THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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SC Court of Appeals

The Honorable DeAndrea Gist Benjamin, Circuit Court Judge

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

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

vs.

DAVID FEDOR, ... RESPONDENT.

FINAL REPLY BRIEF OF APPELLANT

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Plaintiff-Appellant, Edwin N. Smith, Jr. ("Appellant"), respectfully submits this Reply Brief in opposition to the brief of Defendant-Respondent David Fedor ("Respondent").

I. THE "TWO ISSUE RULE" DOES NOT REQUIRE AFFIRMANCE OF THE LOWER COURT'S ORDER.

The Lower Court in its Order of October 31, 2013 divided its discussion into two parts, both of which Appellant has challenged in this appeal. The first part of the Lower Court Order addressed the enforceability of the parties' Confidential Settlement Agreement executed on September 17, 2002. (Order, October, 31, 2013, pp. 2-3) (R. pp. 4-5). Appellant specifically challenged the Lower Court's ruling on that issue in part I of his Motion for Reconsideration dated November 8, 2013. (Mot. For Recons., pp. 3-6) (R. pp. 77-80). That same issue has been raised in this appeal in Appellant's Initial Brief as argument I, A. (Initial Br. of Appellant, pp. 10-14).

After ruling the Confidential Settlement Agreement was not enforceable, the Lower Court then found in Part II of its Order that Respondent's payments exceeded the amount Respondent claimed he owed, thus declaring the Confession of Judgment satisfied. (Order, October, 31, 2013, pp. 3-4) (R. pp. 5-6). In Argument III of his Initial Brief, Appellant has explicitly challenged the Lower Court's finding that the Confession of Judgment had been satisfied. (Initial Br. of Appellant, pp. 26-28). Appellant succinctly stated in Argument III that Respondent owed $400,000, paid an initial $50,000 down payment plus $350,000 in installments for a total of $385,000.00. He thus owes $15,000 on the Confession of Judgment (Id. at p. 27). Respondent's insufficiency in payments is also detailed on page 2, pages 3-5 (in paragraphs 3, 13-18), and again on pages 21-22 of Appellant's Initial Brief. See, Herron v. Century BMW, 395 S.C. 461,

466, 719 S.E.2d 640, 643 (2011)("when an issue is not specifically set out in the statements of issues, the appellate court may nevertheless consider the issue if it is *reasonably clear* from an appellant's arguments.") (italics in original).

The insufficiency of Respondent's payments was also the central issue in the hearing in the Lower Court. (Hr'g Tr., pp 7:12 - 8:220) (R. p. 24, line 12 – p. 25, line 22). Appellant in this appeal has raised both the preliminary issue of the enforceability of the parties' Confidential Settlement Agreement and the penultimate issue on the sufficiency of Respondent's payments towards the Confession of Judgment.

II. ALL ISSUES RAISED IN APPELLANT'S INITIAL BRIEF WERE PROPERLY PRESERVED FOR APPEAL.

Respondent cannot head off a review by this Court of the merits of the case by claiming Appellant did not preserve the issues for appeal. Respondent contends Appellant's arguments in Argument I, B, parts 1, 2, 3 and 4 of his Initial Brief, which address the parol evidence rule, were not properly raised below. (Initial Br. of Resp't, p. 8). However, prior to the Lower Court's Order of October 31, 2013, Appellant argued in Part I of his post-hearing, pre-Order brief the application of the parol evidence rule to the Confidential Settlement Agreement and Confession of Judgment. (Mem. In Supp. of Entering Settlement Agreement into Evidence, pp. 1-3) (R. pp. 69-71). Arguments regarding the admissibility of the Confidential Settlement Agreement under the parol evidence rule were again presented in Appellant's motion for reconsideration dated November 8, 2013 in Argument II thereof. (Mot. for Recons., pp. 6-11) (R. pp. 80-85). The arguments in Argument I, Section B of Appellant's Initial Brief again address the exceptions to the parol evidence rule that would allow the admissibility of the Confidential Settlement Agreement. (Initial Br. of Appellant, pp. 14-22). The same

arguments in the Motion for Reconsideration are set forth in Appellant's Initial Brief nearly verbatim with the exception of the reference to the case of Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004), which was added as additional supporting authority for the previously raised collateral agreement exception to the parol evidence rule. (Initial Br. of Appellant, pp. 16-18). The mere fact that Appellant's Initial Brief cites an additional authority not included in the memorandum to the Lower Court does not transform the argument into a second, separate and distinct issue. See, Denton Cnty v. Huther, 43 S.W.3d 665, 667 (Tex. Ct. App. 2001). Further, Argument I, B, 4 of Appellant's Initial Brief includes as its first paragraph the same paragraph verbatim as in paragraph D of Argument II in Appellant's Motion for Reconsideration of November 8, 2013. (Initial Br. of Appellant, pp. 19-22; Mot. for Recons., pp. 10-11) (R. pp. 84-85). The material added to that paragraph in Appellant's Initial Brief consists primarily of references to the hearing transcript ordered for this appeal. The oral statements discussed therein relate to the parol evidence issue of ambiguities in the subject Confession of Judgment – a topic already raised below. (Initial Br. of Appellant, pp. 20-22). The only other additional material are the cites to two South Carolina cases supporting the same argument, which again does not transform the argument into a separate and distinct issue.

Section C of Argument I of Appellant's Initial Brief is simply an argument based on a logical reading of the subject Confession of Judgment. (Initial Br. of Appellant, p. 23). It responds to the Respondent's oral argument below that the Confession of Judgment should have stated $400,000 instead of $350,000. (Hr'g Tr. p. 14:18-25) (R. p. 31, lines 18-25). Appellant replied to Respondent's statement at oral argument by referencing the text of the Confidential Settlement Agreement that "[t]he amount of the

judgment shall be net of all payments made to date." (Hr'g Tr. p. 17:17-19, quoting Confidential Settlement Agreement, ¶ 3) (R. p. 34, lines 17-19). Section C explains why it was logical to put $350,000 in the Confession of Judgment instead of $400,000. This is not a new issue.

As stated in Argument I above, Appellant's statements in Argument III concerning Respondent's insufficiency of payments were reiterations of the positions taken before the Lower Court. Appellant added to his Initial Brief the citations concerning the scope of review of the appellate court on the subject issues. Those case citations were not included in the Lower Court briefs since they would have been irrelevant to the Lower Court. Those arguments pertain only to actions available to an appellate court.

The arguments regarding enforceability of the Confidential Settlement Agreement under Rule 43(k), SCRCP were raised before the Lower Court in Appellant's Motion for Reconsideration of November 8, 2013, in Argument I. (Mot. for Recons., pp. 3-6) (R. pp. 77-80). The Motion for Reconsideration was Appellant's first opportunity to address the Rule 43(k) issue with the Lower Court. Rule 43(k) was not raised in Respondent's Rule 60(b) Motion. (Def.'s 60(b) Mot.) (R. p. 16). Respondent did not raise the issue of Rule 43(k) at oral argument, nor did the Lower Court raise the issue to either parties at the August 26, 2013 hearing. The first time Appellant saw or heard anything about the Rule 43(k) issue in this case was in the Lower Court's Order filed October 31, 2013.[1]

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[1] Respondent submitted a post-hearing, pre-Order brief to the Lower Court but Appellant's counsel did not receive a copy, and Respondent did not file a copy with the Clerk of Court. (See Mot. for Recons., p. 12) (R. p. 86). Appellant's counsel has not seen that brief as of this date and has no indication from any source that Respondent's memorandum addressed Rule 43(k).

Since the issue of Rule 43(k) was first presented in the Lower Court's Order, Appellant's obligation was to raise the matter in a post-hearing motion which Appellant did on November 8, 2013. See Godfrey v. Heller, 311 S.C. 516, 520, 429 S.E.2d 859, 862 (Ct. App. 1993)(noting appellant must raise by a Rule 59(e) motion to alter or amend the judgment an issue that first appears in the trial court's order) (citing and quoting Pelican Bldg. Ctrs v. Dutton, 311 S.C. 56, 60-61, 427 S.E.2d 673, 675-76 (1993)("where an appellant learns for the first time when the appellant receives the Order that respondent would be granted certain relief, appellant must move pursuant to Rule 59(e), SCRCP, to alter or amend judgment to 'preserve the record for appeal' ")).

III. ALL DOCUMENTS RECITED AND PRESENTED IN THIS APPEAL WERE PROPERLY PRESENTED TO THE LOWER COURT AND RESPONDENT.

This Court has previously ruled that the Confidential Settlement Agreement presented to the Lower Court and Respondent is properly before this Court for review. (See Order, Court of Appeals, dated April 2, 2015). Appellant's arguments in his Return to Respondent's Motion Rule 210(c) supporting this Court's review of the parties' Confidential Settlement Agreement are also applicable to the affidavit of James R. Gilreath, Esquire, and other documents submitted to the Lower Court and included in the Record on Appeal (*e.g.*, Appellant's Mem. In Opp'n to Def.'s Mot. Vacate Judg) (R. pp. 46-59).[2]

In his Initial Brief, Respondent claimed Appellant laid no evidentiary foundation for consideration of the Confidential Settlement Agreement. (Initial Br. of Resp't, pp. 10-

[2] The Lower Court did not reject consideration of the Gilreath affidavit or Appellant's Memorandum In Opposition To Defendant's Motion to Vacate Judgment.

11). The Gilreath affidavit, though, authenticated the copy of the Confidential Settlement Agreement submitted to the Lower Court, stating:

> ... The terms of the settlement were reduced to a settlement agreement prepared by (Respondent's attorney) 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.

Affid. of James R. Gilreath, ¶ 3 (R. p. 57)

Six to seven weeks before the Lower Court hearing, Appellant submitted to the Lower Court and Respondent's counsel the Gilreath affidavit in response to Respondent's Rule 60(b) motion. (Edward Grimsley letter to Hon. Robert Hood (July 3, 2013)) (R.pp. 46-59). The presiding Lower Court judge received the Gilreath affidavit for review. (Hr'g Tr. 9:8-12 and 10:23 - 11:4) (R. p. 26, lines 8-12 and R. p. 27, line 23 – p. 28, line 4). Respondent had ample time to challenge the authenticity of the Confidential Settlement Agreement by counter affidavit, or by live testimony if he chose. He did not (and could not). See Rule 6(d), SCRCP (opposing affidavit due no later than two days before the hearing).

Submission of affidavits is a proper method of supporting and contesting a motion for relief from judgment under Rule 60(b). See Bowers v. Bowers, 304 S.C. 65, 67-68, 403 S.E.2d 127, 129 (Ct. App. 1991) (stating evidence in a Rule 60(b) motion is usually provided through affidavits).

Respondent made no objection to the Court's consideration of the Gilreath affidavit on the grounds of authenticity or hearsay. Respondent's only objection to the Gilreath affidavit was to the Court's consideration of the Confidential Settlement Agreement, which objection was based apparently on the Confidential Settlement

Agreement being parol evidence. (Hr'g Tr. pp. 9:20 - 10:3) (R. p. 26, line 20 – p. 27, line 3).[3]

With all the documents having been presented to the Lower Court and to Respondent in the proceedings below, citation to and discussion of the documents submitted to the Lower Court are proper. See Woodson v. DLI Properties, LLC, 406 S.C. 517, 525-26, 753 S.E.2d 428, 432-33 (2014)(stating that petitioner provided proper appellant record where memoranda, affidavits and other evidence presented to the lower court were in the record on appeal even though petitioner provided no transcript of the lower court proceedings).[4]

IV. THE LOWER COURT COMMITTED AN ERROR OF LAW AND AN ABUSE OF DISCRETION IN FINDING THE CONFESSION OF JUDGMENT SATISFIED WHEN PROPER CONSIDERATION IS GIVEN TO THE RELATED CONFIDENTIAL SETTLEMENT AGREEMENT.

When consideration is given to the parties' Confidential Settlement Agreement, as it properly should be, the only possible conclusion is that Respondent has not satisfied the Confession of Judgment and still owes Appellant $15,000. In arguing against review of the Confidential Settlement Agreement, Respondent in Argument IV of his Initial Brief misapprehends Appellant's argument about the application of the parol evidence rule to this case. (Br. of Resp't, p. 13). Appellant contends the parol evidence rule, which generally bars admission of extrinsic evidence in consideration of written documents, is not applicable to a Confession of Judgment. Therefore, the Confidential Settlement

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[3] Respondent's only objection at the hearing based on hearsay pertained to statements regarding prior negotiations contained in the Gilreath affidavit. However, the issue of prior negotiations is not before this Court, nor was it a part of the Lower Court Order. (Hr'g Tr. pp. 8:24 - 9:7) (R. p. 25, line 24 – p. 26, line 7).

[4] Unlike Woodson v. DLI Properties, LLC, *supra*, Appellant has provided the Lower Court transcript in addition to the memoranda, affidavits and motions presented to the Lower Court and Respondent's counsel.

Agreement is relevant to an understanding of the Confession of Judgment. Alternatively, even if the parol evidence rule were applicable, its various exceptions would allow for consideration of the Confidential Settlement Agreement along with the Confession of Judgment.

V. LOWER COURT COMMITTED AN ERROR OF LAW AND AN ABUSE OF DISCRETION IN REFUSING TO CONSIDER AND ENFORCE THE CONFIDENTIAL SETTLEMENT AGREEMENT.

In addressing which year's version of Rule 43(k) applies to the parties' Confidential Settlement Agreement of 2002, Respondent references the initial presumption that statutory enactments are to be considered prospective rather than retroactive. (Resp't Br. at pp. 13-16, citing on p. 14 Hercules Inc. v. South Carolina Tax Comm'n, 274 S.C. 137, 262 S.E.2d 45 (1980) and Graham v. Dorchester County Sch. Dist., 339 S.C. 121, 528 S.E.2d 80 (Ct. App. 2000)). Respondent, however, omits a critical exception to the general rule on retroactivity as stated in both cases, which provides: "A principal exception is remedial or procedural statutes are generally held to operate retrospectively." Hercules, Inc. v. South Carolina Tax Comm'n, 274 S.C. at 143, 262 S.E.2d at 48; also Graham v. Dorchester County Sch. Dist., 339 S.C.at 124, 528 S.C.2d at 82. Changes to the "rules of civil procedure apply to all further proceedings in pending actions." Id.; see also Allen v. S.C. Public Employee Ben. Auth., 411 S.C. 611, 622, 769 S.E.2d 666, 672 (2015) (holding amendments to administrative law court rules of procedure incorporating South Carolina Rules of Civil Procedure "will be accorded a retroactive application in the sense that it will be applied to pending actions and proceedings") (quoting State v. Davis, 336 S.C. 348, 520 S.E.2d 614 (1999)).

Respondent cites to the unreported case of Price v. Investors Title Ins. Co., Opinion No. 2011-UP-359 (June 30, 2011). (Initial Br. of Resp't, p. 15). As an unpublished decision, this opinion has no precedential effect. Further, it is significantly distinguishable. The court in Price did not address the exception to the prospective application of statutory changes that allows for retroactive application of changes in the Rules of Civil Procedure recognized in Hercules and Graham and most recently in Allen, *supra*. In addition, the plaintiff in Price specifically rejected the settlement agreement before it was ever carried into effect. In contrast, the parties in this case operated under the Confidential Settlement Agreement for ten years. (Gilreath Aff. ¶¶ 3 - 4; Hr'g Tr. p. 7:12-18) (R. pp. 57-58 ; R. p. 24, lines 12-18). Any claim that the application of the current Rule 43(k) would work an injustice or is unfeasible is meritless given the parties' ten-year history with the Confidential Settlement Agreement. As such, no conditions exist that would prevent the application of the current version of Rule 43(k) to this case.

Respondent also argues that the cases of Weinges v. Cash, 15 S.C. 44 (1881) and Wise v. Hardin, 5 S.C. 325 (1874) are not applicable because they deal with the relationship between a third party creditor and the Confession of Judgment, whereas this case involves the two parties to the Confession of Judgment. (Initial Br. of Resp't, pp. 16-17). The relevance of the Confession of Judgment to third parties is exactly the point in this case. A Confession of Judgment is a document designed to provide some specified amount of notice to a third party. It is not designed to be the exclusive document between the two parties in the creditor-debtor relationship. That is why the more detailed Confidential Settlement Agreement is relevant to this action.

CONCLUSION

For all the reasons stated above, this Court should reverse the Lower Court's grant of Respondent's Motion for Relief from the Confession of Judgment and enforce the Confession of Judgment filed for the remaining $15,000 owed by Respondent to Appellant.

Respectfully submitted,

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Dated: October 13, 2015
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CERTIFICATE OF COUNSEL

The undersigned certified that the Final Brief of Appellant and the Final Reply Brief of Appellant comply with Rule 211(b), SCACR.

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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 **FINAL BRIEF OF APPELLANT, FINAL REPLY BRIEF OF APPELANT, AND THE AMENDED RECORD ON APPEAL** by depositing same in the United States Mail with adequate postage affixed thereon to ensure delivery, addressed as follows to:

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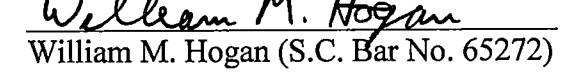

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