure out what the  
6 agreement was.

7 MR. DRYER: Well, exactly, Your Honor. And  
8 the agreement goes behind the confession. We have  
9 the confession clear upon its face.

10 THE COURT: What was filed with the Court?  
11 Was there anything filed with the Clerk of Court's  
12 Office?

13 MR. DRYER: Not until the confession was filed  
14 this spring, I believe.

15 MR. RUSCHKY: I believe that's correct, Your  
16 Honor.

17 THE COURT: And do we have that, what was  
18 filed with the -- my only concern, Mr. Ruschky,  
19 about the confidential agreement is -- it has not  
20 been made a part of the record in the past; is that  
21 correct?

22 MR. DRYER: Exactly.

23 MR. RUSCHKY. Not in the past, Your Honor. We  
24 have -- I know Mr. Grimsley's office prepared an  
25 affidavit of James R. Gilreath.

1 THE COURT: Okay. I have seen that.

2 MR. RUSCHKY: That has not -- is that filed?

3 THE COURT: It was mailed. I don't see a  
4 stamp on it. It was mailed to my office.

5 MR. RUSCHKY: All right. I think the  
6 problem --

7 THE COURT: It was e-mailed to my office.

8 MR. RUSCHKY: Okay. I think the problem, Your  
9 Honor, is that Mr. Grimsley has been struggling  
10 with the 4-page document, which is entitled  
11 Confidential Settlement Agreement, because of the  
12 term *confidential* at the top of the handwritten  
13 document.

14 It bears the signature of Mr. Fedor, his  
15 attorney, the Plaintiff, and the Plaintiff's  
16 attorney. And it is dated December 17th, 2002. We  
17 feel that it is necessary for the Court to see this  
18 document if the Court is going to consider the  
19 legitimacy of Mr. Dryer's argument that \$385,000  
20 has been paid towards the confession of judgment.

21 THE COURT: Well, that's what I -- I mean, I'm  
22 not sure I can make a decision. That's what I'm  
23 trying to figure out. Mr. Dryer may be able to  
24 give us some guidance as to how -- basically you  
25 all have an agreement.

1 MR. DRYER: Well, Your Honor --

2 THE COURT: And you want me to --

3 MR. RUSCHKY: We don't -- Mr. Dryer and I  
4 weren't in the case back then.

5 THE COURT: Well, there is an agreement that  
6 you all -- and he doesn't want it -- I understand  
7 he doesn't want it -- it is confidential. He  
8 doesn't want it a part of the record. I'm not sure  
9 how I can consider it if it is not a part of the  
10 record.

11 MR. RUSCHKY: Take it under seal, Your Honor.

12 THE COURT: Well, I thought about that. But  
13 how I -- but I'm not sure how I get to the final  
14 answer if I don't see the agreement.

15 MR. RUSCHKY: I agree, Your Honor.

16 THE COURT: That is kind of the problem I  
17 have. Unless Mr. Dryer has some other suggestion.

18 MR. DRYER: Your Honor, the confession of  
19 judgment ended the case. The confession of  
20 judgment is clear and concise on its face. Needs  
21 no elaboration. Needs nothing further. It recites  
22 the sum of \$350,000. And moreover -- and I didn't  
23 compose this --

24 THE COURT: No, I see what you are talking --  
25 can you -- Mr. Hollis, can you pass that up? I see

1           Now, I haven't asked in this proceeding for  
2           return of any overpayment. I just want to cut the  
3           misery here on Mr. Fedor, who has -- well, anyway,  
4           I ask that this confession of judgment be read  
5           accordingly. He didn't confess for \$400,000, he  
6           confessed for \$350. And it is undisputed that that  
7           sum and more has been paid.

8           THE COURT: All right.

9           MR. RUSCHKY: Your Honor, granted, the  
10          confidential settlement agreement -- I'm sure  
11          Mr. Dryer could have drafted a better one. Retired  
12          Chief Justice David Harwell drafted it. I believe  
13          it is in his handwriting. And if -- I understand  
14          why Mr. Dryer is not asking for a refund of \$35,000  
15          here, because he is not entitled to it under the  
16          terms of the agreement. And the confession of  
17          judgment has to be read in the context of the  
18          confidential settlement agreement.

19          THE COURT: And that was in 2002, right?

20          MR. RUSCHKY: The settlement agreement is  
21          dated September 17th, 2002.

22          THE COURT: All right. Let me ask you this,  
23          because this happens sometimes.

24          MR. DRYER: Your Honor --

25          THE COURT: Hold on one second. There is a

1 me proposed orders and in that proposed order if  
2 there is any research you need to cite, any case  
3 law -- what I'll do is --

4 MR. RUSCHKY: Well, Your Honor, I would also  
5 like the opportunity to research submitting  
6 something to the Court under seal, because we feel  
7 that it is imperative that the Court see this  
8 confidential settlement agreement.

9 THE COURT: All right. That will be fine.  
10 Strike the part about the proposed orders. If you  
11 all -- I'll give you -- how many days do you need  
12 to research it, regarding the document coming in  
13 under seal?

14 MR. RUSCHKY: On both issues?

15 THE COURT: Both issues.

16 MR. RUSCHKY: Both issues. I'm leaving town a  
17 week from Thursday, so --

18 THE COURT: Thirty days?

19 MR. RUSCHKY: Oh, 30 days would be great  
20 because I'll turn my work in to the Grimsley law  
21 firm and they can file something.

22 THE COURT: Is that okay with you, Mr. Dryer?

23 MR. DRYER: Yes.

24 THE COURT: The only -- he's saying he should  
25 be able to -- I'll take -- and I am going to do

1           some research on the confession of judgment and the  
2           confidentiality. He's saying that the Court should  
3           be able to review it. I'm not going to look at it  
4           at this point until I get some authority that  
5           says -- or I am able to look at some case law about  
6           confidentiality agreement. I know there is some  
7           stuff out there, I just haven't --

8           MR. DRYER: Your Honor, I'll say again, the  
9           confession ended the case.

10          THE COURT: I understand. And I am going to  
11          take a look at that too.

12          MR. DRYER: We didn't draw it up.

13          THE COURT: Yes, sir.

14          MR. DRYER: And it bears all the dignity and  
15          finality of a jury verdict, a Court's verdict. It  
16          says what it says. And it is clear on its face.

17          By the way, so the record might be complete --

18          THE COURT: Yes, sir.

19          MR. DRYER: -- I don't think it is in dispute,  
20          but I would offer the affidavit of Mr. Fedor, which  
21          simply affirms that he has paid the sum of  
22          \$385,000. And that -- I don't think that is in  
23          dispute.

24          THE COURT: No, I don't believe it is.

25          MR. DRYER: So let me --

1           MR. RUSCHKY: Your Honor, which includes  
2 \$50,000 that was paid before the confession of  
3 judgment.

4           THE COURT: You don't dispute that a total of  
5 \$385,000 has been paid?

6           MR. RUSCHKY: Towards \$400,000, no. We don't  
7 dispute that he has paid \$385. He has paid \$385,  
8 but it includes \$50,000 that was paid before the  
9 confession of judgment was signed.

10          MR. DRYER: Well, yes. And I appreciate the  
11 graciousness of counsel that they agree; however,  
12 it is their confession, quoting:

13           Defendant hereby authorizes the entry of  
14 the order in the principal amount less  
15 any payments received by Plaintiff from  
16 Defendants.

17           And it is undisputed that the Plaintiff has  
18 received \$385,000 towards the recited amount of  
19 \$350,000. Therefore, this confession has been  
20 satisfied.

21           Now, if the Plaintiff chooses to back up and  
22 start over and chase the alleged balance of  
23 \$15,000, more power to him. But at the moment,  
24 this confession is of record, and it plainly has  
25 been paid.

**EXHIBIT D**

**MEMORANDUM IN OPPOSITION  
TO DEFENDANT'S MOTION TO  
VACATE JUDGMENT**

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

EDWIN M. SMITH, JR.,  
Plaintiff,

vs.

DAVID A FEDOR.  
Defendant.

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

C/A #: 2001-CP-40-4203

**MEMORANDUM IN OPPOSITION  
TO DEFENDANT'S MOTION TO  
VACATE JUDGMENT**

1. On September 17, 2002, the Plaintiff Edwin M. Smith, Jr (the "Plaintiff") and the Defendant David A Fedor (the "Defendant"), each represented by counsel, signed a settlement agreement mediated by retired Chief Justice David Harwell, in which the Defendant agreed to pay the Plaintiff "the total sum of \$400,000.00 in complete settlement of all claims" (the Agreement"). A true copy of the Agreement is attached hereto as Exhibit A. The Defendant was to pay \$50,000 00 within three days, and the balance of \$350,000.00 was to be paid in annual installments of \$35,000 00. As security, the Defendant agreed to and did sign a Confession of Judgment for \$350,000 00, to be held in escrow by the Plaintiff's attorney and not to be recorded unless the Defendant defaulted on any payments

2. On September 26, 2002, the Defendant signed a Confession of Judgment (the "Judgment"), indicating that the Defendant was indebted to the Plaintiff in the principal sum of \$350,000.00 plus all post-judgment interest as allowed by law, beginning from the date of entry of Judgment. A true copy of the Judgment is attached hereto as Exhibit B. The Judgment was executed in consideration for the Plaintiff agreeing to release all claims against the Defendant and dismiss the above captioned matter (the "Suit")

3. The Judgment authorized entry of an Order and judgment against the defendant "in the principal amount of \$350,000.00, less any payments received by Plaintiff from Defendant through the date of filing hereof."

4. The Judgement provided that it would not be filed "unless and until there has been a default by the Defendant on his payment obligations as set forth in the Confidential Settlement Agreement."

5. The Plaintiff contends that such a default has occurred. Therefore, on February 27, 2013, the Judgment was filed. Consistent with the provisions of Paragraph 7 of the Judgment, the Plaintiff also filed a Partial Satisfaction of Judgment, including that the Defendant paid \$335,000.00 of the \$350,000.00 principal amount.

6. On or about March 26, 2013, the Defendant filed a Motion pursuant to SCRCF (60(b) for relief from the Judgment, arguing that the Defendant had paid "an amount in excess of the named \$350,000.00."

7. The Plaintiff submits that the amount of the settlement referred to in the Agreement was \$400,000.00, which consisted of \$50,000.00 paid at or about the time of the settlement, and the balance of \$350,000.00, secured by the execution of the Judgment. Thus, the initial \$50,000.00 was not included in the \$350,000.00 covered by the Judgment.

8. The Plaintiff specifically rejects any suggestion or argument that the initial \$50,000.00, paid on or about September 26, 2002, was to be included in the \$350,000.00 covered by the Judgment.

9. The terms of the Agreement specifically provide that an initial \$50,000.00 payment would be made, followed by payment of \$350,000.00 through a series of payments of \$35,000.00 under the provisions of a Confession of Judgment to be executed by Mr. Fedor


10 At no place within the terms of the Agreement or the Judgment is there a statement or provision that Mr. Fedor would be given credit for the \$50,000.00 payment (made as part of the Agreement) towards the \$350,000.00 due under the terms of the Judgment.

11 At no time during the negotiations with Mr. Swagart over the \$35,000.00 balance due on the Judgment did he ever state or imply that Mr. Fedor should get or expect to get credit for the \$50,000.00 payment made under the provisions of the Agreement.

12. At no time during the negotiations with Mr. Swagart over the \$35,000.00 balance due on the Judgment did he ever state or imply that because of the initial \$50,000.00 being credited to the Judgment, the amount due under the provisions of the Judgment had been over paid by Mr. Fedor and that Mr. Fedor was entitled to a \$15,000.00 refund.

13. It is Plaintiff's firm belief that Mr. Fedor and Mr. Swagart both know that the \$50,000.00 initial payment was not to be credited toward the \$350,000.00 amount due under the provisions of the Judgment

Submitted this the 3<sup>RD</sup> day of July 2013.

  
Edward L. Grimsley  
Eric Wm Ruschky  
Attorneys for Plaintiff  
GRIMSLEY LAW FIRM, LLC  
Post Office Box 11682  
Columbia, South Carolina 29211  
Telephone: (803) 233-1177

**GRIMSLEY LAW FIRM, LLC**  
Attorneys at Law

**Edward L. Grimsley**  
**Benjamin E. Grimsley**

1703 Laurel Street  
P O Box 11682 (29211)  
Columbia, South Carolina 29201

Telephone (803) 233-1177  
Facsimile (803) 233-0798  
Email [egrimsley@grimsleylaw.com](mailto:egrimsley@grimsleylaw.com)  
[bgrimsley@grimsleylaw.com](mailto:bgrimsley@grimsleylaw.com)

July 3, 2013

(VIA E-MAIL - [rhoodlc@sccourts.org](mailto:rhoodlc@sccourts.org))

The Honorable Robert E. Hood  
Presiding Judge, Fifth Judicial Circuit  
Post Office Box 192  
Columbia, SC 29202

Attn: Elizabeth Hedgecoe

**Re: Edwin M. Smith, Jr. vs. David A. Fedor**  
**C/A No. 2001-CP-40-4203**

Dear Ms. Hedgecoe:

Please find attached Plaintiff's Memorandum in Opposition to Defendant's Motion to Vacate Judgment ("Memorandum") in connection with the above-referenced matter. Also attached is a copy of an Affidavit of James R. Gilreath. A Confidential Settlement Agreement ("Agreement") was entered into between the Parties and is attached as Exhibit A to the Memorandum. Because of the concern that the Settlement Agreement is confidential, it is being presented for Judge Hood's review prior to the hearing scheduled on Monday, July 8, 2013. We ask that you not file the Memorandum or Affidavit or make them a matter of public record with the Clerk of Court until a determination is made at the hearing as to the filing of the Agreement.

By copy of this letter, I am hereby providing a copy of same to Mr. Dryer.

I appreciate your assistance with this matter.

Sincerely yours,



Edward L. Grimsley

ELG/mms

Enclosures (as stated)

cc: Lco A. Dryer, Esq., Attorney for Defendant ([ldryer@sc.rr.com](mailto:ldryer@sc.rr.com))

**EXHIBIT E**

**AFFIDAVIT OF  
WILLIAM M. HOGAN**

**RECEIVED**

FEB 20 2015

**SC Court of Appeals**

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.

---

**AFFIDAVIT OF WILLIAM M. HOGAN**

---

I, William M. Hogan, state and affirm as follows:

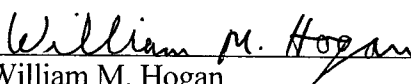
1. I am an attorney with The Gilreath Law Firm, P.A. and counsel of record for Appellant Edwin M. Smith, Jr. in this appeal. Attached to the Return of Appellant to Respondent's Motion Rule 210(c) are four exhibits – namely:

- (A) The Lower Court order of October 31, 2013;
- (B) The Confession of Judgment signed by Respondent dated September 26, 2002;
- (C) Excerpts from the Transcript from the Lower Court hearing held on August 26, 2013; and,
- (D) Appellant's Memorandum in Opposition to Defendant's Motion to Vacate Judgment along with its accompanying cover letter dated July 3, 2013.

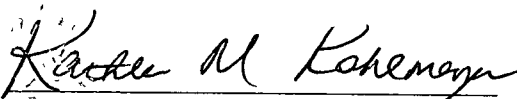
The above-stated documents were all included in the Appellant's Designation of Matter to be included in the Record on Appeal submitted to Respondent's counsel on November 19, 2014.

2. None of the aforementioned documents were the subject of Respondent's objection to inclusion in the Record on Appeal.

3. To the best of my knowledge and based upon reasonable information and belief, the aforesaid documents are true and accurate copies of documents produced or submitted to the parties and the Lower Court.

  
\_\_\_\_\_  
William M. Hogan

Sworn to and subscribed before  
me this 19<sup>th</sup> day of February 2015

  
\_\_\_\_\_  
Notary Public for South Carolina

My commission expires. 09/18/2023

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

**RECEIVED**

FEB 20 2015

**SC Court of Appeals**

---

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

---

EDWIN M. SMITH, JR. .... APPELLANT,

vs.

DAVID FEDOR, ..... RESPONDENT.

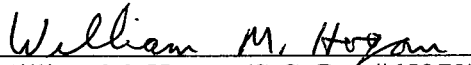
---

**CERTIFICATE OF SERVICE**

---

This is to certify that I have this day served counsel for the Respondent in the foregoing matter with a copy of the foregoing **RETURN OF APPELLANT TO RESPONDENT'S RULE 210(c) MOTION** by electronic mail and also depositing same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

Leo A. Dryer, Jr., Esquire  
DRYER LAW OFFICES  
P.O. Box 11567  
Columbia, SC 29211

  
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](mailto:bhogan@gilreathlaw.com)

[jim@gilreathlaw.com](mailto:jim@gilreathlaw.com)

ATTORNEYS FOR APPELLANT

February 19, 2015  
Greenville, South Carolina.

THE GILREATH LAW FIRM, P.A.

JAMES R. GILREATH\*  
jim@gilreathlaw.com

\*ALSO ADMITTED TO PRACTICE IN NC

WILLIAM M. HOGAN  
bhogan@gilreathlaw.com

110 LAVINIA AVENUE (29601)  
P.O. BOX 2147  
GREENVILLE, SC 29602  
www.gilreathlaw.com  
February 19, 2015

TELEPHONE (864) 242-4727  
FACSIMILE (864) 232-4395

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1205 Pendleton Street  
Columbia, SC 29201

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SC Court of Appeals

RE: *Edwin M. Smith v David Fedor*  
South Carolina Court of Appeals Case No. 2014-001826

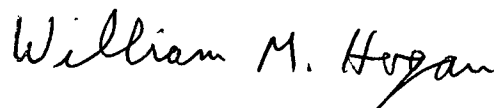
Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of the Return of Appellant to Respondent's Rule 210(c) Motion and a Certificate of Service regarding the above referenced case. Please file the originals and return a filed-clocked copy to me in the enclosed self-addressed, stamped envelope.

By copy of this letter to opposing counsel, I am serving him with the same.

Thank you for your assistance in this matter. If you have any questions or need anything further, please let me know.

Sincerely,

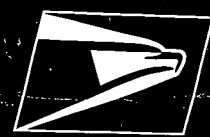


William M. Hogan

WMH/kmk  
Enclosures

cc: Leo A. Dryer, Jr., Esquire (w/enclosures)

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