THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
DeAndrea Gist Benjamin, Circuit Court Judge

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

Edwin M. Smith, Jr.,

Appellant,

v.

David Fedor,

Respondent

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Pursuant to Rule 208(b)(2) of the South Carolina Appellate Court Rules, respondent provides this alternative statement of the issues on appeal:

1. Does the "two issue rule" require affirmance of the lower court's order?

2. Are the arguments and authorities cited in support of appellant's first and third issues and arguments, presented for the first time in the motion for reconsideration or on appeal, preserved for appellate review?

3. Should this court consider factual recitals not supported by evidence and documents not properly admitted into evidence?

4. Did the lower court appropriately grant the motion for relief from the confession of judgment, where the undisputed evidence established that respondent had paid to appellant a sum in excess of the amount confessed?

5. Did the lower court appropriately decline to consider a purported "Confidential Settlement Agreement"?

6. Did the lower court appropriately deny appellant's motion for reconsideration, both procedurally and substantively, but if the court erred, was appellant prejudiced thereby?

7. Is the relief requested in appellant's third issue and argument inappropriate?

STATEMENT OF THE CASE

Appellant, Edwin M. Smith, Jr., brought this action against respondent, David Fedor, in 2001 in the Richland County Court of Common Pleas. Respondent executed a confession of judgment, in the amount of $350,000, less any payments received by appellant from respondent through the date of filing of the confession of judgment. R.

pp. 11-12. The action was dismissed with prejudice by order of dismissal dated October 29, 2002, filed November 4, 2002. R. p. 10.

On February 27, 2013, appellant filed the confession of judgment in the Richland County Clerk's Office, together with a document titled "Partial Satisfaction of Judgment" which asserted that respondent had paid $335,000 toward the confession of judgment, leaving an unpaid balance of $15,000. R. pp. 13-14. As of that date, however, it is undisputed that respondent had in fact paid to appellant $385,000, a sum in excess of the confessed amount of $350,000. R. pp. 4, 25, 38, 62.

On April 23, 2013, respondent filed a motion pursuant to Rule 60(b)(5) of the South Carolina Rules of Civil Procedure, seeking relief from the confession of judgment on the grounds that the judgment had been satisfied. R. pp. 15-17. Appellant opposed this motion. App. to R. p. 2.

A hearing was held August 26, 2013, before Judge DeAndrea Gist Benjamin. At the hearing, respondent submitted an affidavit which recited he had paid appellant the sum of $385,000. R. pp. 37, 62. Respondent's affidavit was received without objection. R. pp. 37-38, 62-64. Indeed, counsel for appellant repeatedly conceded that respondent had paid appellant $385,000. R. pp. 25, 38. No other evidence was presented by either party.

Throughout appellant's principal brief (in an "Introduction," in the Statement of the Case, and in Argument), appellant makes assertions about facts not in evidence that this Court should disregard. These assertions pertain to a purported "Confidential Settlement Agreement." The purported agreement is a handwritten document that was not admitted into evidence and was not considered by the lower court. Indeed,

respondent objected to the court's consideration of this document on multiple grounds: (1) it was not in the record, (2) it was full of scratch-overs and strike-throughs, and (3) it was not clear on its face. R. p. 26, lines 20-24; p. 27, lines 19-21; p. 32, lines 13-17; p. 35, lines 8-10. Respondent further objected and disputed opposing counsel's assertions as to the origin of the document. R. p. 33, lines 11-13; p. 35, lines 10-13.

No witness testified concerning the purported confidential settlement agreement. It was not authenticated and was not admitted into evidence. The factual recitals concerning this document throughout appellant's brief are not supported by any evidence, and those statements should be disregarded in their entirety.

It appears that an affidavit of attorney James Gilreath[1] was submitted by appellant prior to the hearing. *See* R. p. 26, lines 8-11; p. 27, line 24 – p. 28, line 4. However, the Gilreath affidavit was not offered or admitted into evidence, and it is not in the case file maintained by the office of the Richland County Clerk of Court or in the possession of the lower court's evidence custodian. R. p. 64 (Receipt for Exhibits of Richland County Clerk of Court in case no. 01-CP-40-4203, dated August 26, 2013). Had the Gilreath affidavit been offered into evidence, respondent's former counsel would have made the same objections as those he asserted with respect to matters stated by opposing counsel during the hearing: (1) an objection to representations about and consideration of the purported confidential settlement agreement, (2) an objection to and dispute as to who prepared the purported agreement, (3) an objection to comments about and consideration of negotiations that may have occurred between the parties, and (4) an objection to

[1] Although attorney Gilreath was not listed as counsel of record for appellant in the proceedings with respect to the Rule 60(b)(5) motion in the court below, he is now acting as counsel for appellant in this appeal.

hearsay. R. p. 26, lines 4-6, 20-24; p. 27, lines 19-21; p. 32, lines 13-17; p. 35, lines 8-13. Because the affidavit was not offered as an exhibit, these and any other objections were not made. The Gilreath affidavit is not in evidence, and it should not be considered by this Court.

In addition to designating for inclusion in the record on appeal the purported confidential settlement agreement and the Gilreath affidavit, appellant designated for inclusion in the record on appeal two other documents that are not in the court file: Plaintiff's "Memorandum in Opposition to Defendant's Motion to Vacate Judgment" and Plaintiff's "Memorandum in Support of Entering Settlement Agreement into Evidence." Respondent has designated a document entitled "Defendant/Movant Memorandum," which was submitted by respondent's former counsel to Judge Benjamin by letter dated September 23, 2013. R. pp. 65-67. This document is also not in the court file.[2]

On October 30, 2013, Judge Benjamin signed an order granting respondent's motion to be relieved from the confession of judgment. R. pp. 3-6. The court declined to consider the purported confidential settlement agreement. R. pp. 4-5. The court further held that the confession of judgment, "in the principal amount of $350,000.00, less ***any*** payments received by [appellant] from [respondent] through the date of filing hereof," had been satisfied by respondent's payment to appellant of more than $350,000. R. p. 6

[2] Upon reviewing the court file and not finding the documents referenced above, *supra* pp. 3-4, respondent's appellate counsel sought the assistance of the staff of the Richland County Clerk of Court in locating these documents elsewhere in the clerk's office, in the evidence room, or in the judge's chambers. An employee of the Clerk of Court attempted to locate the documents that are not contained in the court file and informed counsel that the documents could not be located in the clerk's office and are not in the possession of the evidence custodian or Judge Benjamin and her staff.

(emphasis in court's order). Finding that the judgment was satisfied, the court held respondent was entitled to be relieved from the confession of judgment. *Id.*

Appellant filed a motion for reconsideration of the court's order. R. pp. 75-87. None of the arguments and none of the authorities cited in that motion had previously been argued in the lower court – they were not cited or argued in either of the earlier memoranda and they were not cited or argued at the hearing held August 26, 2013. On July 22, 2014, Judge Benjamin signed a Form 4 order denying the motion for reconsideration because the court did not receive a copy of the motion within ten days of the motion being filed. R. p. 8. Thereafter, appellant filed a second motion for reconsideration, arguing the original motion was timely served and filed; resubmitted the original motion for reconsideration; and asked the court to rule on the merits of the original motion. R. pp. 91-95. Appellant filed this appeal before the court ruled on the second and resubmitted motion. By Form 4 order dated September 5, 2014, the court again denied appellant's motion for reconsideration. R. p. 9.

STANDARD OF REVIEW

Appellant correctly recites the appropriate standard – abuse of discretion – for appellate review of Judge Benjamin's order granting relief from the confession of judgment. *See* Final Brief of Appellant, pp. 7-8. However, appellant fails to mention other considerations that are relevant to appellate review of the lower court's order.

On appeal, the appellant has the burden of convincing the reviewing court that the lower court was in error. *Conran v. Joe Jenkins Realty, Inc.*, 263 S.C. 332, 334, 210 S.E.2d 309, 310 (1974); *South Carolina Dep't of Soc. Servs. v. Williams*, 412 S.C. 458, 468, 772 S.E.2d 279, 284 (Ct. App. 2015). The lower court's order comes to the

appellate court with a presumption of correctness, and the appellant bears the burden of demonstrating reversible error. *See Weaver v. Recreation Dist.*, 328 S.C. 83, 88, 492 S.E.2d 79, 82 (1997); *McCall v. IKON*, 380 S.C. 649, 659-60, 670 S.E.2d 695, 701 (Ct. App. 2008); *Dicks & Gillam, Inc. v. Cleland*, 295 S.C. 124, 367 S.E.2d 430 (Ct. App. 1988). To do so, the appellant must place in the record sufficient testimony to serve as the foundation for his argument. *State v. Attardo*, 263 S.C. 546, 550 n.1, 211 S.E.2d 868, 869 n.1 (1975); *Conran*, 263 S.C. at 334, 210, S.E.2d at 310.

Under the "two issue rule," where a decision is based on more than one ground, the appellate court must affirm unless the appellant appeals all grounds, because the unappealed ground is the law of the case. *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012); *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903-04 (2010); *Mason v. Mason*, 412 S.C. 28, 48, 770 S.E.2d 405, 415 (Ct. App. 2015).

An issue or argument raised for the first time on appeal is not preserved for appellate review. *See Stevens & Wilkinson of South Carolina, Inc., v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014); *CoastalStates Bank v. Hanover Homes of South Carolina, LLC*, 408 S.C. 510, 518 n.3, 759 S.E.2d 152, 157 n.3 (Ct. App. 2014); *Busillo v. City of North Charleston*, 404 S.C. 604, 607, 745 S.E.2d 142, 144 (Ct. App. 2013). Moreover, a party cannot use a Rule 59(e) motion to advance an issue or argument the party could have raised to the lower court prior to judgment, but did not. *See Stevens & Wilkinson*, 409 S.C. at 567, 762 S.E.2d at 695. An argument first raised in the Rule 59(e) motion is not preserved. *Smallwood v. Smallwood*, 392 S.C. 574, 583, 709

S.E.2d 543, 547-48 (Ct. App. 2011); *McClurg v. Deaton*, 380 S.C. 563, 579, 671 S.E.2d 87, 96 (Ct. App. 2008), *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (2011).

A party may not present one theory in the lower court and a different theory on appeal. *Kennedy v. South Carolina Retirement Sys.*, 349 S.C. 531, 533, 564 S.E.2d 322, 323 (2001); *Butler v. Town of Edgefield*, 328 S.C. 238, 248, 493 S.E.2d 838, 843 (1997); *Gurganious v. City of Beaufort*, 317 S.C. 481, 488, 454 S.E.2d 912, 916 (Ct. App. 1995).

The appellate court may affirm the judgment of the lower court on any ground appearing in the record on appeal. *See* Rule 220(c), SCACR. A party who prevailed in the court below may argue additional reasons for affirmance that appear in the record, even if not advanced in the court below. *See* Rule 208(b)(2), SCACR; *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).

ARGUMENT

I. THE "TWO ISSUE RULE" REQUIRES AFFIRMANCE OF THE LOWER COURT'S ORDER.

The issue before the lower court, based on the Rule 60(b)(5) motion filed by respondent, was the question whether respondent was entitled to relief from a confession of judgment because the judgment had been satisfied. This case was not an action to enforce a settlement agreement. No pleading filed by appellant placed the purported settlement agreement before the court. When appellant sought to have the court construe and enforce a purported confidential settlement agreement, respondent objected. The court considered two questions: whether it could consider and enforce the purported agreement (R. pp. 4-5, Discussion, Part I) and whether the confession of judgment had been satisfied (R. pp. 5-6, Discussion, Part II).

On appeal, the issues framed and argued by appellant all address the finding of the court with respect to the purported agreement. Appellant has not stated as an issue on appeal any challenge to the ruling of the court in Part II of the order's discussion – the determination that the confession of judgment had been satisfied. This unappealed ruling is the law of the case, and the court's order must be affirmed. *See Atlantic Coast Builders*, 398 S.C. at 328, 730 S.E.2d at 284; *Jones*, 387 S.C. at 346, 692 S.E.2d at 903-04; *Mason*, 412 S.C. at 48, 770 S.E.2d at 415.

II. THE ARGUMENTS AND AUTHORITIES CITED IN SUPPORT OF APPELLANT'S FIRST AND THIRD ISSUES AND ARGUMENTS, PRESENTED FOR THE FIRST TIME IN THE MOTION FOR RECONSIDERATION OR ON APPEAL, ARE NOT PRESERVED FOR APPELLATE REVIEW.

The arguments in appellant's brief with respect to appellant's first issue on appeal were either first raised in the motion for reconsideration or in appellant's opening brief. The brief's Argument I, A, is essentially the argument made in the motion for reconsideration as Argument I. *See* Final Brief of Appellant, pp. 10-14; R. pp. 77-80. The brief's Argument I, B, parts 1, 2, 3, and 4, were first made in the motion for reconsideration as Argument II, parts A, B, C, and D. *See* Final Brief of Appellant, pp. 14-20; R. pp. 80-85. A portion of the brief's Argument I, B, 2, is entirely new. *See* Final Brief of Appellant, p. 17. All but the first paragraph of the brief's Argument I, B, 4, is entirely new, raising an issue of ambiguity and new argument and authorities not raised in the court below. *See* Final Brief of Appellant, pp. 20-23. The logical consistency argument of the brief's Argument I, C, is made for the first time on appeal. *See* Final Brief of Appellant, pp. 23-24. The third argument and the authorities cited therein are also raised for the first time on appeal. *See* Final Brief of Appellant, pp. 27-28. These

arguments are not preserved for appellate review, because they were either not made or not timely made in the court below.

Appellant's arguments first made in his motion for reconsideration pursuant to Rule 59(e) are not preserved for appellate review. *See Stevens & Wilkinson*, 409 S.C. at 567, 762 S.E.2d at 695; *Smallwood*, 392 S.C. at 583, 709 S.E.2d at 547-48; *McClurg*, 380 S.C. at 579, 671 S.E.2d at 96. Appellant's new arguments, made for the first time in his appellate brief, are also not preserved. *See Stevens & Wilkinson*, 409 S.C. at 567, 762 S.E.2d at 695; *CoastalStates Bank*, 408 S.C. at 518 n.3, 759 S.E.2d at 157 n.3; *Busillo*, 404 S.C. at 607, 745 S.E.2d at 144.

The theory presented in the court below, prior to the motion for reconsideration, was a different theory than that argued in the motion for reconsideration and now presented on appeal with respect to appellant's first issue. In his "Memorandum in Support of Entering Settlement Agreement into Evidence," submitted following the August 26, 2013, appellant presented entirely different theories and arguments for having the court consider the purported confidential settlement agreement than those now asserted on appeal. R. pp. 69-73. After the court ruled against him, he abandoned those arguments and presented new theories, arguments, and authorities in his motion for reconsideration. R. pp. 75-87. The arguments made in the memorandum filed prior to the court's ruling are not raised in this appeal, and the authorities cited in that memorandum are not cited in appellant's brief. Rather, in the motion for reconsideration and on appeal, appellant abandoned those arguments and authorities and presented entirely new theories, arguments, and authorities. This Court should not address the arguments now asserted with respect to appellant's first and third issues, because they are unpreserved.

"'Preserving issues for appellate review is a fundamental component of appellate practice.'" *Kennedy*, 349 S.C. at 533, 564 S.E.2d at 323, *quoting* Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina*, at 65 (1999). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the Court with a platform for meaningful appellate review." *Stevens & Wilkinson*, 409 S.C. at 567, 762 S.E.2d at 695. In this case, appellant has not complied with the rules of preservation, and this Court should not consider any of the arguments and authorities contained in argument of his first and third issues on appeal.

III. THIS COURT SHOULD NOT CONSIDER FACTUAL RECITALS NOT SUPPORTED BY EVIDENCE AND DOCUMENTS NOT PROPERLY ADMITTED INTO EVIDENCE.

The factual recitals and arguments made by appellant throughout his brief are wholly unsupported by any evidentiary record. No testimony was taken at the hearing of August 26, 2013. The affidavit of attorney James Gilreath was not admitted into evidence. The purported confidential settlement agreement was not admitted into evidence. Appellant did not call any witness to lay a foundation for the admission of the purported agreement.

Respondent's trial counsel made numerous specific objections to the factual assertions made by opposing counsel and to any consideration of the agreement. R. p. 26, lines 4-6, 20-24; p. 27, lines 19-21; p. 32, lines 13-17; p. 35, lines 8-13. Had ***any*** evidentiary support been introduced by counsel for appellant, respondent's trial counsel would have had an opportunity to cross-examine appellant's witnesses concerning the making of the alleged agreement, the identity of its drafter, the irregularities contained in the document itself, and the events that may have transpired between the making of the

alleged agreement on September 17, 2002, and the execution of the confession of judgment by respondent on September 26, 2002. No evidentiary foundation was laid for admission of the document. It was not authenticated in any way, as required by the South Carolina Rules of Evidence and case law. *See* Rule 901(a), SCRE (authentication requirement); *see also Clark v. Cantrell*, 339 S.C. 369, 386, 529 S.E.2d 528, 536 (2000); *State v. Rich*, 293 S.C. 172, 173-74, 359 S.E.2d 281, 281-82 (1987); *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015). To the extent that the Gilreath affidavit might be argued to authenticate the document, that affidavit also was not offered into evidence, and respondent's trial counsel had no opportunity to object to its admission. Under these circumstances, this Court should not consider either the purported agreement or the affidavit, and it should not consider the factual recitals throughout appellant's brief that are based on those documents.

IV. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE MOTION FOR RELIEF FROM THE CONFESSION OF JUDGMENT, WHERE THE UNDISPUTED EVIDENCE ESTABLISHED THAT RESPONDENT HAD PAID APPELLANT A SUM IN EXCESS OF THE AMOUNT CONFESSED.

As noted above, the court's decision to grant relief from judgment on the basis that the judgment has been satisfied is reviewed under an abuse of discretion standard. *See Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 47, 590 S.E.2d 502, 504 (Ct. App. 2003).

The confession of judgment states, in relevant part:

> 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.

R. p. 12, ¶ 7 (emphasis added). The evidence presented at the hearing August 26, 2013, established that respondent has paid to appellant $385,000, an amount in excess of the confessed amount of $350,000. R. p. 62 [Plantiff's Exhibit 1]. Indeed, appellant concedes respondent has paid $385,000 to appellant. R. pp. 25, 38. The confession of judgment is clear and unambiguous on its face. The amount of the judgment is plainly stated as $350,000. That amount has been paid. The judgment is satisfied. The lower court did not abuse its discretion in finding the judgment is satisfied and in granting relief from the confession of judgment. R. p. 6.

In arguments that have been abandoned (Memorandum in Support of Entering Settlement Agreement into Evidence) or that were not timely made and are therefore not preserved (Motion for Reconsideration), *see* R. pp. 69-70, 80-85, appellant argues that the parol evidence rule allows for modification of the clear, plain, and unambiguous language of the confession of judgment. The parol evidence rule is applicable in the area of ***contract*** construction. It is not a principal applicable to construction of ***judgments***. A confession of judgment is not a contract. Rather, it is the legal equivalent of a judgment entered by a court. As the court noted in its order,

> "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).

R. pp. 5-6.

The parol evidence rule does not provide an avenue for modification of a court's judgment, and it cannot be invoked to modify the plain language of the confession of

judgment. Indeed, although appellant invoked the parol evidence rule in the court below and in his appellate brief, he specifically acknowledges it ***does not apply to a confession of judgment***: "The parol evidence rule is one of substantive contract law . . . . [T]he parol evidence rule ***has no application to the unilateral Confession of Judgment.***" *See* Final Brief of Appellant, p. 15 (emphasis added). By appellant's own admission, parol evidence simply cannot be considered to modify the terms of the confession of judgment. This Court should affirm the court's determination that the judgment has been satisfied and that respondent was entitled to relief from the confession of judgment.

V. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO CONSIDER OR ENFORCE THE PURPORTED CONFIDENTIAL SETTLEMENT AGREEMENT.

The lower court properly held that it could not consider the purported agreement in determining if the confession of judgment had been satisfied and further properly held the agreement was not binding on the court. The court premised its decision with respect to the purported agreement on its application of Rule 43(k) of the South Carolina Rules of Civil Procedure, as in effect when the parties entered into the purported agreement in 2002. The court's analysis of the applicability of Rule 43(k) was correct. Moreover, the court's decision is also supported by additional sustaining grounds.

1. Rule 43(k), SCRCP.

When the agreement was allegedly reached in 2002, Rule 43(k) provided, in relevant part:

> 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.

See Rule 43(k) (2002). This rule applies to settlement agreements. *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 494-95, 458 S.E.2d 533, 534-35 (1995). As the court's order found, the parties acknowledge that the purported confidential settlement agreement was never entered into the record. R. p. 5. Under the language of former Rule 43(k), the purported agreement is not binding on the court. *See Buckley v. Shealy*, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006); *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 638, 627 S.E.2d 724, 726 (2006).

In an argument first made in the motion for reconsideration, appellant contends a 2009 amendment to Rule 43(k) should be applied retrospectively. The court correctly found this amendment applies prospectively. "In the construction of statutes, there is a presumption that statutory enactments are to be considered prospective rather than retroactive in their operation unless there is a specific provision or clear legislative intent to the contrary." *Hercules Inc. v. South Carolina Tax Comm'n*, 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980). This presumption of prospective application applies with equal force to new rules of court. *See Graham v. Dorchester Coounty Sch. Dist.*, 339 S.C. 121, 124, 528 S.E.2d 80, 81-82 (Ct. App. 2000). The court correctly found the amendment to Rule 43(k) in 2009 did not apply retroactively to an agreement allegedly entered into in 2002.

Appellant contends *Graham* dictates that Rule 43(k) be applied retroactively to all cases pending before the court "unless to do so 'would not be feasible or would work injustice.'" *See* Final Brief of Appellant, pp. 12-13. This argument, first made in the motion for reconsideration, is not sound, for several reasons. First, *Graham* was addressing a change in a different rule, one with a clearly procedural purpose. It was not

addressing the question whether a settlement agreement is binding on the court. Second, the passage in *Graham* quoted by appellant addressed the applicability of rule changes to actions pending when the change was adopted or brought thereafter. This action was brought in 2001, the purported settlement was reached in 2002, and the action was dismissed in 2002, long before the adoption of the 2009 amendment to Rule 43(k).

Third, and most importantly, retroactive application of the change in Rule 43(k) is not feasible and would work serious injustice, not only in this case but in countless others. Retroactive application of Rule 43(k) would have the effect of reviving litigation long before ended and would upend established results. An agreement in existence prior to the effective date of the rule change in 2009, formerly deemed not binding on the court, would suddenly regain vitality and undo the finality that existed in cases concluded prior to the amendment in 2009. Such a result would be unfeasible and would work injustice in cases long ago resolved and concluded.

An unpublished decision of the Court of Appeals from 2011, while having no precedential effect, is instructive. In *Price v. Investors Title Ins. Co.*, Opinion No. 2011-UP-359 (June 30, 2011), a panel of this Court applied the earlier version of Rule 43(k) to a mediated settlement agreement reached in 2008, prior to the 2009 amendment. The Court noted the 2009 amendment to Rule 43(k) but construed the 2008 agreement under the former version of the rule. Acknowledging the discussions in *Hercules* and *Graham*, cited above, *see Price*, 2011 WL 11735003, at p. 2, n.2, the Court did not apply the amendment retroactively. Instead, the Court construed the 2008 agreement under the version of the rule in effect on the date of the agreement. Similarly, in this case, the

lower court correctly applied the version of Rule 43(k) in effect in 2002 when the purported agreement was made and the case was dismissed.

Appellant further argues, in an argument first made in the motion for reconsideration, that a footnote in the *Ashfort* decision of 1995 yields a different construction of the language of Rule 43(k) in effect in 2002. *See* Final Brief of Appellant, p. 13; *see Ashfort*, 318 S.C. at 494 n.1, 458 S.E.2d at 534 n.1. Appellant's argument is both misleading and unfounded. Appellant claims, based on the *Ashfort* footnote, that in 2002 there existed an exception to the applicability of Rule 43(k) for an agreement that is admitted or has been carried into effect. However, the Supreme Court has squarely rejected the premise of appellant's argument, holding that the statement in the footnote in *Ashfort* was dictum. *See Farnsworth*, 367 S.C. at 637-38, 627 S.E.2d at 726. The Supreme Court disavowed this dictum as being inconsistent with the language of Rule 43(k). *Id.* The so-called exception, noted in dictum, simply did not exist, as *Farnsworth* later made clear. However, if such exception had existed, it would be inapplicable here, where the alleged agreement is in dispute and has not been established by competent evidence. *See* Argument III, *supra* at 10-11.

2. Sufficiency of Confession of Judgment.

Appellant challenges the sufficiency of the confession of judgment on the basis of a decision from 1881, a decision which appellant cites out of context. *See* Final Brief of Appellant, pp. 15-16. This argument was made for the first time in the motion for reconsideration and is unpreserved. However, it also is unfounded.

The case on which appellant relies, *Weinges v. Cash*, 15 S.C. 44 (1881), addressed the sufficiency of a confession of judgment to put a ***third party*** on notice of the

facts from which the confession arose, so that the third-party creditor could investigate and determine if the confession was entered into by fraud and in an effort to place the claim of the person to whom the confessed amount was owed ahead of the claim of the third-party creditor. *See Weinges*, 15 S.C. at 61-66. The *Weinges* decision had nothing to do with whether the confession was enforceable as between the confessor and the person to whom the judgment amount was owed. Indeed, the Supreme Court noted that the circuit court concluded the judgment in *Weinges* was ***good*** between the confessor and the person to whom the judgment was owed. *See id.*, 15 S.C. at 57.

Significantly, *Weinges* and another decision make clear that the amount confessed does not have to be the equivalent of the amount of the indebtedness or the amount of the consideration for the confession, in order for the confession to be valid. *See Weinges*, 15 S.C. at 47, 65 (confession for an amount less than the amount actually owed was a sufficient statement); *Wise v. Hardin*, 5 S.C. 325, 330-31 (1874) (confession was not void merely because the value of the consideration was not equal to the confession amount).

Contrary to appellant's assertions, the confession of judgment was sufficient under the requirements of S.C. Code Ann. § 15-35-360. It precisely stated the amount of the judgment and authorized entry of judgment therefor, and it stated the facts out of which it arose and that the sum confessed for was justly due. *See* S.C. Code Ann. § 15-35-360(1), (2).[3]

3. Parol Evidence Rule.

Notwithstanding appellant's acknowledgement that the parol evidence rule ***does not apply to the confession of judgment***, discussed *supra* at 12-13, appellant nonetheless

[3] A third requirement of the statute addressing contingent liabilities is inapplicable here.

adheres to his arguments based on the parol evidence rule, arguments raised for the first time in the motion for reconsideration and on appeal. *See* Final Brief of Appellant, pp. 17-24. Essentially, appellant claims the parol evidence rule makes the purported agreement admissible to vary the terms of the confession of judgment. As noted above, the confession of judgment is not an agreement. It is a ***unilateral*** document executed by respondent before a notary public. It is the equivalent of a judgment entered by the court. *See Triangle Auto*, 270 S.C. at 389, 242 S.E.2d at 431. The arguments premised on the parol evidence rule and the authorities cited in those arguments are simply inapplicable, as appellant concedes elsewhere in his brief. *See* Final Brief of Appellant, p. 15.

Appellant asserts that the purported settlement agreement is admissible to explain ambiguities in the confession of judgment. *See* Final Brief of Appellant, pp. 20-23. Only the first paragraph of this argument was raised below, and it was raised for the first time in the motion for reconsideration. The remainder of the argument, Final Brief of Appellant, pp. 20-23, and the authorities cited in support of this argument, were never raised in the court below but are raised for the first time in appellant's opening brief. Contrary to this unpreserved argument, the language of the confession is clear and unambiguous. Appellant is attempting to have the court consider the purported agreement and the amount actually paid in order to ***create an ambiguity where none exists on the face of the document itself***. This is not the purpose of the parol evidence rule, and the court correctly refused to consider the extraneous document.

Moreover, under recognized rules of construction, an ambiguity in an instrument must be construed against the party who drafted the instrument. *See Duncan v. Little*, 384 S.C. 420, 426, 682 S.E.2d 788, 791 (2009) (ambiguity in contract, if any, construed

against the drafter); *Southern Atl. Fin. Servs., Inc., v. Middleton*, 356 S.C. 444, 447-49, 590 S.E.2d 27, 29-30 (2003) (ambiguity in promissory note construed against drafter); *Heritage Fed. Savs. & Loan Assoc. v. Eagle Lake & Golf Condominiums*, 318 S.C. 535, 542, 458 S.E.2d 561, 565 (Ct. App. 1995) (ambiguity in amended master deed construed against developer who drafted deed). If an ambiguity exists in the confession of judgment, which respondent disputes, that ambiguity must be resolved in respondent's favor, and against appellant, whose attorney drafted the confession of judgment. R. p. 31.

4. Evidentiary Foundation.

As noted in the Statement of the Case and addressed in Argument III, *supra*, appellant offered no evidence whatsoever to establish the authenticity of and foundation for admission of the purported settlement agreement. Appellant offered no testimony concerning the circumstances surrounding the making of the purported agreement and the events that occurred between its alleged making and the execution of the confession of judgment on a later date. Without a proper evidentiary foundation, the court could not admit this document or consider it for any purpose. *See* Rule 901(a), SCRE; *Clark*, 339 S.C. at 386, 529 S.E.2d at 536; *Rich*, 293 S.C. at 173-74, 359 S.E.2d at 281-82; *Deep Keel*, 413 S.C. at 64, 773 S.E.2d at 610.

VI. THE COURT APPROPRIATELY DENIED APPELLANT'S MOTION FOR RECONSIDERATION, BUT IF IT DID NOT, APPELLANT SUFFERED NO PREJUDICE.

Appellant filed a motion for reconsideration following the issuance of the court's order, but he did not comply with Rule 59(g), which provides:

> 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 Rule 59(g), SCRCP. By order dated July 22, 2014, the court denied the motion for reconsideration because of appellant's non-compliance with this rule. R. p. 8. Appellant claims this ruling was erroneous.

The authorities on which appellant relies are not germane to the issue he raises. Three of those decisions address whether appeals were untimely because of an allegedly deficient Rule 59(e) motion or because of failure to comply with the requirement of Rule 59(g). *See Camp v. Camp*, 386 S.C. 571, 574-76, 689 S.E.2d 634, 636-37 (2010) (appeal not untimely where Rule 59(e) motion was sufficient under Rule 7(b)(6), SCRCP); *Coon v. Coon*, 356 S.C. 342, 346, 588 S.E.2d 624, 626 (Ct. App. 2003) (appeal not untimely where party failed to comply with Rule 59(g), SCRCP); *Gallagher v. Evert*, 353 S.C. 59, 63-64, 577 S.E.2d 217, 219 (Ct. App. 2002) (same). None of those decisions addressed a claim of error in the court's denial of the post-trial motion because of non-compliance with Rule 59(g). In *Gallagher*, the Court of Appeals expressly noted that the lower court stated it could have denied the motion "'on this ground alone,'" and the Court of Appeals did not address or correct this assertion. *See Gallagher*, 353 S.C. at 63, 577 S.E.2d at 219.

Appellant's characterization of the holding of *Jones v. State*, 382 S.C. 589, 677 S.E.2d 20 (2009), as "reversing judgment of trial court where court denied appellant's motion for reconsideration for failure to comply with service requirement of Rule 59(g)" is misleading. *See* Final Brief of Appellant, p. 27. In *Jones*, the Supreme Court noted that the trial court "dismissed the State's motion for reconsideration on the ground the State failed to comply with the ten-day service requirement of Rule 59(g)." *See Jones*, 382 S.C. at 594, 677 S.E.2d at 22. However, the Supreme Court did ***not*** address whether

this ruling was within the court's discretion or was erroneous. Rather, the majority and concurring opinions both addressed the merits of issues raised on appeal, without addressing the procedural basis for the court's denial of the post-trial motion. *See id.*, 382 S.C. at 595-97, 677 S.E.2d at 23-24 (majority opinion); 382 S.C. at 598, 677 S.E.2d at 24 (concurring opinion). Counsel is unaware of any appellate decision of this state that has addressed the precise issue presented here.

The language of the rule is mandatory, using the word "shall." *See* Rule 59(g), SCRCP. The conduct of the proceedings in the lower court rests in the sound discretion of the trial judge, and the court's ruling should not be disturbed absent a showing of abuse of discretion, error of law, and resulting prejudice. *See American Fed. Bank, FSB, v. Number One Main Joint Venture*, 321 S.C. 169, 174, 467 S.E.2d 439, 442 (1996); *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 147, 697 S.E.2d 644, 655 (Ct. App. 2010). Here, the court acted within its discretion and did not commit any error of law in denying the motion based on non-compliance with a mandatory rule of procedure.

Nor is there any resulting prejudice. Appellant filed a second motion for reconsideration, refiled the original motion for reconsideration, and asked the court to review the original motion on the merits. The court then issued an order denying the motion for reconsideration. Appellant has not been denied appellate review as the result of the first order that denied his motion. Moreover, because the court's rulings were all correct, there is no prejudice.

VII. THE RELIEF REQUESTED IN APPELLANT'S THIRD ISSUE ON APPEAL AND ARGUMENT IS INAPPROPRIATE.

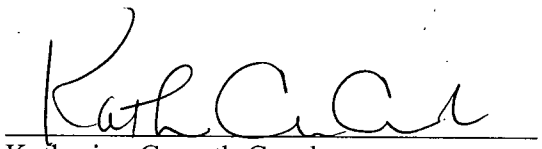
Appellant asks this Court to remand this case to the lower court with instructions to deny respondent's Rule 60(b)(5) motion, arguing that the purported confidential settlement agreement is clear and unambiguous and should be enforced. As with other arguments made by appellant on appeal, this argument and the authorities on which it relies appear for the first time in appellant's opening brief, and it should not be considered by this Court. *See Stevens & Wilkinson*, 409 S.C. at 567, 762 S.E.2d at 695; *CoastalStates Bank*, 408 S.C. at 518 n.3, 759 S.E.2d at 157 n.3; *Busillo*, 404 S.C. at 607, 745 S.E.2d at 144. However, if the argument is considered, the relief requested is inappropriate under the circumstances of this case.

As previously noted, this case was ***not*** an action by appellant to enforce a settlement agreement. It was an action by respondent for relief from a confession of judgment that has been satisfied. The purported agreement has not been introduced into evidence. No testimony has been taken concerning the facts surrounding its making, who drafted it, who participated in its making, the many alterations showing on its face, or any further events that may have occurred and that may be relevant to its authenticity or enforceability. Under these circumstances, this Court should deny the relief requested in appellant's third issue and argument.

CONCLUSION

For all the reasons set forth above, this Court should affirm the order of the lower court in its entirety and deny appellant's request for a remand.

Respectfully submitted,



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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
DeAndrea Gist Benjamin, Circuit Court Judge

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

Edwin M. Smith, Jr.,

Appellant,

v.

David Fedor,

Respondent

CERTIFICATE OF COUNSEL

Counsel hereby certifies that the final brief of respondent complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Counsel further certifies that the final brief of respondent complies with the Order of the Supreme Court of South Carolina, *Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings*, 407 S.C. 607, 757 S.E.2d 421 (April 15, 2014).

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PROOF OF SERVICE

I certify that I have served copies of the final brief of respondent, certificate of counsel, and proof of service, by mail, to James R. Gilreath and William M. Hogan, The Gilreath Law Firm, P.A., P.O. Box 2147, Greenville, SC 29602, and Edward L. Grimsley and Eric William Ruschky, Grimsley Law Firm, LLC, P.O. Box 11682, Columbia, South Carolina 29211, on October 26, 2015.

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