

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DEC 06 2017

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.

PETITION FOR REHEARING *EN BANC*

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Appellant, Edwin N. Smith, Jr. (“Smith”), petitions the Court for rehearing and reconsideration *en banc* of Opinion No. 5523 filed November 22, 2017 pursuant to Rule 221(a), SCACR. Appellant asks this Court to reconsider the decision to affirm the Lower Court’s Order and hold that Rule 43(k), SCRCP, as existed on the date of the Lower Court’s hearing on August 26, 2013 should have been applied to consideration of the Confidential Settlement Agreement, thereby making the Confidential Settlement Agreement enforceable. This Court should reverse the Lower Court’s grant of Respondent’s Rule 60(b) Motion for relief from the Confession of Judgment and enforce the Confession of Judgment filed for the remaining \$15,000 Respondent owes to Appellant.

I. Graham v. Dorchester Cty. Sch. Dist. does not require that a case be pending on the trial court roster on the day a change in a rule of civil procedure goes into effect in order for the new rule to be applied to cases subsequently coming before the court.

This Court, in its Order of November 22, 2017, held: “Because the settlement agreement does not comply with the prior version of Rule 43(k), the agreement is not binding on the court. . . . Additionally, this matter was not pending when the rule was amended in 2009, and thus, the exception providing for civil procedure rule changes applying to pending matters is inapplicable. See Graham v. Dorchester Cty. Sch. Dist., 339 S.C. 121, 124, 528 S.E.2d 80, 82 (Ct. App. 2000).” Smith v. Fedor, Op. No. 5523 (S.C. Ct. App. filed Nov. 22, 2017) (Shearouse Adv.Sh. No. 44 at 49) (internal citation omitted).

Graham v. Dorchester Cty. Sch. Dist. does not require that a case be pending at the time a change in the rule is made in order for the new rule of civil procedure to be

applied retroactively. The statement from Graham v. Dorchester Cty. Sch. Dist. that, “the rules also govern ‘all further proceedings in actions then pending’ unless to do so would not be feasible or work an injustice” is meant to point out how broadly sweeping the retroactive principle regarding changes in the Rules of Civil Procedure is to cases before the trial court. Graham v. Dorchester Cty. Sch. Dist., 339 S.C. at 124, 528 S.E.2d at 82. It is not meant to limit the circumstances in which rule changes are applied retrospectively.

In fact, in Graham v. Dorchester Cty. Sch. Dist., the Court of Appeals applied the change in Rule 40, SCRPC, retroactively to a case that was not pending at the time Rule 40 was changed to add Rule 40(j). In addition, the case before the trial court was not a newly filed matter either. In that case, the plaintiff’s original suit had been filed in 1991 and then stricken from the roster in 1993. On January 1, 1995, Rule 40(c)(3) was amended and replaced by Rule 40(j). An order to restore the case placed the case back on the roster in April of 1998. This Court held that the newly enacted Rule 40(j) applied retroactively to the restored case.

Similarly in this case, Appellant’s original action was dismissed by settlement in 2002. (R. p. 10). The case was subsequently restored to the roster as case number 01CP4004203R, by adding “R” to the prior case number for the restored case, following Respondent’s filing of his Rule 60(b) Motion to vacate the Confession of Judgment. (R. pp. 7-10, 15-16). A restored case, such as at issue in Graham v. Dorchester Cty. Sch. Dist. and this case, is not a pending case on the date of the applicable rule change. See Rule 40(a), (b), and (j) (providing that restored cases go to the foot of the roster). Yet this Court has held in Graham v. Dorchester Cty. Sch. Dist. that changes in a rule of civil procedure are applied retroactively to restored cases.

II. Rule 43(k) is a rule of procedure affecting a remedy and is not a rule of substantive contract law and therefore should be applied retroactively.

The version of Rule 43(k), SCRCP, as a rule of procedure, that existed on August 26, 2013, should have been applied to the proceedings before the Lower Court. This Court noted that, as a general rule, statutory changes are construed prospectively rather than retroactively absent an express provision or a clear legislative intent to the contrary. However, as this Court has previously held, “a principal exception is remedial or procedural statutes are generally held to operate retrospectively.” Graham v. Dorchester Cty. Sch. Dist., 339 S.C. at 124, 528 S.E.2d at 82. Rule 43(k) is a procedural rule not a substantive rule of contract law. The South Carolina Supreme Court in Farnsworth v. Davis Heating & Air Condition, Inc. stated in footnote 3 thereof that under the prior Circuit Court Rule 14, the agreement signed by the parties’ counsel “would be enforceable.” The Supreme Court therefore found that the version of Rule 43 then in effect determined whether the settlement agreement was enforceable. Farnsworth v. Davis Heating & Air Conditioning, Inc., 367 S.C. 634, 638, 627 S.C.2d 724, 726, n.3 (2006). A rule of law that is a matter of enforcement is a procedural law. See Edwards v. State Law Enf’t Div., 395 S.C. 571, 580, 720 S.E.2d 462, 466 (2011) (stating that a “procedural” law sets out a mode of procedure for a court to follow, or “prescribes a method of enforcing rights.”). Rule 43(k), which sets out the method for enforcing the rights under settlement agreements, is therefore a procedural law entitling it to be applied retrospectively at the date of the hearing.

This Court held that the Confidential Settlement Agreement is not binding on the Court under the prior version of Rule 43(k) and therefore applied the prior rule

prospectively. In effect, this Court made Rule 43(k) a rule of contract law creating substantive rights. However, the General Assembly, in the enabling statute for the South Carolina Rules of Civil Procedure, declared that “neither the promulgation of the rules nor this act may be construed to effect the substantive legal rights of any party to any civil litigation in the courts of this State but shall affect only matters of *practice and procedure*.” 1985 S.C. Acts No. 100, § 3 (“Act 100”) (emphasis added).

III. The Lower Court erred in failing to consider Appellant’s Motion to Alter or Amend Judgment under Rule 59(g) when the late mailing of the motion to the Lower Court judge caused no prejudice to Respondent or caused no detrimental effect on the Lower Court judge.

In the case of Patton v. Miller issued after briefing and oral arguments were made in this case, our Supreme Court reversed the ruling of the trial court under an abuse of discretion standard where the circuit court did not conduct a prejudice analysis under Rule 15. The Supreme Court stated: “While we have consistently held that a circuit court’s ruling on any Rule 15 motion to amend is within its discretion, a court’s failure to exercise discretion is itself an abuse of discretion.” Patton v. Miller, 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017).

Similarly, in this case the Lower Court did not point to any kind of prejudice that resulted from the judge receiving the Appellant’s Motion for Reconsideration untimely even though the motion was timely filed with clerk of court and timely submitted to Respondent. The Supreme Court pointed out that: “Today, however, we operate under the far more flexible notice pleading provisions of the Rules of Civil Procedure. As Professor Flannigan observed, ‘the purpose of the rules is to secure justice, and consequently, they reduce formalities and technicalities.’” *Id.* at 492, 804 S.E.2d at 263 (citing James F. Flannigan, *South Carolina Civil Procedure* (2d ed. 1996)). The South

Carolina Supreme Court further quoted the United States Supreme Court concerning the overriding purpose of the rules of civil procedure to secure justice and reduce formalities and technicalities, by stating:

“It is too late in the day and entirely contrary to the spirit of the ... Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. The . . . rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.”

Id. at 493 (quoting Foman v. Davis, 371 U.S. 178, 181-82, 83 S.Ct. 227, 230 (1962)).

In reviewing the full record, it is indisputable that the valid Confidential Settlement Agreement of the parties settled Appellant’s malpractice claims against Respondent for \$400,000 by payment of \$50,000 within three days of the agreement with the \$350,000 balance to be paid over ten years beginning the following year and to be secured by a \$350,000 confession of judgment. (R. pp. 50 – 52). Respondent has paid only \$385,000 by his own admission. (R. p. 62). He therefore owes Appellant the remaining \$15,000.

IV. Petition for Rehearing En Banc.

Pursuant to Rule 219, SCACR, Appellant respectfully requests that this Court rehear Appellant’s Petition *en banc*. Appellant submits that consideration by the full Court is necessary to secure or maintain uniformity of its decisions since this Order conflicts with this Court’s prior ruling in Graham v. Dorchester Cty. Sch. Dist. Moreover, the issue of whether the South Carolina Rules of Civil Procedure should be applied only prospectively or retroactively will face the circuit courts on a frequent and repeated basis; therefore, this issue involves one of exceptional importance. See Rule 219(a), SCACR.

CONCLUSION

The retroactivity of the South Carolina Rules of Civil Procedure, including Rule 43(k), is not limited to only those situations where a newly-filed action is before the trial court or a case is pending action on the court roster when a rule is changed. The Rules of Civil Procedure in effect at the time of the hearing are to govern the proceedings of the Lower Court. Therefore, Rule 43(k), SCRPC, in effect in 2013, which holds that settlement agreements signed by both counsel and the parties are enforceable, should be applied in this case. Further, all other arguments of Appellant are preserved under Appellant's Motion for Reconsideration that was timely filed and served on Respondent and which created no prejudice by the late submission to the Lower Court judge.

For the foregoing reasons, Appellant requests that this Court grant this Petition for Rehearing and Reconsideration *en banc*.

Respectfully submitted,

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December 5, 2017
Greenville, South Carolina.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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The Honorable DeAndrea Gist Benjamin, Circuit Court Judge

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Appellate Case No. 2014-001826

EDWIN M. SMITH, JR. APPELLANT,

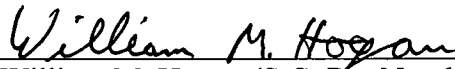
vs.

DAVID FEDOR, RESPONDENT.

CERTIFICATE OF SERVICE

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

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VIA FEDERAL EXPRESS

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RECEIVED
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SC Court of Appeals

RE: *Edwin M. Smith, Jr. v. David Fedor*
Appellate Case No. 2014-001826

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of the Appellant's Petition for Rehearing *En Banc* with Certificate of Service regarding the above referenced case. Also enclosed is a check in the amount of \$25 for the filing fee.

Please file the originals and return a filed-clocked copy to me in the enclosed self-addressed, stamped envelope.

By copy of this letter to counsel for Respondent in this matter, I am sending her the same.

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

Sincerely,



William M. Hogan

WMH/kmk

Enclosures

cc: Katherine Carruth Goode, Esquire (w/enclosures – via electronic mail and U.S. Mail)

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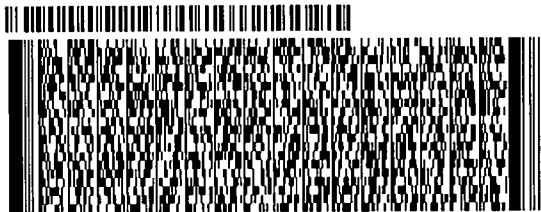
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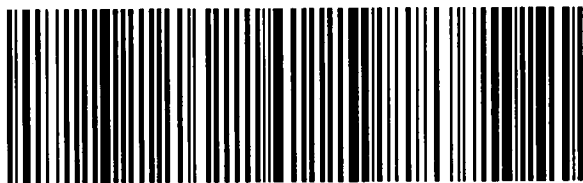
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