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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

AUG 27 2015

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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.

RECORD ON APPEAL

William M. Hogan (S.C. Bar No. 65272)
James R. Gilreath (S.C. Bar No. 02133)
THE GILREATH LAW FIRM, P.A.
110 Lavinia Avenue (zip 29601)
P.O. Box 2147
Greenville, South Carolina 29602
Telephone: (864) 242-4727
ATTORNEYS FOR APPELLANT

Katherine Carruth Goode (S.C. Bar No. 8951)
229 South Congress Street
P.O. Box 1175
Winnsboro, South Carolina 29180
Telephone: (803) 799-4440
ATTORNEY FOR RESPONDENT

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Plaintiff's second Motion for Reconsideration filed August 4, 2014 with cover letter of Edward L. Grimsley dated November 8, 2013 from Exhibit A, and Certificate of Service included. [Omitted are the remainder of Exhibit A (Plaintiff's first Motion for Reconsideration included above), Exhibit B (Order of October 31, 2013 included above), Exhibit C (October 31, 2013 e-mails to Lower Court) and Exhibit D (form 4 Order of November 4, 2013 included above)].....89

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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 CO. CT.
FILED
2013 OCT 31 AM 10:21
JEANETTE W. HOBBS
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), SCRCF 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), SCRCF 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 (Cl. 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), SCRCF 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.



DeAndrea Gist Benjamin
Presiding Judge

October 30, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE **Exhibit D**

CASE NUMBER: 01CP4004203R

Edwin M Jr Smith

David A Fedor

PLAINTIFF(S)

Edwards A G & Sons Incorporated
DEFENDANT(S)

Submitted by: _____

Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Non-suic); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 4 November 2013 to attorneys of record or to parties (when appearing pro se) as follows:

James R. Gilreath

Edward L. Grimsley

Leo A. Dryer Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2001-CP-40-4203 **R**

Edwin M. Smith, Jr.

David A. Fedor

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: 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.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge W/B

Judge Code 2161

Date 7-22-14

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 24 day of July, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Edwin L. Grimsley

Leo A. Dwyer

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Janette W. McBride

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2001CP404203R

Edwin M. Smith, Jr

David A. T. Fedor

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: Motion for reconsideration has been denied.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge hmb

Judge Code 2161

Date 9-5-14

For Clerk of Court Office Use Only

This judgment was entered on the 10 day of Sept, 20 14 and a copy mailed first class or placed in the appropriate attorney's box on this 10 day of Sept, 20 14 to attorneys of record or to parties (when appearing pro se) as follows:

Edwin L. Grimsley

ATTORNEY(S) FOR THE PLAINTIFF(S)

Leo A. Dryer

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeannette W. McBride

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Edwin M. Smith, Jr

Plaintiff,

David A. Fedor,

Defendant

IN THE COURT OF COMMON PLEAS

Docket No 01-CP-40-4203R

ORDER OF DISMISSAL
(With Prejudice)

FILED
NOT - 4 PM 12-12
JAN 16 2001
CLERK

It appearing to the Court that the remaining parties to this lawsuit have finally and fully compromised and settled all disputes between them and that they have consented hereto, it is hereby

ORDERED, ADJUDGED, and DECREED that this case, to include all claims and counterclaims which were or could have been asserted herein, is hereby DISMISSED WITH PREJUDICE

DONE AND ORDERED in chambers at Columbia, South Carolina, this 26th day of September,

2002


G. Thomas Cooper, Jr
Chief Judge for Administrative Purposes

WE CONSENT

SWAGART, WALKER, MARTIN
& REIBOLD, P A

by 
Harry A. Swagart, III

ATTORNEYS FOR DEFENDANT

WE CONSENT

THE GILBREATH LAW FIRM, P A

by 
James R. Gilbreath

ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Edwin M. Smith, Jr.)
Plaintiff,)

Docket No. 01-CP-40-4203

v.)

David A. Fedor,)
Defendant.)

CONFESSION OF JUDGMENT

RICHLAND COUNTY
FILED
2013 FEB 27 AM 9:23
JEANETTE W. MCBRIDE
C.C.P. & G.S.

Pursuant to South Carolina Code Annotated § 15-35-350 *et. seq.*, the undersigned being first
duly sworn, shows the following to the Court:

1. Plaintiff, Edwin M. Smith, Jr., is a citizen and resident of Calhoun County, South Carolina.
2. Defendant David A. Fedor is a citizen and resident of Richland County, South Carolina.
3. Defendant is indebted to Plaintiff and agrees to execute this Confession of Judgment, dated September 26, 2002, in the principal sum of \$350,000.00 plus all post-judgment interest as allowed by law, beginning from the date of entry of an Order on Confession of Judgment.
4. Defendant executed this Confession of Judgment in consideration for 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 No. 2001-CP-40-4203.

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.

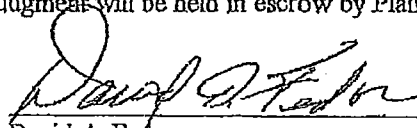
6. Defendant has no defense to the payment of, or right to set off against, the indebtedness, debt, or liability, and Defendant waives, and will not assert or allege, any defense or right to set off with respect to the judgment confessed herein.

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.

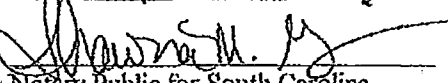
8. The undersigned represents that he signs this Confession of Judgment of his own free will, and that he fully understands the meaning and legal effect hereof.

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. Redor

SWORN TO BEFORE ME this 26th
day of September, 2002.


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

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Edwin M. Smith, Jr.,

Plaintiff,

v.

David A. Fedor,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

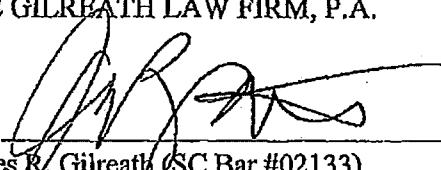
2001-CP-40-4203

PARTIAL SATISFACTION
OF JUDGMENT

RICHLAND COUNTY
FILED
2003 FEB 27 AM 9:49
JEANETTE W. MCBRIDE
C.C.P. & G.S.

The Plaintiff, Edwin M. Smith, Jr., holds a Confession of Judgment executed by David A. Fedor on September 26, 2002, in the original amount of Three Hundred Fifty Thousand Dollars (\$350,000). Subsequent to the execution of the Confession of Judgment, but prior to the recording of same, Edwin M. Smith, Jr. received principal payments from the Defendant of Three Hundred Thirty-Five Thousand Dollars (\$335,000). Edwin M. Smith, Jr., by and through his undersigned counsel, hereby acknowledges a credit to the Confession of Judgment, reducing the unpaid balance therefore to the sum of Fifteen Thousand Dollars (\$15,000) through the date of the recording of the Confession of Judgment. The Confession of Judgment shall otherwise remain in full force and effect.

THE GILREATH LAW FIRM, P.A.

By: 

James R. Gilreath (SC Bar #02133)

110 Lavinia Avenue (29601)

P. O. Box 2147

Greenville, South Carolina 29202

Phone: (864) 242-4727

Fax: (864) 232-4395

jim@gilreathlaw.com

SWORN TO AND SUBSCRIBED before
me this 26TH day of February 2013.

Kathleen M. Kohlmann

Notary Public for South Carolina

My commission expires: 10/10/13

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

EDWIN M. SMITH, JR.

Plaintiff,

vs.

DAVID A. FEDOR

Defendant.

IN THE COURT OF COMMON PLEAS
5th JUDICIAL CIRCUIT

CASE NO.: 2001-CP-40-4203R

MOTION AND ORDER INFORMATION
FORM AND COVERSHEET

Plaintiff's Attorney: <u>James Gilreath</u> , Bar No. _____		Defendant's Attorney: <u>Leo A. Dryer</u> , Bar No. <u>1759</u>	
Address: <u>P.O. Box 2147, Greenville, SC 29602</u>		Address: <u>P.O. Box 11567, Columbia, SC 29211</u>	
Phone: <u>864-242-4727</u> Fax: <u>864-232-4395</u>		Phone: <u>803-926-1235</u> Fax: <u>803-926-1276</u>	
E-mail: _____ Other: <u>N/A</u>		E-mail: <u>N/A</u> Other: <u>N/A</u>	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)			
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)			
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: <u>60(b)</u>			
Estimated Time Needed: <u>20 min.</u>		Court Reporter Needed: ☐ YES ☒ NO	
SECTION II: Motion/Order Type			
☐ Written motion attached			
☒ Form Motion/Order			
I hereby move for relief or action by the court as set forth in the attached proposed order.			
Signature of Attorney for <u>Plaintiff</u> Defendant		Date submitted <u>3-26-13</u>	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$ <u>25.00</u>			
☐ EXEMPT: (check reason)			
☐ Rule to Show Cause in Child or Spousal Support			
☐ Domestic Abuse or Abuse and Neglect			
☐ Indigent Status ☐ State Agency v. Indigent Party			
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief			
☐ Motion for Stay in Bankruptcy			
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)			
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions			
Name of Court Reporter: _____			
☐ Other: _____			
JUDGE'S SECTION		JUDGE CODE _____	
☐ Motion Fee to be paid upon filing of the attached order.		Date: _____	
☐ Other: _____			
CLERK'S VERIFICATION			
Collected by: <u>metts</u>		Date Filed: <u>4/23/13</u>	
☐ MOTION FEE COLLECTED: \$ _____			
☐ CONTESTED - AMOUNT DUE: \$ _____			

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA]

COUNTY OF RICHLAND]

EDWIN M. SMITH, JR.,]

PLAINTIFF,]

VS.]

DAVID A. FEDOR,]

DEFENDANT.]

IN THE COURT OF COMMON PLEAS

01-CP-40-4203A

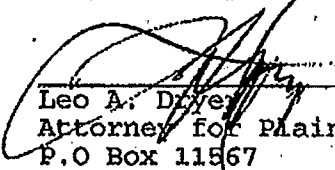
DEFENDANT'S 60(b) MOTION

RICHLAND COUNTY
FILED
2013 APR 23 PM 4:24
JEANETTE W. McBRIDE
C.C.P. & C.S.

Now comes your Defendant herein, and by provision of Rule 60(b) (5) (SCRCP), your Defendant does hereby move for relief from the Confession of Judgment, as filed by Plaintiff's counsel on or after February 26, 2013.

As will be argued before this Court, the Confession of Judgment plainly recites a money amount of \$350,000.00, and it is undisputed that Defendant has paid to the Plaintiff, an amount in excess of the named \$350,000.00 and thus premised upon the clear wording of the Confession of Judgment, as prepared by Plaintiff's counsel, the debt recited therein has been satisfied and Plaintiff's filed Confession of Judgment should be rescinded.

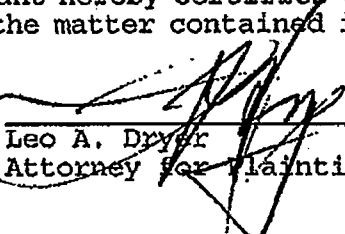
Respectfully submitted,


Leo A. Dyer
Attorney for Plaintiff
P.O. Box 11567
Columbia, SC 29211
(803) 926-1235
(803) 826-1276 FAX

March 26, 2013
Columbia, South Carolina

RULE 11 CERTIFICATION

Your undersigned movant hereby certifies that he has attempted in good faith to resolve the matter contained in the within Motion.


Leo A. Dryer
Attorney for Plaintiff

motion.doc/13030504/mbp

JEANETTE W. McBRIDE
C.C.P. & G.S.

2013 APR 23 PM 4:24

RICHLAND COUNTY
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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.

} TRANSCRIPT OF RECORD

David Fedor,

Defendant.

}
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

I N D E X O F W I T N E S S E S

(WHEREUPON, no witnesses were called
during these proceedings.)

E X H I B I T S

(WHEREUPON, no exhibits were introduced
during these proceedings.)

AUGUST 26, 2013

THE COURT: Edwin M. Smith, Jr., vs. David
Fedor. 2001-CP-40-4203. Is that correct?

MR. RUSCHKY: Correct, Your Honor.

THE COURT: Okay. 2001?

MR. RUSCHKY: Yes.

THE COURT: All right. And if everyone could
just state their name for the record, even though I
have Mr. Ruschky, but if you could state your name
just for the record.

MR. RUSCHKY: Eric Ruschky, of counsel to the
Grimsley Law Firm.

MR. DRYER: And Leo Dryer, for the Defendant.

THE COURT: All right. And this is the
Plaintiff's --

MR. DRYER: It is the Defendant's motion.

THE COURT: The Defendant's motion. All
right.

MR. DRYER: Yes, ma'am.

THE COURT: This is the Defendant's motion to
set aside judgment?

MR. RUSCHKY: Yes.

THE COURT: All right. And if one of you all
can give me a little bit of background on what is
going on so I'll have a better understanding.

1 Catch me up.

2 MR. DRYER: I noticed that the Court observed
3 the case number, and indeed the case was resolved
4 many years ago. And my client paid the sum of
5 \$15,000 a month towards the satisfaction of the
6 debt that was alleged and decreed with Mr. Smith.

7 The debt was secure by a confession of
8 judgment which is before you -- and I am
9 referencing the Plaintiff's Exhibit in writing --
10 but the confession is before you, if not in the
11 Court's file, it is before you by reference to
12 Plaintiff's Exhibit B. The confession is in the
13 sum of \$350,000. It is undisputed that the
14 Defendant has paid a sum to the Plaintiff in excess
15 of -- in fact, \$385,000..

16 I don't need to remind the Court that the
17 confession of judgment bears all the dignity and
18 finality of the entry of judgment. And therefore
19 neither the Plaintiff nor the Defendant can inquire
20 behind the confession and seek to now reargue the
21 merits and such. We have a confession for
22 \$350,000. It is undisputed that the Defendant has
23 paid \$385,000.

24 I would also draw the Court's attention to
25 Paragraph 7 of the confession. The confession of

1 course is prepared by the Plaintiff. It is their
2 own work and their own language, and this is what
3 they prepared.

4 The Defendant hereby authorizes the
5 entry of an order and judgment against
6 Defendant and in favor of Plaintiff in
7 the principal amount less any payments
8 received by Plaintiff from Defendant
9 through the date of filing here.

10 That is their language. And it is undisputed
11 that the Defendant has satisfied in abundance the
12 confession for \$350,000. And that is what the
13 confession speaks.

14 And therefore we ask that the confession, as
15 recorded earlier this year, be vacated.

16 Thank you, Judge.

17 THE COURT: So you are asking that the
18 confession be vacated? From what you are saying,
19 the confession has been satisfied?

20 MR. DRYER: Exactly. Excuse me for being
21 seated.

22 THE COURT: Oh, no, that's okay. That's fine.

23 MR. DRYER: I am perspiring battery acid from
24 one of the treatments.

25 THE COURT: That's fine. You're fine.

1 All right. Yes, sir?

2 MR. RUSCHKY: If it please the Court? And I
3 appreciate the Court scheduling us last because, as
4 I view the sensitivity of this matter, I have the
5 highest regard and respect for Mr. Fedor. One of
6 my most memorable cases before Judge Perry had
7 Mr. Fedor on the opposite side, and I have always
8 respected him and regarded him as Defense counsel.

9 THE COURT: Mr. Fedor has lots of memorable
10 cases.

11 MR. RUSCHKY: Yes, he does. He has had a
12 remarkable career -- is having a remarkable career.

13 THE COURT: Yes, he's still good. He is.

14 MR. RUSCHKY: Unfortunately, Your Honor, my
15 understanding of this case is that it originated
16 from a lawsuit against Mr. Fedor alleging
17 malpractice.

18 MR. DRYER: Your Honor, if I might object. We
19 have a confession of judgment that ended -- that
20 has to be respected as a finality of this case.
21 Elaborating on the merits of the case I would
22 object to. We are confronted with the confession
23 of judgment. That's it.

24 The confession of judgment has all the
25 authority of the entry of an order for judgment,

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 what you are talking about when you refer to the
2 confession of judgment that was filed on
3 February 2013.

4 MR. RUSCHKY: I have a copy, Your Honor.

5 THE COURT: Is that what you are talking
6 about?

7 MR. RUSCHKY: That's it.

8 THE COURT: Okay.

9 (Complies.)

10 THE BAILIFF: Do you need this one too, Your
11 Honor?

12 THE COURT: No, I have it. Okay. Here you
13 go.

14 MR. RUSCHKY: It is in the file?

15 THE COURT: Yes. It is attached to your
16 Exhibit B. Okay, so this is a confession of
17 judgment that was filed by -- looks like filed by
18 Mr. Fedor on February 27th, 2013.

19 MR. RUSCHKY: No.

20 MR. DRYER: It was against Mr. Fedor and was
21 filed earlier this year.

22 MR. RUSCHKY: Filed by the Plaintiff's
23 attorney. It was filed by James Gilreath on behalf
24 of Edwin Smith.

25 THE COURT: Okay. Now, this does say -- and

1 it is your position, Mr. Dryer, is that the
2 confession of judgment that was filed with the
3 Court says \$350,000?

4 MR. DRYER: Yes. Yes. Plainly upon its face.
5 Furthermore, it says in Paragraph 7:

6 Less any payments received by the
7 Plaintiff from Defendant through the
8 date of filing -- filing of this
9 confession.

10 And it is undisputed that \$385,000 has been
11 received. Therefore, I submit the confession has
12 been satisfied in an abundance and there is no --
13 but I also submit, Your Honor, that there is no
14 need to inquire behind this. This ended the case.
15 And this is the confession drawn by the Plaintiff.
16 And therefore -- and plain on its face. There is
17 no need to look behind it.

18 THE COURT: So your position is if it was
19 \$400, that Mr. Gilreath should have put \$400 in the
20 confession?

21 MR. DRYER: Exactly. Exactly. And I can't
22 explain why, but that is the confession that Mr.
23 Fedor signed. There is no need to go behind it
24 because it is clear -- abundantly clear upon its
25 face.

1 THE COURT: And is this -- was it drafted
2 by -- Mr. Ruschky, was it drafted by Mr. Gilreath?

3 MR. RUSCHKY: I assume, Your Honor. I do not
4 know.

5 THE COURT: All right. I'll be glad to hear
6 from you. Any response to what was just said?

7 MR. RUSCHKY: Your Honor, the confession of
8 judgment, I submit, has to be read in the context
9 of the 4-page confidential settlement agreement,
10 which we did not file as a publicly accessible
11 document out of deference to Mr. Fedor and asking
12 for guidance from the Court.

13 MR. DRYER: And if I haven't already made it
14 abundantly clear on the record, I object to the
15 introduction of the 4-page document. It is not
16 clear and concise on its face. I was troubled when
17 I reviewed it. But plainly the confession is the
18 intent of the parties that it is as reduced in
19 writing. I don't think it is a stretch to say that
20 counsel for the Plaintiff drew this instrument.
21 But, in any event, it was accepted. And it doesn't
22 say \$400,000, it says \$350. And it says less any
23 payments. And it is undisputed amongst the parties
24 that there has been payments in excess of that
25 \$350,000.

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 settlement and then there is -- I'm trying to
2 figure out, how did we get to the confession being
3 filed in the earlier part of this year? I mean,
4 apparently something -- of February 2013?

5 MR. RUSCHKY: Right.

6 THE COURT: The problem I have is, I don't
7 know if there was some other discussion, but there
8 is a confession that is signed, and it says
9 \$350,000 about 10 years later -- 10, 11 years
10 later. So --

11 MR. RUSCHKY: Paragraph 3, Your Honor.
12 As security Defendant agrees to give to
13 Plaintiff confession of judgment for
14 \$350,000 to be held in escrow by the
15 Plaintiff's attorney and not to be
16 recorded unless the Defendant defaults
17 on any payments. The amount of the
18 judgment shall be net of all payments
19 made to date.

20 THE COURT: All right. So the Plaintiff has
21 received \$385,000?

22 MR. RUSCHKY: Right, out of \$400.

23 THE COURT: Okay.

24 MR. DRYER: The Defendant acknowledges that he
25 has paid -- and it is undisputed -- \$385,000.

1 Now, it is anybody's guess as to why he
2 overpaid whatever. But the confession is for
3 \$350,000. And there is no need to go beyond the
4 corners of this instrument. It speaks for itself.
5 And it says \$350.

6 Now, counsel for the Plaintiff goes on to
7 quote from an agreement -- a writing, if you
8 will -- that is not recorded and is not clear upon
9 its face -- many strike-overs and
10 strike-throughs -- and I object that the assumption
11 that Chief Justice Harwell composed and wrote it.
12 He did not, according to the knowledge that I have.
13 I believe it was done by counsel for the Plaintiff.

14 But, in any event, the confession is what I'm
15 here to argue about. And it has been overpaid.

16 THE COURT: All right. Any case law out there
17 that you all are aware of regarding when the
18 confession is satisfied or what -- I'm guessing
19 there is nothing on point regarding some other
20 agreement on confidentiality?

21 MR. RUSCHKY: Your Honor, I don't know if
22 there is anything on point. I would be glad to
23 be -- and I would solicit the opportunity to
24 research this and submit a brief.

25 THE COURT: Or maybe if you all can just send

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.

1 THE COURT: All right. All right, I'll give
2 you 30 days to get me something on both sides. And
3 in the process, my law clerk and I will try to see
4 what we can find out there too. All right. Thank
5 you.

6 MR. DRYER: Judge, I appreciate the Court's
7 patience.

8 THE COURT: Oh, no problem. No problem. No
9 problem at all. Thank you all. Thank you all for
10 being patient.

11 (WHEREUPON, the proceedings were concluded.)
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(END OF TRANSCRIPT)

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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I, Deborah M. McCurdy, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 26th day of August, 2013.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

September 20, 2014

s/Deborah M. McCurdy, RPR

Deborah M. McCurdy, RPR
Fifth Circuit Court Reporter

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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) 233-0788
Email egrimsley@grimsleylaw.com
bgrimsley@grimsleylaw.com

July 3, 2013

(VIA E-MAIL - rhodlc@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

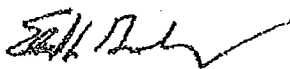
Dear Ms. Hedgecoe:

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: Leo A. Dryer, Esq., Attorney for Defendant (ldryer@sc.rr.com)

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 3rd day of July 2013.

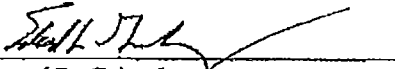

Edward L. Grimsley
Eric Wm. Ruschky
Attorneys for Plaintiff
GRIMSLEY LAW FIRM, LLC
Post Office Box 11682
Columbia, South Carolina 29211
Telephone: (803) 233-1177

EXHIBIT A

Confidential Settlement Agreement

~~This~~

This Settlement Agreement entered into
this 17th day of September 2002 by and
between Edwin M. Smith Jr. (hereinafter
"Plaintiff") and David H. Fahn (hereinafter
"Defendant")

Plaintiff and ~~Defendant~~ Defendant
agree as follows:

~~Defendant will within three (3)
days deliver to Plaintiff's agent in the
sum of \$50,000.00 to be held in the
trust account of Plaintiff's estate. Plaintiff
hereby to be disbursed to Plaintiff's
agent.~~

1. Plaintiff Defendant agrees to
pay Plaintiff the total sum of \$700,000.00
in complete settlement of all claims, to be paid

as follows:

a. Defendant shall within three (3) days
of the date of this agreement deliver the
sum of \$50,000.00 to his attorneys for
deposit into their trust account, to be
disbursed to Plaintiff's counsel upon the
execution of all releases and ~~Consent Order~~
~~Consent Order~~ of Defendant's (with prejudice);

b. the balance of \$350,000.00 to
be paid in annual installments of
\$35,000.00 per annum or 15% of Defendant's
gross income (net of all taxes and
deductions) as shown in annual federal
income tax returns, for the calendar year
preceding upon the year in which the
payment is made, each payment to be
made on September 15 of each year beginning
on September 15, 2003, and to be accompanied by a copy

of Defendant's federal income tax return ^{for the preceding} ~~for the~~ year. Annual payments to be sent by Defendant ~~to~~ to Plaintiff's attorney.

3. As security Defendant agrees to give to Plaintiff a Confession of Judgment for \$350,000.00 to be held in escrow by Plaintiff's attorney and not to be released unless the Defendant defaults on any payments. The amount of the judgment shall be met by all payments made to date.

4. Defendant agrees to cooperate with Plaintiff in obtaining any ~~insurance~~ life insurance policy so long as the Plaintiff understands that payment for any principal or life insurance premium is his sole responsibility. The insurable interest would be the unpaid balance.

5. Plaintiff agrees to write a letter
to the Grievance Committee of the Bar promising
not to take this case to the court and to be satisfied
with the outcome of the grievance process.

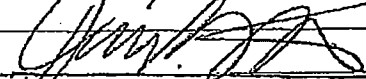
~~This~~

Sept 17, 2002

Edwin M. Smith, Jr.

Edwin M. Smith, Jr.

Plaintiff



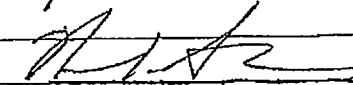
Susan R. DeBeauvoir

Attorney for Plaintiff

David A. Fodor

David A. Fodor

Respondent



Kenneth J. Sargent, III

Attorney for Respondent

EXHIBIT B

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Edwin M. Smith, Jr.)
Plaintiff,)

Docket No. 01-CP-40-4203

v.)

David A. Fedor,)
Defendant.)

CONFESSION OF JUDGMENT

RICHLAND COUNTY
FILED
2013 FEB 27 AM 9:53
JEANETTE W. McBRIDE
C.C.P. & G.S.

Pursuant to South Carolina Code Annotated § 15-35-350 *et. seq.*, the undersigned being first
duly sworn, shows the following to the Court:

1. Plaintiff, Edwin M. Smith, Jr., is a citizen and resident of Calhoun County, South Carolina.
2. Defendant David A. Fedor is a citizen and resident of Richland County, South Carolina.
3. Defendant is indebted to Plaintiff and agrees to execute this Confession of Judgment, dated September 26, 2002, in the principal sum of \$350,000.00 plus all post-judgment interest as allowed by law, beginning from the date of entry of an Order on Confession of Judgment.
4. Defendant executed this Confession of Judgment in consideration for 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 No. 2001-CP-40-4203.

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.

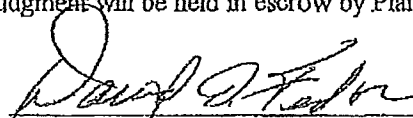
6. Defendant has no defense to the payment of, or right to set off against, the indebtedness, debt, or liability, and Defendant waives, and will not assert or allege, any defense or right to set off with respect to the judgment confessed herein.

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.

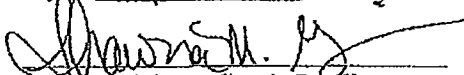
8. The undersigned represents that he signs this Confession of Judgment of his own free will, and that he fully understands the meaning and legal effect hereof.

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 26th
day of September, 2002.


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

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

**AFFIDAVIT OF JAMES R.
GILREATH**

1. My name is James R. Gilreath. I am a lawyer practicing in Greenville, South Carolina. My South Carolina Bar number is 2133.

2. In 2002, I represented Edwin M. Smith, Jr., ("Mr. Smith") in the above captioned matter (the "Suit"). David A. Fedor ("Mr. Fedor") was represented by Harry A. Swagart, III, Esquire ("Mr. Swagart").

3. The case was mediated by retired Chief Justice David Harwell and resulted in a settlement. The terms of the settlement were reduced to a settlement agreement prepared by Mr. Swagart and signed by both parties and both attorneys on September 17, 2002 (the "Agreement"). A true copy of the Agreement is attached hereto as Exhibit A. Among other things, Mr. Fedor agreed to pay Mr. Smith the total sum of \$400,000.00, to be paid in the following manner: \$50,000.00 within three days of the date of the Agreement, and the balance of \$350,000.00 to be paid in annual installments on or before September 1st of each year beginning on September 1, 2003. As security, Mr. Fedor signed a Confession of Judgment on September 26, 2002 (the "Judgment") in the amount of \$350,000.00, and the Judgment was to be held in escrow by me and not to be recorded unless Mr. Fedor defaulted on any payments. A true copy of the Judgment is attached hereto as Exhibit B. If default under the provisions of the Judgment occurred, then credit would be applied to the Judgment for all payments received under the terms of the Judgment and required thereby. The Agreement further provided that the Suit would be dismissed once the initial payment under provisions of the Agreement was made and the Judgment was executed by Mr. Fedor.

4. Through 2011, Mr. Fedor made his required payments, leaving a balance due on September 1, 2012 of \$35,000.00 Dollars. Mr. Fedor did not make that payment.

5. On November 14, 2012, Mr. Swagart contacted me and advised that Mr. Fedor did not have the full \$35,000.00 in order to make the payment. Mr. Swagart asked if Mr. Fedor could pay the \$35,000.00 through a series of monthly payments. This offer was rejected.

6. On November 16, 2012, Mr. Swagart indicated that Mr. Fedor could pay \$15,000.00 within one week, and \$10,000.00 per month thereafter.

7. On November 20, 2012, Mr. Swagart offered \$20,000.00 within the next few days, and the rest in a week or two. This offer was accepted and payment on that amount was received.

8. By January 31, 2013, Mr. Fedor had not paid the final \$15,000.00.

9. On February 4, 2013, Mr. Swagart told me that Mr. Fedor did not have the funds to pay the final \$15,000.00.

10. On February 27, 2013, I caused the Confession of Judgment and a Partial Satisfaction of Judgment to be filed, indicating that Mr. Smith had received \$335,000.00, reducing the unpaid balance to \$15,000.00.

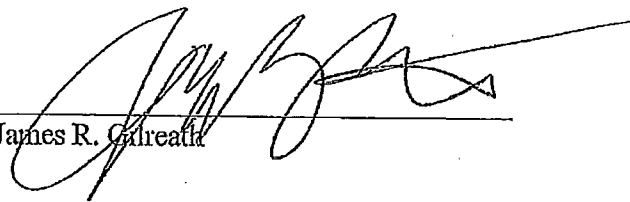
11. The terms of the Agreement specifically provide that an initial \$50,000.00 payment would be made, followed by payment of \$350,000.00 through a series of payments of \$35,000.00 under the provisions of a Confession of Judgment to be executed by Mr. Fedor.

12. 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.

13. At no time during my 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.

14. At no time during my 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.

15. It is my 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.


James R. Gilreath

SWORN to before me this

1ST day of JULY, 2013

Katherine M. Kohlmann

Notary Public, State of SOUTH CAROLINA

My Commission Expires: 10/10/13

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Edwin M. Smith, Jr.)

Docket No. 01-CP-40-4203

Plaintiff,)

v.)

David A. Fedor,)

Defendant.)

CONFESSION OF JUDGMENT

RICHLAND COUNTY
FILED
2013 FEB 27 AM 9:43
JEANETTE W. McBRIDE
C.C.P. & G.S.

Pursuant to South Carolina Code Annotated § 15-35-350 *et. seq.*, the undersigned being first
duly sworn, shows the following to the Court:

1. Plaintiff, Edwin M. Smith, Jr., is a citizen and resident of Calhoun County, South Carolina.
2. Defendant David A. Fedor is a citizen and resident of Richland County, South Carolina.
3. Defendant is indebted to Plaintiff and agrees to execute this Confession of Judgment, dated September 26, 2002, in the principal sum of \$350,000.00 plus all post-judgment interest as allowed by law, beginning from the date of entry of an Order on Confession of Judgment.
4. Defendant executed this Confession of Judgment in consideration for 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 No. 2001-CP-40-4203.

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.

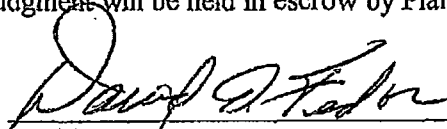
6. Defendant has no defense to the payment of, or right to set off against, the indebtedness, debt, or liability, and Defendant waives, and will not assert or allege, any defense or right to set off with respect to the judgment confessed herein.

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.

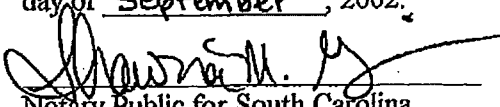
8. The undersigned represents that he signs this Confession of Judgment of his own free will, and that he fully understands the meaning and legal effect hereof.

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 26th
day of September, 2002.


Notary Public for South Carolina
My Commission Expires: 10/17/2011

STATE OF SOUTH CAROLINA]

COUNTY OF RICHLAND]

EDWIN M. SMITH, JR.,]

PLAINTIFF,]

VS.]

DAVID A. FEDOR,]

DEFENDANT.]

IN THE COURT OF COMMON PLEAS

01-CP-40-4203

AFFIDAVIT OF DAVID FEDOR

BEFORE ME, the undersigned Notary Public in and for the County and State aforesaid, personally appeared David Fedor who under oath affirms that he is the Defendant and that he has paid to the Plaintiff, or his attorney, the sum of \$385,000 that sum being in excess of the sum recited in Defendant's Confession of Judgment and that the Confession of Judgment should be deemed satisfied.

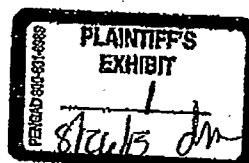
David A. Fedor
David A. Fedor

David Fedor

Sworn to and subscribed before me this 19 day of August, 2013

John D. Elliot
Notary Public for the State of SC

My Commission Expires: 7.29.2020



RECEIVED
IN 205 4 3 2001
U.S. DEPT. OF JUSTICE

RECEIPT FOR EXHIBITS

Case No. 01-CP-40-4203
 Plaintiff: Eduin M Smith Jr
 Defendant: David A Fedor
 Date Trial Started: 8/26/13

Judge D B Benjamin
 State's Atty. Leo Dyer Jr
 Def's. Atty. _____
 Date Trial Ended: 8/26/13

Received of Abraham M King, Court Reporter for the above case, these exhibits:

1	P-1 affidavit of David A. Fedor	Clerk of Court Use ✓
2		
3		
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This 26 day of August 20 13.

Page 1 of 1

By: [Signature]

Richland County Clerk of Court

Clerk should retain white copy in Civil cases, yellow copy in Criminal cases.

Revised 3/96

September 23, 2013

Honorable DeAndrea Benjamin
P.O. Box 192
Columbia, SC 29202

RE: Edwin M. Smith, Jr.

VS: David A. Fedor

Docket No.: 2001-CP-40-4203
Our File No: 13030504

Dear Ms. Benjamin:

Upon the close of the hearing, on my motion, you requested that counsel for the Plaintiff provide you with a memorandum, to include any authority to reopen the sealed record. To date, I await the opportunity to provide a reply memorandum but hesitate to delay any further. I provide herewith memorandum to support Defendant's/Movant's motion.

Very truly yours,

Leo A. Dryer
DRYER LAW OFFICE

LAD/tat

cc: James R. Gilreath, Esq.
P.O. Box 2147
Greenville, SC 29602

plaintiff now seeks to have this Court reconsider the finality of its confession, although it should be noted that plaintiff has filed no counter motion to amend or correct its confession, by mistake, scrivener's error etc. Defendant believes that such an omission/failure by the plaintiff to file its own Rule 60b(1) (mistake, etc.) motion precludes any further argument by plaintiff that would allow this Court to look behind the finality of the subject confession and objects thereto.

The finality of the confession, as an order, is further reinforced by the succeeding Section 380 where it provides an execution may be issued upon a confession.

plaintiff cannot cite any failing or insufficiency in the wording of its confession, as drafted and composed by the plaintiff. Said confession is clear and without any discrepancies upon its face as prepared by plaintiff, almost 11 years prior.

"A judgment by confession has all the characteristics of an ordinary judgment and cannot be attacked collaterally. The remedy is by application to the court in which the confession is entered to vacate or modify it, if it is insufficient in form or for any reason void."

Defendant, relying upon Section 15-35-370 and the status/holding that a confession of judgment sustains the same finality as an order of judgment, see Southern Porcelain Manufacturing Co. vs. Thew 55CS (1873):

Defendant seeks to void plaintiff's recordation of its confession of judgment. The confession of judgment sets forth an amount of \$350,000.00 whereas the parties are undisputed that this amount and more, has been paid to the plaintiff. Thus, Defendant argues that the plaintiff's confession of judgment should be deemed satisfied and its recordation rescinded and voided. The plaintiff argues, over Defendant's objection that, in fact, the settlement was for \$400,000.00 and thus the payments to date do not satisfy the agreed settlement.

STATE OF SOUTH CAROLINA	]	
COUNTY OF RICHLAND	]	
EDWIN M. SMITH, JR.,	]	
PLAINTIFF,	]	
VS.	]	
DAVID A. FEDOR,	]	
DEFENDANT.	]	

01-CP-40-4203

DEFENDANT/MOVANT

MEMORANDUM

IN THE COURT OF COMMON PLEAS

While Plaintiff attempts to argue that the true settlement is \$400,000.00, reduced by a beginning lump sum payment of \$50,000.00, Plaintiff is bound by its own language (see paragraph 7 of subject Confession):

"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 (emphasis added) by Plaintiff from Defendant through the date of filing hereof...."

And by Plaintiff's own language, the initial \$50,000.00 was intended to be credited against the \$350,000.00 figure.

While Plaintiff asks this Court to open the sealed, confidential Settlement Agreement, which it described, over Defendant's objections, would sustain the greater \$400,000.00 figure, again, the final word/judgment is contained within the Confession of Judgment, as drafted/composed by Plaintiff, and recites \$350,000.00 less any payments. Thus there is no sustainable argument to justify opening the sealed settlement. Defendant further objects to the inclusion of the hand written "Confidential Settlement Agreement" upon Plaintiff's submission to the Court believing that such submission was and is a violation of the "Confidential" caption and intent of the parties and again objects thereto.

In conclusion, it is both unnecessary, for this Court to inquire beyond this Confession and contrary to the finality of the Confession as a final Order, to look behind such a final Order particularly upon the fact that Plaintiff composed and drew the subject Confession and should be bound thereby.

Respectfully Submitted,

Leo A. Dryer
Attorney for Defendant

September _____, 2013

order.doc/13030504/tat

GRIMSLEY LAW FIRM, LLC

Attorneys at Law

Benjamin E. Grimsley
Edward L. Grimsley

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

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

September 25, 2013

(VIA HAND DELIVERY)

The Honorable DeAndrea G. Benjamin
Circuit Court Judge
Fifth Judicial Circuit
Post Office Box 192
Columbia, SC 29202

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

Dear Judge Benjamin:

Enclosed for your review please find an original and one copy of Plaintiff's Memorandum in Support of Entering Settlement Agreement into Evidence in connection with the above-referenced matter.

By copy of this letter, I am providing a copy to Leo A. Dryer, Attorney for the Plaintiff.

Thank you for your assistance in this matter.

Sincerely,



Edward L. Grimsley

ELG/mms

Enclosures (as stated)

Cc: Leo A. Dryer, Esq., Attorney for Plaintiff

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 SUPPORT OF
ENTERING SETTLEMENT AGREEMENT
INTO EVIDENCE

I. The Settlement Agreement meets the exception to the parol evidence rule as stated in *Smith v. McClam*.

"The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the evidence is to be used to contradict, vary, or explain the written instrument." *McGill v. Moore*, 381 S.C. 179, 188, 672 S.E.2d 571, 576 (2009). This rule has many exceptions. One common exception is that parol evidence is admissible to show a "separate and independent agreement, which is not inconsistent with the terms of a contemporaneous or subsequent written agreement, if it can be inferred that the parties did not intend the written paper to be a complete integration of the agreement. *Smith v. McClam*, 289 S.C. 452, 457, 346 S.E. 2d 720, 724 (1986).

In *Harbour Town Yacht Club Boat Slip Owners' Ass'n v. Safe Berth Mgmt, Inc.*, the court found that because the agreement in question did not contain an integration clause, and made reference to a proposed agreement, the agreement in question was not completely integrated and parol evidence was admissible, 421 F.Supp. 2d 908, 911-12 (D.S.C. 2006).

In order for a settlement agreement to be admissible into evidence under the exception to the parol evidence rule, the court states in *McClam* it must be (1) a separate and independent agreement, (2) the terms may not be inconsistent with the terms of the confession of judgment, (3) there must be

an inference that the parties did not intend the confession of judgment to be a complete integration of their agreement. *McClam*, 289 S.C. at 457, 346 S.E.2d at 724.

The settlement agreement now before this court (the "Settlement Agreement") can be established as a separate and independent agreement due to the fact that it was negotiated and entered into prior to the execution of the confession of judgment which is also before this court (the "Confession of Judgment"). Thereafter, the Confession of Judgment was made concerning the payment terms and the method by which the remaining settlement payments would be made and served by agreement as security for the Settlement Agreement.

The terms of the Settlement Agreement are not inconsistent with the terms of the Confession of Judgment. The terms in both agreements provide for the same payments. The Settlement Agreement merely supplements the term missing from the Confession of Judgment. Comment three to the parol evidence rule codified in section 36-2-202 of the South Carolina Code states that "[i]f the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact." S.C. Code § 36-2-202 (1976). The payment term that is in the Settlement Agreement, but left out of the Confession of Judgment, would not have "certainly been included" in the Confession of Judgment because the term left out of the Confession of Judgment was for an amount of money that had already been paid prior to the execution of the Confession of Judgment. The Confession of Judgment was to be security for the remaining unpaid settlement amount, as set forth in the Settlement Agreement.

Finally, the parties did not intend the Confession of Judgment to be a complete integration of their agreement. This is evidenced by the fact that the Confession of Judgment does not contain an integration clause. *McClam*, 289 S.C. at 457, 346 S.E.2d at 724. It is also evidenced by the fact that

the Confession of Judgment makes reference to the Settlement Agreement stating that the indebtedness owed "arose pursuant to a Confidential Settlement Agreement between the parties." This parallels the findings in *Harbour Town Yacht Club*, 421 F. Supp. 2d at 911-12.

Because the parties had a separate agreement that did not contradict the terms of the Confession of Judgment, but merely supplemented them, and that the parties did not intend for the Confession of Judgment to be a complete integration of their agreement, the court should allow the Settlement Agreement to be entered into evidence in order to provide the terms missing from the Confession of Judgment.

II. Allowing a party to breach a contract on the grounds that the contract is confidential is contrary to public policy and would lead to unjust results.

Plaintiff's disclosure of the Settlement Agreement to this court is necessitated by Defendant's motion for relief and failure to perform under the confidential settlement agreement. "A litigant cannot complain of prejudice by reason of an issue he has placed before the court." *Gibson v. Wright*, 403 S.C. 32, 43, 742 S.E.2d 49, 55 (Ct. App. 2013). Based on the above statement of the "door-opening doctrine," the Defendant, by filing his motion with the court, has opened the door for the Settlement Agreement to be entered into evidence. *Id.* If the Defendant had not filed the motion for relief and abided by the terms of the Settlement Agreement, there would be no need to enter the Settlement Agreement into evidence to show the true intent of the parties and amount of settlement. By not allowing the Settlement Agreement into evidence, the court will allow the Defendant to breach the Settlement Agreement, hide behind its terms, and face no consequences. Such a decision would set a precedent which would incentivize others to breach settlement agreements which have been labeled confidential in the hope that they too will be able to avoid giving the compensation that they agreed to.

III. The Defendant's failure to perform his duties under the agreement amounts to a material breach of the agreement, which releases the Plaintiff from his duties under the agreement.

By filing the "Confidential Settlement Agreement" with the court, the Plaintiff would not be breaching the terms of the Settlement Agreement because Defendant has already materially breached the Settlement Agreement, thereby releasing Plaintiff from its duties under the Settlement Agreement.

In *Silver v. Abstract Pools & Spas, Inc.*, the plaintiff, a homeowner, contracted for work to be done to his home with the defendant, a contractor. 376 S.C. 585, 588, 658 S.E.2d 539, 540 (Ct. App. 2008). When the plaintiff failed to make any further installment payments the contractor ceased working on the plaintiff's property. *Id.* at 589, 658 S.E.2d at 541. Plaintiff brought a breach of contract action against the defendant, who counterclaimed that the plaintiff had breached the contract. *Id.* at 590, 658 S.E.2d at 541. The Master in Equity found in favor of the plaintiff. *Id.* The defendant appealed and the Court of Appeals held that the Master in Equity erroneously found for the plaintiff and that the failure of the plaintiff to pay the agreed upon amount under the contract amounted to a material breach which justified the defendant's cessation of performance under the contract. *Id.* at 594, 658 S.E.2d at 543.

The circumstances in *Silver* are similar to those in the instant case. The Defendant failed to make the final payment under the terms of the Settlement Agreement resulting in a material breach of the contract. Due to the Defendant's breach the Plaintiff is no longer bound by the terms of the Settlement Agreement, including the confidentiality provision, and should be able to file the Settlement Agreement with the court.

IV. In the alternative the Settlement Agreement should be reviewed *in camera* and sealed by the court should the court find that it can not otherwise review the agreement due to concerns of confidentiality for the document.

While the Plaintiff does not believe there is a need to seal the Settlement Agreement, in the event this court finds that it can not review the Settlement Agreement out of concern for confidentiality, Plaintiff would ask the court to review it *in camera* and file it under seal. While Rule 41.1 of the *South Carolina Rules of Procedure* (the "Rule") provides guidance as to the sealing of documents and settlement agreements, it states that it does not apply to private agreements. However, it further provides that the enforceability of confidentiality provisions in settlement agreements is governed by general legal principles and not this Rule. Based on the legal principles and policies set forth in the paragraphs above, the court, in the alternative, should review the Settlement Agreement *in camera* and file it under seal. By not allowing the Settlement Agreement into evidence, the court will not have a true understanding of the payments made under the Confession of Judgment and will allow the Defendant to breach the terms of the Settlement Agreement, hide behind its terms, and face no consequences.

Conclusion .

Based on the above analysis, the Settlement Agreement should be allowed into evidence to clarify and provide the term not in the Confession of Judgment.

Submitted 25th day of September 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

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 No. 2001-CP-40-4203

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Edward L. Grimsley Bar No.: 2326 Attorney for the Plaintiff Address: Post Office Box 11682 Columbia, South Carolina 29211 Phone: 803 233 0797 Fax: 803 233 0798 Email: egrimsley@grimsleylaw.com Other:		Defendants Attorney Bar No: Address: Phone: Fax: Email: Other	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Motion for Reconsideration Estimated Time Needed: ***Est Time Needed***		Court Reporter Needed: ☐ YES ☒ NO	
SECTION II: Motion / Order Type			
☒ Written Motion Attached ☐ Form Motion -- I hereby move for relief or action by the court as set forth in the attached proposed order.			
Signature of Attorney for ☒ Plaintiff ☐ Defendant		November 8, 2013 Date submitted	
SECTION III: Motion Fee			
☒ Paid - Amount: \$25.00 ☐ Exempt: (check reason)		☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per Judge's instructions Name of Court Reporter: _____ ☐ Other	
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order ☐ Other:		JUDGE _____ Code: _____ Date: _____	
CLERK'S VERIFICATION			
Collected By: _____		Date Filed: _____	
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____			

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Edwin M. Smith, Jr.,

Plaintiff,

v.

David A. Fedor,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2001-CP-40-4203

**MOTION FOR
RECONSIDERATION**

RECEIVED
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2013 NOV 15 PM 4:30
CLERK OF COURT
COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Pursuant to Rules 52(b), 59(e) and 60(a) of the South Carolina Rules of Civil Procedure, Plaintiff Edwin M. Smith, Jr. hereby moves the Court for reconsideration of the October 31, 2013 Order granting Defendant's Motion for Relief from Confession of Judgment ("the Order").

Edwin M. Smith, Jr. ("Plaintiff") respectfully submits that the Order contains legal errors that impacted the Court's analysis and ultimately its ruling. Therefore, Plaintiff respectfully requests that the Court reconsider the Order, amend its ruling, and deny the motion of David A. Fedor ("Defendant") to be relieved from his Confession of Judgment.

SUMMARY

The issues in this current 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. The Confidential Settlement Agreement was not recorded with the Court. Shortly thereafter, the parties informed the Court by a letter filed on September 26, 2002 "that a mediated settlement had been reached". That same day, the Defendant also executed a Confession of Judgment for \$350,000 in consideration for the 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 the 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, the Plaintiff on February 27, 2013 filed the Confession of Judgment and a Partial Satisfaction of Judgment with the Court. The Partial Satisfaction stated that the Defendant had paid \$335,000 towards the balance owed under the Confession of Judgment, leaving an unpaid balance of \$15,000. Following the entry of the Confession of Judgment, the Defendant filed a motion to be relieved from the judgment pursuant to Rule 60(b)(5), SCRCP.

At the August 26, 2013 hearing, counsel for the 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 this Court to ignore the terms of the Confidential Settlement Agreement specifically referenced in the Confession of Judgment.

Both parties agreed during the hearing that the Defendant had paid sums to the Plaintiff *in excess of* the \$350,000 amount set forth in the Confession of Judgment. However, Plaintiff's counsel pointed out to the Court that the Defendant had more than one payment obligation to the

Plaintiff under the Confidential Settlement Agreement and that not all the Defendant's payments were towards the obligation secured by the Confession of Judgment. It was therefore necessary to review the referenced Confidential Settlement Agreement to determine if the Defendant had met his payment obligations secured by the Confession of Judgment.

In the subject Order, the Court declined to consider the terms of the Confidential Settlement Agreement. The Order stated that the 2002 version of Rule 43(k), SCRCP, 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. As a result, the Court held that the payments in excess of \$350,000 satisfied the Confession of Judgment and granted the Defendant's Motion for Relief from the Confession of Judgment.

ARGUMENT

I. The current version of Rule 43(k) is applied retrospectively making the confidential settlement agreement enforceable.

This Court held that Rule 43(k), SCRCP as amended in 2009 and currently in effect did not apply to the matter presently before the Court. 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 Court, including this matter.

As a rule of procedure, the amended Rule 43(k), SCRCP 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 the South Carolina Court of Appeals 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) SCRCF 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, the Court of Appeals 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), SCRCF. 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)¹
(emphasis added).

¹ 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).

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. 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 the Defendant admittedly made over \$350,000 in payments since then. So the Confidential Settlement Agreement has 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 the Defendant to apply the present version of Rule 43(k). The 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.

II. 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, the Defendant's unilaterally signed Confession of Judgment was not intended to be the complete agreement of the parties, making the Confidentiality Settlement Agreement admissible.

A. 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 the Defendant is a unilateral statement signed by him alone. The Plaintiff is not a signatory to the document.

The parol evidence rule is one of substantive contract law, not a rule of evidence. *Gilliland v. Elmwood Properties*, 301 S.E. 295, 302, 391 S.E. 2d 577, 581 (1990). The parol evidence rule therefore 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, 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.

B. 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, previously discussed in Plaintiff's Memorandum in Support of Entering Settlement Agreement into Evidence, 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 is precisely the situation at issue in this case. The Confession of Judgment in three places references the Confidential Settlement Agreement. It also 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 simply 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.

C. 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 the 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 precisely 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-40-4203.

Confession of Judgment, ¶ 4.

The 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).

D. Parol evidence is admissible to explain ambiguities.

The Court noted in its order that both parties agreed during the hearing that the Defendant had paid an amount in excess of the \$350,000.00 set forth in the Confession of Judgment. Order

at p. 2. This begs the obvious question — why did the Defendant pay more than \$350,000.00 if he were not obligated to do so? The 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 the Defendant was making his payments required him to pay additional sums to the 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.

E. No terms of confidentiality prevent disclosure of the Confidentiality Settlement Agreement.

The Confidential Settlement Agreement does not contain any terms of confidentiality that would prohibit the disclosure of the terms of the agreement to a third party. The word "Confidential" only shows up in the title, but there are no confidential provisions within the agreement. *See Garner v. Houck*, 312 S.C. 481, 486, 435 S.C.2d 847, 849 (1993) (holding limitation in heading is not applicable where the text itself contains no limitation because the title alone does not govern the substantive terms of the document). The only possible provision within the Confidential Settlement Agreement that references any non-disclosure is the requirement also contained in the Confession of Judgment that the Plaintiff's attorney will hold the Confession of Judgment in escrow and not record it until there has been a default under the Confidential Settlement Agreement. (Confession of Judgment, ¶ 10). Since there has been a default in the Confidential Settlement Agreement, such non-disclosure requirement is no longer applicable.

IV. Set-off of payments is prohibited by the Confession of Judgment.

Paragraph 6 of the Confession of Judgment states as follows:

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

Confession of Judgment, ¶ 6 (emphasis added).

Under paragraph 6 the Defendant waived the right to set off payments made on one obligation against payments owed under another obligation. The Confession of Judgment does not detail which payments are prohibited from being set off against the \$350,000 debt. As is obvious by the Defendant's payments in excess of \$350,000.00, the Defendant has more than one payment obligation to the Plaintiff. The lack of a detailed and particularized description of the payment obligations in the Confession of Judgment renders the set-off proscription ambiguous. Without resort to the Confidential Settlement Agreement, the proper allocation of Defendant's payments cannot be properly determined.

V. Plaintiff was never provided the Defendant's brief.

The Defendant never provided to Plaintiff's counsel a copy of the brief he submitted to the Court in this case. The Defendant also did not file a copy of his brief with the Court. Therefore, even as of this date the Plaintiff has been unable to obtain a copy of the Defendant's brief which has been shown only to the judge and not to Plaintiff's counsel. As a result, the Plaintiff has been unable to respond to the arguments briefed by the Defendant. Rule 5(b)(3) requires that "any party providing a . . . paper to the court for its consideration in any pending matter shall serve the same on all counsel of record at the same time and by the same means." Rule 5(b)(3), SCRCP.

Because of the lack of service of the Defendant's brief on Plaintiff's counsel, the Plaintiff is forced to address in this Motion for Reconsideration the Defendant's arguments made at the hearing. Plaintiff therefore would assert that his inclusion in this Motion of responses to the Defendant's arguments adopted in the Court's Order is proper under the circumstances, given the lack of service of the Defendant's brief.

Respectfully submitted,



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

November 8, 2013
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
PLEAS

COUNTY OF RICHLAND

EDWIN M. SMITH, JR.,

Plaintiff,

vs.

DAVID A. FEDOR,

Defendant.

) IN THE COURT OF COMMON

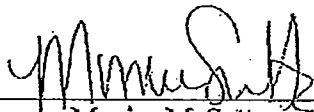
) FIFTH JUDICIAL CIRCUIT

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

) CERTIFICATE OF SERVICE

The undersigned hereby certifies that she caused a copy of PLAINTIFF'S
MOTION FOR RECONSIDERATION, filed in the above captioned case, to be
served, via United States Mail, on the party listed below this 8 day of November,
2013:

Leo A. Dryer, Esq.
DRYER LAW FIRM
Post Office Box 11567
Columbia, SC 29211
Attorney for Defendant



Monica M. Sutton
Paralegal
Grimsley Law Firm, LLC.
Post Office Box 11682
Columbia, South Carolina 29211

GRIMSLEY LAW FIRM, LLC

Attorneys at Law

Benjamin E. Grimsley
Edward L. Grimsley

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

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

August 4, 2014

(VIA HAND DELIVERY)

The Honorable DeAndrea G. Benjamin
Circuit Court Judge
Fifth Judicial Circuit
Post Office Box 192
Columbia, SC 29202

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

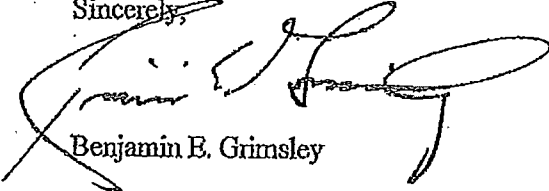
Dear Judge Benjamin:

Enclosed for your review please find an filed copy of Plaintiff's Motion for Reconsideration in connection with the above-referenced matter.

By copy of this letter, I am providing a copy to Leo A. Dryer, Attorney for the Plaintiff.

Thank you for your assistance in this matter.

Sincerely,


Benjamin E. Grimsley

BEG/mms

Enclosures (as stated)

Cc: Leo A. Dryer, Esq., Attorney for Plaintiff

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 No. 2001-CP-40-4203R

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

RICHLAND COUNTY
FILED
2014 AUG -4 PM 2:19
JEANETTE M. MORRIS
C.C.P. & C.S.

Plaintiff's Attorney: Edward L. Grimsley
Bar No.: 2326
Attorney for the Plaintiff
Address: Post Office Box 11682
Columbia, South Carolina 29211
Phone: 803 233 0797 Fax: 803 233 0798
Email: egrimsley@grimsleylaw.com Other:

Defendant's Attorney
Bar No:
Address:

Phone: Fax:
Email: Other:

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Reconsideration

Estimated Time Needed: 30

Court Reporter Needed: ☒ YES ☐ NO

SECTION II: Motion / Order Type

☒ Written Motion Attached

☐ Form Motion--

I hereby move for relief or action by the court as set forth in the attached proposed order.

Edward L. Grimsley August 4, 2014
Signature of Attorney for ☒ Plaintiff ☐ Defendant Date submitted

SECTION III: Motion Fee

- ☒ Paid - Amount: \$25.00
☐ Exempt: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order
☐ Other:

JUDGE

Code: _____

Date: _____

CLERK'S VERIFICATION

Date Filed: _____

Collected By: _____

- ☐ MOTION FEE COLLECTED: _____
☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Edwin M. Smith, Jr.,

Plaintiff,

v.

David A. Fedor,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2001-CP-40-4203 R

MOTION FOR
RECONSIDERATION

RICHLAND COUNTY
FILED
2014 AUG -4 PM 2:19
JEANETTE W. MCSPRUE
C.C.P. & C.S.

Pursuant to Rules 52(b), 59(b) and (e), and 60(b) of the South Carolina Rules of Civil Procedure, Plaintiff Edwin M. Smith, Jr. hereby moves the Court for reconsideration of the Order of July 22, 2014 ("the Order") denying Plaintiff's Motion for Reconsideration submitted November 8, 2013 due to the Court's finding that the original Motion for Reconsideration was not timely received by the Court.

Edwin M. Smith, Jr. ("Plaintiff") respectfully submits that the Order contains a legal error and an error of fact that manifestly impacted the Court's denial of the original Motion for Reconsideration. Therefore, Plaintiff respectfully requests that the Court reconsider the Order of July 22, 2014, take into consideration Plaintiff's Motion for Reconsideration submitted November 8, 2013¹, and deny the motion of David A. Fedor ("Defendant") to be relieved from his Confession of Judgment.

ARGUMENT

I. Plaintiff properly delivered a copy of the Motion for Reconsideration to the Court.

The Court's Order of July 22, 2014 states as follows:

¹ Plaintiff's Motion for Reconsideration dated November 8, 2013 at Exhibit A is hereby incorporated herein as if fully set forth in this Motion.

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 of July 22, 2014.

The undersigned would show this Court as set forth below that the Motion for Reconsideration was timely filed with the Court. Plaintiff acknowledges that a copy of the filed Motion for Reconsideration may have inadvertently not been delivered to the presiding judge. See Rule 59(g), SCRCF ("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), SCRCF (same). The failure to provide a copy to the presiding judge was inadvertent and 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 and is therefore on notice of the issues raised in the original Motion for Reconsideration. Plaintiff thereby requests that the Court relieve him from the dismissal of his Motion for Reconsideration under Rule 60(b)(1), SCRCF.

"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 court's administrative convenience and are not meant to be inflexible rules of jurisdiction. 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). Given the lack of prejudice on Defendant, Plaintiff asks this Court to consider his Motion for Reconsideration on its merits.

II. Plaintiff's delivery and filing of the original Motion for Reconsideration meets the filing requirements of Rules 52(b) and 59(e).

The relevant dates in this case for consideration of the timeliness of the Motion for Reconsideration are as follows:

October 30, 2013 – Order signed by the Court (Ex. B, Order of Oct. 31, 2013);

October 31, 2013 – Order filed with the Clerk of Court (Ex. B, supra) and emailed by Ashley Wheeling-Goodson, law clerk to the Honorable DeAndrea G. Benjamin, to Plaintiff's counsel (Ex. C, E-mail of Oct. 31, 2013);

November 4, 2013 – The Order of October 31, 2013 was mailed by the Clerk of Court by First Class Mail to Plaintiff's attorneys or placed in attorney's box (Ex. D, Form 4 order);

November 8, 2013 – Plaintiff's attorney mailed original Motion for Reconsideration to the Clerk of Court and to Defendant's attorney (Ex. A, Cover letter, Mot. Recons., and Certif. of Serv.); and

November 15, 2013 – Clerk of Court filed Plaintiff's original Motion for Reconsideration (See Ex. A, Mot. Recons.)

Rule 52(b) states:

Upon motion of a party made not later than ten (10) days after receipt of written notice of entry of judgment, the court may amend its findings or make additional findings and may amend the judgment accordingly . . .

Rule 52(b), SCRPC.

Likewise, Rule 59 regarding Amendment of Judgments states in paragraphs (b) and (e):

In non-jury actions the motion shall be made not later than 10 days after the receipt of written notice of the entry of judgment or of the filing of an order disposing of the action, if no judgment has been entered... A motion to alter or amend the judgment shall be served not later than ten (10) days after receipt of written notice of the entry of the order.

Rule 59(b) and (e), SCRPC.²

² See Wilson v. Dollar General Corp., 2012 WL 1144616, at *2 (W.D. Va. April 5, 2012) (explaining that Rule 52(b) applies only to judicial findings made in non-jury actions and is thus a trial rule, while Rule 59(e) applies to orders following motions for summary judgment; court

The South Carolina Supreme Court has interpreted a Rule 59(b) motion to alter or amend the judgment as being "made" when the motion is placed in the mail for service on opposing counsel. Curtis v. Blake, 381 S.C. 189, 191, 672 S.E.2d 576, 577 (2009). In that case the Court specifically stated as follows:

The question here is whether the post-trial motion was "made" at the time it was filed with the court or when it was served on opposing counsel. We find the motion was "made" when it was placed in the mail for service on opposing counsel.

Curtis v. Blake, 381 S.C. at 191, 672 S.E. 2d at 577.

In this case, the Motion for Reconsideration was mailed on November 8, 2013 as evidenced by the Certificate of Service of Monica M. Sutton, paralegal to the Grimsley Law Firm, LLC. November 8 is eight days from the date the Order was filed, and nine days from the date the Order was signed by the Honorable Judge Benjamin. Regardless of whether the date of signing, filing, or e-mailing to the attorneys of record is used³, Plaintiff timely made his Motion for Reconsideration by serving it on November 8, 2013, which date is within ten (10) days of the Court's October 31, 2013 Order.

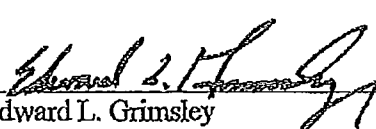
CONCLUSION

Because Plaintiff "made" his Motion for Reconsideration by mailing it to the Clerk of Court and opposing counsel within ten days of the October 31, 2013 Order, Plaintiff's Motion for Reconsideration was timely. Therefore, Plaintiff would ask this Court to review his original Motion for Reconsideration and grant the relief requested based on the merits of the case.

recognized a motion filed under both rules may be considered under standard applicable to Rule 59(e)).

³ See Bowman v. Richland Mem. Hosp., 335 S.C. 88, 91, 515 S.E.2d 259, 260-61 (Ct. App. 1999) (holding order is not final until date it is entered by clerk of court for purposes of calculating 10-day filing requirement).

Respectfully submitted,


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

July 31, 2014
Columbia, South Carolina.

Exhibit A

GRIMSLEY LAW FIRM, LLC

Attorneys at Law

Edward L. Grimsley

Benjamin E. Grimsley *

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

Telephone (803) 233-1177
Facsimile (803) 233-0708
Email: egrimsley@grimsleylaw.com
bgrimsley@grimsleylaw.com

* Also admitted in North Carolina

November 8, 2013

The Honorable Jeanette McBride
Clerk of Court, Richland County
Post Office Box 2766
1701 Main Street, Room 205
Columbia, South Carolina 29202-2766

Re: Edwin M. Smith, Jr. vs. David A. Fedor, et al.
Case No.: 2001-CP-40-4203

Dear Ms. McBride:

Enclosed please find the originals and one copy each of Plaintiff's Motion for Reconsideration, and Certificate of Service in connection with the above-referenced matter. Please file and return the clocked copies in the envelope provided.

I appreciate your assistance in this matter.

Sincerely,


Edward L. Grimsley

ELG/mmms
Enclosures

cc: Leo A. Dryer, Esq., Attorney for Plaintiff

dburjamineLC @ SC Courts. org. 6/14

STATE OF SOUTH CAROLINA
PLEAS

COUNTY OF RICHLAND

EDWIN M. SMITH, JR.,

Plaintiff,

vs.

DAVID A. FEDOR,

Defendant.

IN THE COURT OF COMMON

FIFTH JUDICIAL CIRCUIT

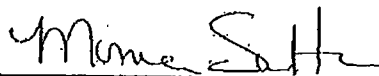
C/A # 2001-CP-40420

CERTIFICATE OF SERVICE

RICHLAND COUNTY
FILED
2014 AUG - 4
JEANETTE MCBRIDE
C.C.P. & S.

The undersigned hereby certifies that she caused a copy of the MOTION FOR RECONSIDERATION, filed in the above-captioned case, to be served, via United States Mail, on the party listed below this 4 day of August, 2014:

Leo A. Dryer, Esq.
DRYER LAW FIRM
Post Office Box 11567
Columbia, SC 29211
Attorney for Plaintiff



Monica M. Sutton
Paralegal
Grimsley Law Firm, LLC
Post Office Box 11682
Columbia, South Carolina 29211

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-40-4203

--) EDWIN M. SMITH, JR. APPELLANT,

v.

DAVID A. FEDOR, ... RESPONDENT.

NOTICE OF APPEAL

) Edwin M. Smith, Jr. appeals the order of the Honorable DeAndrea Gist Benjamin dated October 31, 2013 (a copy which is attached as Exhibit A). [This appeal is taken from the Order of the Honorable DeAndrea Gist Benjamin, dated July 22, 2014, which denied Appellant's motion to alter or amend the judgment (a copy of which is attached as Exhibit B). Appellant received written notice of entry of this order on July 28, 2014.]

August 21, 2014

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

RECEIVED

AUG 25 2014

SC Court of Appeals

Telephone: (864) 242-4727

Fax: (864) 232-4395

bhogan@gilreathlaw.com

jim@gilreathlaw.com

ATTORNEYS FOR APPELLANT

OTHER COUNSEL OF RECORD:

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

Leo A. Dryer, Jr.

DRYER LAW OFFICES

P.O. Box 11567

Columbia, SC 29211

Telephone: (803) 926-1235

pdryer@ss.rr.com

ATTORNEY FOR RESPONDENT

RECEIVED

AUG 25 2014

SC Court of Appeals

EXHIBIT A

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 01CP4004203R

Edwin M Jr Smith

David A Fedor

Edwards A G & Sons Incorporated

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Non-suitt);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____

Judge Code _____

Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 4 November 2013 to attorneys of record or to parties (when appearing pro se) as follows:

James R. Gilreath

Edward L. Grimsley

Leo A. Dryer Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

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AUG 25 2014

SC Court of Appeals

SCANNED

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
JENNIFER W. MORRIS
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 (Cl. 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

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AUG 25 2014

SC Court of Appeals

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), SCRCF 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.



DeAndrea Gist Benjamin
Presiding Judge

October 30, 2013
Columbia, South Carolina

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EXHIBIT B

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2001-CP-40-4203 **R**

Edwin M. Smith, Jr.

David A. Fedor

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: 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.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge W/BJudge Code 2161Date 7-22-14

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 24 day of July, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Edwin L. Grimsley

Leo A. Dryer

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Janette W. Bride

RECEIVED

JUL 28 2014

Gilreath Law Firm, P.A.

RECEIVED

AUG 25 2014

SC Court of Appeals

RECEIVED

AUG 27 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-40-4203

EDWIN M. SMITH, JR. APPELLANT,

v.

DAVID A. FEDOR, ... RESPONDENT.

PROOF OF SERVICE OF NOTICE OF APPEAL

This is to certify that I have this day served counsel for the Respondent in the foregoing matter with a copy of the foregoing **NOTICE OF APPEAL** by depositing same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows:

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

August 21, 2014

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)

RECEIVED

AUG 25 2014

SC Court of Appeals

P.O. Box 2147
Greenville, SC 29602
Telephone: (864) 242-4727
Fax: (864) 232-4395
bhogan@gilreathlaw.com
jim@gilreathlaw.com

ATTORNEYS FOR APPELLANT

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

RECEIVED
AUG 25 2014
SC Court of Appeals

RECEIVED

AUG 27 2015

SC Court of Appeals

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

August 24, 2015

William M. Hogan

William M. Hogan (S.C. Bar No. 65272)

James R. Gilreath (S.C. Bar No. 02133)

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

RECEIVED

The Honorable DeAndrea Gist Benjamin, Circuit Court Judge
AUG 27 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.

PROOF 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 **RECORD ON APPEAL** by depositing same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows to:

Katherine Carruth Goode, Esquire
229 South Congress Street
P.O. Box 1175
Winnsboro, South Carolina 29180

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

ATTORNEYS FOR APPELLANT

August 24, 2015
Greenville, South Carolina.