

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
DeAndrea G. Benjamin, Family Court Judge

Trial Court Case No. 2001-CP-40-04203
Appellate Case No. 2014-001826

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SC Court of Appeals

Edwin M. Smith, Jr.,

Appellant,

v.

David Fedor,

Respondent,

RETURN TO PETITION FOR REHEARING *EN BANC*

Respondent, David Fedor, respectfully submits this return to the petition filed by appellant, Edwin M. Smith, Jr., for rehearing *en banc* of the decision of the Court of Appeals filed November 22, 2017, Opinion No. 5523. That decision, by a unanimous panel of this Court (Lockemy, C.J., and Huff and Thomas, JJ), affirmed the order of the lower court granting respondent relief from a judgment filed by appellant, because the judgment had been satisfied. The Court of Appeals granted respondent leave to serve and file a return to appellant's petition for rehearing *en banc* by January 4, 2018. The petition for rehearing, and for rehearing *en banc*, should be denied in all respects.

ARGUMENT AND AUTHORITIES

Appellant brought this action against respondent 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.

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 in evidence without objection. R. pp. 37-38, 62-64. Counsel for appellant repeatedly conceded that respondent had paid appellant \$385,000. R. pp. 25, 38. No other evidence was presented by either party.

In his petition for rehearing, as he did in his final brief and final reply brief previously filed, appellant makes assertions about facts not in evidence that this Court should disregard. The assertions pertain to a purported "Confidential Settlement Agreement." The

purported agreement is a handwritten document that was not in evidence and was not considered by the lower court. No witness testified concerning the purported confidential settlement agreement. It was not authenticated and was not admitted into evidence. *See* Final Brief of Respondent, pp. 2-4, 10-11, 19, incorporated herein by reference. Appellant's factual recitals concerning this document are not supported by evidence, and those statements should be disregarded in their entirety.

In his petition for rehearing, as he did in his final briefs, appellant argues for enforcement of the purported "Confidential Settlement Agreement." Appellant is seeking a remedy not available under the procedural posture of this case. 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 had been satisfied. The purported agreement was not in evidence. No testimony was 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. Because it was not offered into evidence, there was no occasion during the hearing for respondent's trial counsel to object to its admission on these or other grounds.

The lower court correctly reviewed the confession of judgment and correctly held respondent was entitled to relief from the judgment, because it had been satisfied. The unanimous panel of the Court of Appeals correctly analyzed the issues it decided and correctly affirmed the order of the lower court. No basis exists for rehearing this appeal or for rehearing *en banc*. This Court should deny appellant's petition for rehearing and for rehearing *en banc*.

- I. The Court of Appeals properly affirmed the trial court's finding that the purported confidential settlement agreement is not binding on the court. (Opinion, Law/Analysis, I)

Sections I and II of appellant's petition for rehearing address the Court of Appeals' discussion of the purported confidential settlement agreement in the opinion's Law/Analysis section, under heading I. Appellant's sections I and II are interrelated and are therefore addressed together in this return. The Court of Appeals did not misconstrue or misapply *Graham v. Dorchester County School District*, 339 S.C. 121, 528 S.E.2d 80 (Ct.App. 2000), and the Court correctly found the 2009 amendment to Rule 43(k) of the South Carolina Rules of Civil Procedure does not apply retroactively. The Court correctly affirmed the lower court's holding that the purported settlement agreement is not binding on the court.

The lower court held that it could not consider the purported agreement in determining if the confession of judgment had been satisfied and further 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 the earlier version of Rule 43(k) and the Court of Appeals' decision affirming as to this issue were both correct.

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). In this case, the purported confidential settlement agreement was never entered into the record. 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).

Both the lower court and the Court of Appeals correctly found the 2009 amendment to Rule 43(k) 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*, 339 S.C. at 124, 528 S.E.2d at 81-82. Both the lower court and the Court of Appeals correctly found the amendment to Rule 43(k) in 2009 did not apply retroactively to this purported agreement, allegedly entered into in 2002.

In its decision, the Court of Appeals noted that this case was not pending in 2009 when the rule was amended. Appellant makes a new argument under *Graham*, not previously made in his appellate briefs, that it does not matter that the action was not pending when the rule was amended. In his brief in the Court of Appeals, appellant contended *Graham* dictates that the current version of Rule 43(k) be applied retroactively to all cases pending before the court. Specifically, appellant quoted a lengthy passage from *Graham*, then concluded:

Therefore under Graham, Rule 43(k) is to be applied retroactively to all cases pending before the court “unless to do so ‘would not be feasible or would work injustice.’” Id.

See Final Brief of Appellant, pp. 12-13. In response, respondent pointed out:

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).

See Final Brief of Respondent, p. 15. Although appellant filed a reply brief, he did not assert in reply the argument he now makes in his petition for rehearing – that the action in *Graham* was not pending at the time of the rule change at issue there but the amended version of the rule was applied retroactively.

This new argument, made for the first time in the petition for rehearing, is not preserved and should not be considered. See *Herron v. Century BMW*, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011); *Kiawah Property Owners Group v. Public Serv. Comm’n of South Carolina*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004). However, if it is considered, it is without merit and should not serve as the basis for granting rehearing. Under the clear language of *Graham*, quoted in appellant’s final brief, changes to the rules of civil procedure apply to actions “brought after they take effect” and to “actions then pending”:

The South Carolina Rules of Civil Procedure provide that the rules . . . would “**govern all proceedings in civil actions brought after they take effect.**” Rule 86(a), SCRPC. 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.**”).

See Final Brief of Appellant, p. 12, *quoting Graham*, 339 S.C. at 124, 528 S.E.2d at 82 (emphasis added).

Graham addressed a change to Rule 40 of the South Carolina Rules of Civil Procedure, governing trial rosters and restoration of a case to the trial roster after it has been stricken. In *Graham*, the plaintiff brought her action in 1991, it was stricken in 1993, and she brought it a second time, after the intervening change to Rule 40, by motion to restore; a 1998 order placed the case back on the active roster. See *Graham*, 339 S.C. at 122, 124-25, 528 S.E.2d at 81, 82. The case was later dismissed on statute of limitations grounds, pursuant to Rule 40(j). See *id.*, 339 S.C. at 123, 125, 528 S.E.2d at 81, 82. The restored case was a resumption of the original case filed in 1991, and the *Graham* Court clearly treated it as a case that was “pending” at the time of the amendment to Rule 40. The Court analyzed the retroactivity issue under the applicable test and determined it was feasible and would not work injustice to apply the rule change retroactively. *Id.*, 339 S.C. at 124-15, 528 S.E.2d at 82, *citing* Rule 86(a), SCRCP. However, if it can be said that the case was not “pending” when the rule change went into effect, as appellant now argues, then the restored action was “brought after” the effective date of the rule change and therefore subject to the new version of the rule. See Rule 86(a), SCRCP.

Unlike the restored action in *Graham*, the action in this case was brought in 2001, resolved by agreement in 2002, and dismissed with prejudice in 2002. Appellant makes the claim that this case was “restored” because the letter “R” appears in the case number on certain documents in the record on appeal. There is nothing in the record on appeal to establish that the case was ever “restored” under Rule 40(j). However, if the letter “R” is an indicator that the case at some point had been “restored” as contemplated by Rule 40(j), that

event occurred *prior to the dismissal in 2002*, as evidenced by the letter “R” in the case number on the 2002 order of dismissal. *See* R. p. 10. Appellant’s argument premised on the letter “R” in the case number is disingenuous and spurious.

This case was finally concluded in 2002, long before the 2009 amendment to Rule 43(k). The factual circumstances of *Graham* are entirely different. *Graham* does not support applying Rule 43(k) retroactively to a case that was concluded in 2002 and was neither pending in 2009 nor brought after the 2009 rule change. The Court of Appeals correctly found the case was not pending when Rule 43(k) was amended.

In his arguments premised on *Graham* in his appellate briefs and in the new argument asserted for the first time in his petition for rehearing, appellant ignores the very important language set out in *Graham* and Rule 86(a) concerning retroactive application of rule changes. If the analysis of *Graham* could somehow be applied to this action that was concluded in 2002, retroactive application of the change in Rule 43(k) is not feasible and would work serious injustice, not only in this case but in potentially countless others. Retroactive application of Rule 43(k) would have the effect of reviving litigation long before ended and would upend established results. Agreements 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 2009 amendment. Such a result would be unfeasible and would work injustice by undermining the finality of cases long ago resolved and concluded.

Appellant contends the rule change should be retroactively applied in this case, claiming it “is a procedural rule and not a substantive rule of contract law.” This assertion is a misstatement of the standard. *Hercules* and *Graham*, which recognize a presumption of

prospective application of new statutes or rules, note an exception to that presumption where the new provision is remedial or procedural. *See Graham*, 339 S.C. at 124, 528 S.E.2d at 82; *Hercules*, 274 S.C. at 143, 262 S.E.2d at 48. But those cases do *not* inject a consideration of whether the rule change is a substantive rule of contract law.¹ Rather, the issue is whether the change is remedial or procedural in nature. Moreover, if the provision is deemed remedial or procedural, that merely impacts the presumption. *See Graham*, 339 S.C. at 124-25, 528 S.E.2d at 82. It does not negate the remainder of the analysis – whether retroactive application would not be feasible or would work injustice. *See* Rule 86(a), SCRC. Indeed, in *Graham*, the rule change was procedural, pertaining to the statute of limitations, but the Court nonetheless evaluated whether the new rule should be applied retroactively under the standard of Rule 86(a). *See Graham*, 339 S.C. at 124-25, 528 S.E.2d at 82.

Here, the amendment to Rule 43(k) was not merely remedial or procedural. The amendment has the effect of making binding and enforceable settlement agreements that previously had no binding effect upon the court. To find that the amendment applies retroactively would potentially resurrect countless actions in which such agreements, not previously deemed binding and enforceable, could be brought before the court even though the actions in which they were reached were concluded years prior to the effective date of the

¹ Appellant quotes passages from *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 627 S.E.2d 727 (2006), and *Edwards v. State Law Enforcement Division*, 395 S.C. 571, 720 S.E.2d 462 (2011), out of context. Neither supports nor warrants the result appellant seeks. Appellant implies that former Circuit Court Rule 14 was in effect when the agreement at issue in *Farnsworth* was entered but that the Court applied the later Rule 43(k). This implication is unfounded. The footnote discussing Circuit Court Rule 14 merely stated that the agreement in *Farnsworth* would have been enforceable under the former rule. That footnote did not state the former rule was in effect when the agreement was entered. Although the 2006 *Farnsworth* decision does not state the date of the agreement, its discussion of the course of the litigation makes it apparent that the litigation occurred after the Rules of Civil Procedure went into effect in 1985, not while the former Circuit Court Rules were in force.

amendment. Such a result is not feasible and would work injustice by reopening final litigation outcomes. In this case, there is no basis for retroactive application of the amendment to Rule 43(k) and clear reason not to allow retroactive application.

For these reasons, and for the additional reasons outlined in the Final Brief of Respondent, pages 13-16, incorporated herein by reference, the Court of Appeals properly affirmed the lower court's conclusion that the purported settlement agreement was not binding on the Court, and no rehearing of this issue is warranted.

II. The Court of Appeals properly affirmed the trial court's denial of the motion for reconsideration due to non-compliance with Rule 59(g) of the South Carolina Rules of Civil Procedure. (Opinion, Law/Analysis, II)

Section III of appellant's petition for rehearing addresses the Court of Appeals' discussion of the lower court's denial of the motion for reconsideration due to appellant's failure to comply with Rule 59(g) of the South Carolina Rules of Civil Procedure, in the opinion's Law/Analysis section, under heading II. The Court correctly analyzed this issue, and the new authority cited by appellant does not control or alter the Court's determination under Rule 59(g).

When appellant filed his first motion for reconsideration in the lower court, 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), SCRPC. The lower court denied the motion for reconsideration because of appellant's non-compliance with Rule 59(g). The Court of Appeals affirmed this ruling, finding "Rule 59(g) would lack any purpose if trial courts committed error by denying the motion for failure to comply with the rule."

Most of the authorities on which appellant relied with respect to this issue in his appellate brief are not applicable to the issue presented here, and respondent addressed the inapplicability of those authorities in his respondent's brief. *See* Final Brief of Respondent, pp.19-21, incorporated herein by reference. One of the authorities he cited, however, actually supports the conclusion reached by the Court of Appeals. In *Gallagher v. Evert*, 353 S.C. 59, 63-64, 577 S.E.2d 217, 219 (Ct.App. 2002), 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 correct this assertion. *See Gallagher*, 353 S.C. at 63, 577 S.E.2d at 219. In this case, the Court of Appeals correctly found *Gallagher* implies that a trial court may deny the motion solely on the basis of Rule 59(g).

The Court of Appeals appropriately decided this issue based on the rule's requirement of notifying the judge of the motion to reconsider within 10 days of its filing. The language of the rule is mandatory, using the word “shall.” *See* Rule 59(g), SCRPC. It contains no additional language setting forth a basis for reviewing a Rule 59(e) motion on the merits where the requirement of Rule 59(g) has not been met. The Court appropriately affirmed the lower court's denial of the Rule 59(e) motion due to non-compliance with Rule 59(g).

Citing *Patton v. Miller*, 420 S.C. 471, 804 S.E.2d 252 (2017), decided by the Supreme Court after briefing and argument but prior to the decision of the Court of Appeals in this case, appellant contends the Court of Appeals erred in not conducting a prejudice analysis. The *Patton* decision, which construed Rule 15(a) of the South Carolina Rules of Civil Procedure, is inapplicable to the Rule 59(g) issue this case. Rule 15(a) addresses the standard for granting leave to amend pleadings. Significantly, the rule explicitly mandates a

prejudice analysis. *See* Rule 15(a), SCRCP (“leave shall be freely given when justice so requires and does not prejudice any other party”). The Supreme Court addressed the language of Rule 15(a) that requires the court to consider the prejudice resulting from amendment of a complaint, and the Court reversed based on the lower court’s failure to conduct this mandated prejudice analysis.

Unlike Rule 15(a), no language in Rule 59(g) requires a prejudice analysis where the moving party fails to provide a copy of the motion to the judge within 10 days of filing the motion. Under the rule’s language, the Rule 59(g) requirement is mandatory. The Court of Appeals appropriately upheld the court’s decision to deny the motion on the basis of the movant’s failure to comply with this requirement.

III. The Court of Appeals properly affirmed the trial court’s grant of relief from judgment under Rule 60(b)(5), and appellant has not sought rehearing of this issue, which is now final. (Opinion, Law/Analysis, III)

The Court of Appeals determined the trial court did not abuse its discretion in granting respondent’s motion for relief from judgment and affirmed the order granting such relief, in the opinion’s Law/Analysis section, under heading III. Appellant’s petition for rehearing does not seek further review of this determination, and it is the law of the case. The Court of Appeals’ decision affirming the lower court on the central issue before it – whether the confession of judgment had been satisfied – is not challenged in the petition for rehearing. It is a final determination of the action.

As previously noted, 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 the 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 lower court's order addressed 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). The Court of Appeals separately addressed each of these issues (Law/Analysis, I, Confidential Settlement Agreement, and Law/Analysis, III, Confession of Judgment), and it affirmed as to each issue.

In his petition for rehearing, Appellant has not raised as an issue a challenge to the Court of Appeals' determination that the lower court did not abuse its discretion in finding the confession of judgment was satisfied and respondent was entitled to relief from the judgment. (Law/Analysis, III, Confession of Judgment). This determination is the law of the case.

Under the "two issue rule," where a decision is based on more than one ground, a reviewing 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). Here, appellant has not sought rehearing of the determination made by the Court of Appeals as to the confession of judgment, and that determination is dispositive of the case. Accordingly, no rehearing should be granted on any other ground.

IV. There is no basis for granting rehearing *en banc*.

The extraordinary and disfavored remedy of rehearing *en banc* is not appropriate in this case. The South Carolina Appellate Court Rules provide:

A hearing or rehearing *en banc* is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

See Rule 219(a), SCACR. In this case, neither of these criteria is met. First, contrary to appellant's contentions, the determinations of the Court of Appeals as to every issue addressed in its opinion are consistent with and not contrary to any precedent of the Court of Appeals, including *Graham v. Dorchester County School District*, as more fully discussed above. Second, the proceedings do not involve a question of exceptional importance. Appellant asserts the issue of retroactivity of rule changes will face circuit courts on a frequent and repeated basis and that this circumstance makes the retroactivity issue one of exceptional importance. To the contrary, the body of case law pertaining to prospective/retroactive application of rule changes provides the necessary guidance to the circuit court bench on the proper analysis of such questions. Because each rule change is unique and the issue of prospective or retroactive application depends on the nature of the rule change and the specific facts of the case in which the prospective/retroactive application issue is being decided, the resolution of the issue in this case does not have significant implications on future, as yet unknown, changes to rules other than Rule 43(k). Under these circumstances, the resolution of the prospective/retroactive application issue in this case is unique to its specific factual circumstances and does not have exceptional importance so as to warrant rehearing *en banc*. The grounds invoked by appellant for rehearing *en banc* are unfounded. Because the issues raised by appellant's petition do not fit within the narrowly drawn criteria for rehearing *en banc*, that aspect of appellant's petition for rehearing should be denied.

CONCLUSION

For all the reasons set forth above, and based on all the arguments and authorities cited in the final brief of respondent, this Court correctly addressed the issues it decided and correctly affirmed the decision of the lower court. No basis exists for the Court of Appeals to rehear this case, and no basis exists for rehearing *en banc*. The petition for rehearing filed by appellant should be denied in every particular.

Respectfully submitted,



Katherine Carruth Goode
229 South Congress Street
P.O. Box 1175
Winnsboro, South Carolina 29180
Telephone: (803) 799-4440
South Carolina Bar number 008951
Attorney for Respondent

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In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
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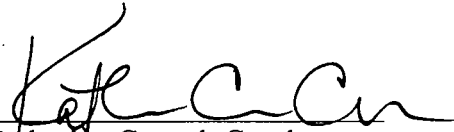
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David Fedor,

Respondent,

PROOF OF SERVICE

I hereby certify that I have served a copy of the Return to Petition for Rehearing *En Banc*, by mail to appellant's counsel, William M. Hogan and James R. Gilreath, The Gilreath Law Firm, P.A., P.O. Box 2147, Greenville, South Carolina 29602, on January 4, 2018.



Katherine Carruth Goode
229 South Congress Street
P.O. Box 1175
Winnsboro, South Carolina 29180
Telephone: (803) 799-4440
South Carolina Bar number 008951

Attorney for Respondent