

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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MAR 30 2018

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 5523 (S.C. Ct. App. filed November 22, 2017)
South Carolina Supreme Court Appellate Case No. 2018-000456

Edwin M. Smith, Jr.,Petitioner,

v.

David Fedor,Respondent.

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

James R. Gilreath (S.C. Bar No. 02133)
William M. Hogan (S.C. Bar No. 65272)
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110 Lavinia Avenue (zip 29601)
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Katherine Carruth Goode (S.C. Bar No.
8951)
229 S. Congress Street
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Winnsboro, South Carolina 29180
Telephone: (803) 799-4440

ATTORNEYS FOR PETITIONER

ATTORNEY FOR RESPONDENT

APPENDIX INDEX

Appendix to the Record on Appeal filed September 14, 2015	2-6
Proof of Service of Amended Record on Appeal filed October 1, 2015	7
Amended Record on Appeal filed October 16, 2015.....	8-119
Final Brief of Appellant filed October 16, 2015	120-156
Final Brief of Respondent filed October 26, 2015.....	157-187
Final Reply Brief of Appellant filed October 16, 2015	188-203
Opinion No. 5523, South Carolina Court of Appeals filed November 22, 2017	204-210
Petition for Rehearing <i>En Banc</i> filed December 6, 2017.....	211-220
Return to Petition for Rehearing <i>En Banc</i> filed January 4, 2018.....	221-236
Court of Appeals Order Denying Petition for Rehearing filed February 23, 2018	237

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable DeAndrea Gist Benjamin, Circuit Court Judge

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SEP 14 2015

SC Court of Appeals

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

EDWIN M. SMITH, JR. APPELLANT,

vs.

DAVID FEDOR,RESPONDENT.

**APPENDIX TO THE
RECORD ON APPEAL**

William M. Hogan (S.C. Bar No. 65272)
James R. Gilreath (S.C. Bar No. 02133)
THE GILREATH LAW FIRM, P.A.
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P.O. Box 1175
Winnsboro, South Carolina 29180
Telephone: (803) 799-4440
ATTORNEY FOR RESPONDENT

INDEX

Plaintiff's Response to Defendant's Rule 60(b) Motion.....2

Certificate of Appellant's Counsel.....4

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

EDWIN M. SMITH, JR.,

Plaintiff,

vs.

DAVID A. FEDOR,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

C/A # 2001-CP-40-4203

PLAINTIFF'S RESPONSE TO
DEFENDANT'S 60(b) MOTION

TO: LEO A. DRYER, ATTORNEY FOR DEFENDANT

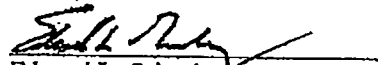
YOU WILL PLEASE TAKE NOTICE that the undersigned, as counsel for Edwin M. Smith, Jr. (hereinafter "Plaintiff"), respectfully requests this Court to deny Defendant's Motion for Relief from the Confession of Judgment (the "Judgment") sought pursuant to Rule 60(b), SCRPC. The Judgment was filed with the Court on February 27, 2013 declaring that Plaintiff have judgment against David A. Fedor (hereinafter "Defendant") for the principal amount of \$350,000.00. Based on documents in possession of both the Plaintiff and the Defendant and under the provisions thereof, Plaintiff will establish at the hearing on this motion that the debt recited in the Judgment has not been paid in full and that the Judgment should not be rescinded.

Due to the foregoing reasons, this Court should deny the Defendant's Motion for Relief from the Judgment or Order.

Respectfully submitted,

GRIMSLEY LAW FIRM, LLC

BY:


Edward L. Grimsley
P.O. Box 11682
Columbia, SC 29211
(803) 233-1177
Attorney for Plaintiff

Columbia, South Carolina
April __, 2013

RECEIVED

SEP 14 2015

SC Court of Appeals

Certificate of Counsel

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

September 11, 2015

William M. Hogan

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

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

THE GILREATH LAW FIRM, P.A.

110 Lavinia Avenue (zip 29601)

P.O. Box 2147

Greenville, SC 29602

Telephone: (864) 242-4727

ATTORNEYS FOR APPELLANT

RECEIVED

OCT 01 2015

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable DeAndrea Gist Benjamin, Circuit Court Judge

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

EDWIN M. SMITH, JR. APPELLANT,

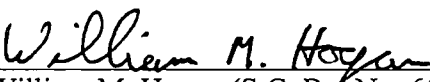
vs.

DAVID FEDOR, RESPONDENT.

PROOF OF SERVICE

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

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


William M. Hogan (S.C. Bar No. 65272)
James R. Gilreath (S.C. Bar No. 02133)
THE GILREATH LAW FIRM, P.A.
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Telephone: (864) 242-4727
Fax: (864) 232-4395
bhogan@gilreathlaw.com
jim@gilreathlaw.com
ATTORNEYS FOR APPELLANT

September 28, 2015
Greenville, South Carolina.

RECEIVED

OCT 16 2015

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable DeAndrea Gist Benjamin, Circuit Court Judge

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

EDWIN M. SMITH, JR. APPELLANT,

vs.

DAVID FEDOR,RESPONDENT.

**AMENDED
RECORD ON APPEAL**

William M. Hogan (S.C. Bar No. 65272)
James R. Gilreath (S.C. Bar No. 02133)
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Telephone: (864) 242-4727
ATTORNEYS FOR APPELLANT

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Telephone: (803) 799-4440
ATTORNEY FOR RESPONDENT

INDEX

Order granting motion, filed October 31, 20133

Form 4 Order of November 4, 20137

Form 4 Order of July 22, 2014.....8

Form 4 Order filed September 5, 20149

Order of Dismissal (with Prejudice) dated October 29, 2002, filed
November 4, 2002.....10

Confession of Judgment filed February 27, 201311

Partial Satisfaction of Judgment filed February 27, 2013.....13

Defendant’s Rule 60(b) Motion, with cover sheet, filed April 23, 201315

Transcript of Hearing August 26, 201318

Plaintiff’s Memorandum in Opposition to Defendant’s Motion to Vacate
Judgment45

Affidavit of James R. Gilreath57

Affidavit of David Fedor62

Receipt for Exhibits of Richland County Clerk of Court dated August 26, 201363

Defendant/Movant Memorandum with cover letter to the Honorable DeAndrea G.
Benjamin dated September 23, 201365

Plaintiff’s Memorandum in Support of Entering Settlement Agreement into Evidence
Dated September 25, 2013.....69

Plaintiff’s first Motion for Reconsideration dated November 8, 201374

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

Notice of Appeal with Proof of Service of Notice of Appeal.....98

Certificate of Appellant's Counsel.....111

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
EDWIN M. SMITH, JR.,)
)
PLAINTIFF,)
)
vs.)
)
DAVID FEDOR)
)
)
DEFENDANT.)

COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Case Number: 2001-CP-40-4203

ORDER

2013 OCT 31 AM 10:21
JEANETTE W. MORRIS
C.C.P. & G.S.
RICHLAND COUNTY
FILED

This matter came before the Court on August 26, 2013 at a hearing on Defendant's motion to be relieved from a confession of judgment. Present at the hearing were Eric Ruschky, Esquire, counsel for Plaintiff, and Leo A. Dryer, Esquire, counsel for Defendant. After considering the law, the memoranda submitted by the parties, the arguments of counsel, and all matters submitted, Defendant's motion to be relieved from the confession of judgment is **GRANTED.**

BACKGROUND

This case dates back to the filing of the summons and complaint on December 12, 1998. However, the underlying merits of the suit are not presently at issue. After several years of litigation, the Court was informed by a letter filed on September 26, 2002 that a "mediated settlement had been reached in the case." Subsequently, on November 4, 2002, an Order of Dismissal (with Prejudice) signed by The Honorable G. Thomas Cooper was filed with the Court. Thereafter, on September 17, 2002, the parties and their attorneys executed a written instrument titled "Confidential Settlement Agreement." This document was never recorded with the Court. The Defendant also executed a Confession of Judgment in consideration for the

Plaintiff's agreement to release all claims against him and to dismiss the underlying suit with prejudice.

Nearly eleven years after the dismissal of the case, on February 27, 2013, the Plaintiff filed the Confession of Judgment and a Partial Satisfaction of Judgment with the Court. Following the entry of the Confession of Judgment, the Defendant filed a motion pursuant to Rule 60(b)(5), SCRCP to be relieved from judgment. This motion was filed on April 23, 2013.

At the hearing held on August 26, 2013, Counsel for the Defendant urged the Court to consider only the terms on the face of the Confession of Judgment, which provides, in pertinent part, that "[t]he Defendant hereby authorizes the entry of the Order and judgment against Defendant, and in favor of Plaintiff, in the principal amount of \$350,000.00, less any payments received by Plaintiff from Defendant through the date of filing hereof. Thereafter, post-judgment interest shall accrue as allowed by law, until the judgment is paid in full."

Both parties conceded during the hearing that the Defendant has paid an amount in excess of the \$350,000.00 set forth in the Confession of Judgment. However, Counsel for the Plaintiff urged the Court to also consider certain provisions set forth by the parties in the confidential settlement agreement referenced above. According to Plaintiff's Counsel, the terms of the settlement agreement would demonstrate to the Court that the Defendant failed to satisfy his obligations, as set forth in the settlement agreement; thus, making the entry of the Confession of Judgment proper.

DISCUSSION

I. Confidential Settlement Agreement

At the time the settlement agreement was executed in 2002, Rule 43(k), SCRCP provided in relevant part that "No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel

and entered in the record, or unless made in open court and noted upon the record." Reed v. Associated Investments of Edisto Island, Inc., 339 S.C. 148, 152, 528 S.E.2d 94, 96 (Ct. App. 2000). Rule 43(k), SCRPC was later amended in 2009 to provide a third method for creating an enforceable settlement agreement, which permits parties to a settlement to reduce the agreement to a writing signed by the parties and their counsel.

In this matter, the parties acknowledged that the 2002 confidential settlement agreement was never entered into the record. Consequently, the parties failed to adhere to the version of Rule 43(k), SCRPC in effect at the time of the execution of the settlement, which renders the purported confidential settlement agreement not binding on this Court. See Buckley v. Shealy, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006) ("Because the purported agreement the parties reached following mediation was neither entered into the court's record nor acknowledged in open court and placed upon the record, Rule 43(k), SCRPC, plainly provides that the agreement is unenforceable."). Assuming arguendo that 2002 confidential settlement agreement complied with the 2009 amendment of Rule 43(k), SCRPC because it was reduced to writing and signed by the parties and their counsel, the agreement is still unenforceable because the amendment was prospective and not retrospective in nature. See Hercules Inc. v. S.C. Tax Comm'n, 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980) (statutes are to be construed prospectively unless there is an express provision or a clear legislative intent to the contrary). As a result, the Court will not consider the terms of the confidential settlement agreement executed by the parties.

II. Confession of Judgment

Confessions of judgment share the legal significance of a judgment entered by the Court. "Though no adjudication is in fact required in entering a judgment of confession without action, ... it has all the qualities, incidents, and attributes of other judgments, and cannot be valid unless


entered in a court which might have legally pronounced the same judgment in a contested action." Triangle Auto Spring Co. v. Gromlovitz, 270 S.C. 386, 389, 242 S.E.2d 430, 431 (1978) (quoting Ex parte Ware Furniture Co., 49 S.C. 20, 27 S.E. 9 (1897)). Rule 60(b)(5), SCRPC provides that a judgment can be set aside if the judgment has been satisfied. Perry v. Heirs at Law of Gadsden, 357 S.C. 42, 48, 590 S.E.2d 502, 505 (Ct. App. 2003).

The confession of judgment at issue provides that "[t]he Defendant hereby authorizes the entry of the Order and judgment against Defendant, and in favor of Plaintiff, in the principal amount of \$350,000.00, less *any* payments received by Plaintiff from Defendant through the date of filing hereof." At the hearing, both of the parties agreed that the Defendant has in fact paid more than \$350,000.00. Thus, I find that the judgment was satisfied, and the Defendant is entitled to be relieved from the confession of judgment.

ORDER

For the foregoing reasons, Defendant's Motion for Relief from the Confession of Judgment is **GRANTED**.

AND IT IS SO ORDERED.



DeAndrea Gist Benjamin
Presiding Judge

October 30, 2013
Columbia, South Carolina

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

FORM 4

JUDGMENT IN A CIVIL CASE **Exhibit D**

CASE NUMBER: 01CP4004203R

Edwln M Jr Smith

David A Fedor

PLAINTIFF(S)

Edwards A G & Sons Incorporated

DEFENDANT(S)

Submitted by: _____

Attorney for: Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE PUBLIC INDEX

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

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

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

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

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

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

James R. Gilreath

Edward L. Grimsley

Leo A. Dryer Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCANNED

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

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

Edwin M. Smith, Jr.

David A. Fedor

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : Motion for Reconsideration has been denied because the Court did not receive a copy of the motion within ten days of the motion being filed.

INFORMATION FOR THE PUBLIC INDEX

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

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

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

Circuit Court Judge W/B

Judge Code 2161

Date 7-22-14

For Clerk of Court Office Use Only

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

Edwin L. Grimsley

Leo A. Dryer

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2001CP404203R

Edwin M. Smith, Jr

David A. T. Fedor

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant
---------------------	---

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

This order ends does not end the case.

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

INFORMATION FOR THE PUBLIC INDEX

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

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

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

Circuit Court Judge HRB Judge Code 2161 Date 9-5-14

For Clerk of Court Office Use Only

This judgment was entered on the 10 day of Sept, 2014 and a copy mailed first class or placed in the appropriate attorney's box on this 10 day of Sept, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Edwin L. Grimsley

ATTORNEY(S) FOR THE PLAINTIFF(S)

Leo A. Dyer

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Edwin M. Smith, Jr)
Plaintiff,)
David A. Fedor,)
Defendant)

IN THE COURT OF COMMON PLEAS

Docket No 01-CP-40-4203R

ORDER OF DISMISSAL
(With Prejudice)


FILED
NON-4 PM:12
JUL 11 2001
A. SCOTT
CLERK

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


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

DONE AND ORDERED in chambers at Columbia, South Carolina, this 29 day of September, 2001

2002

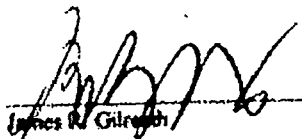

G. Thomas Cooper, Jr
Chief Judge for Administrative Purposes

WE CONSENT
SWAGART, WALKER, MARTIN
& REIBOLD, P A

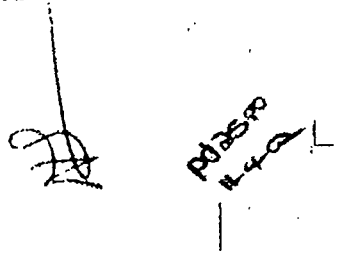
by 
Harry A. Swagart, III

ATTORNEYS FOR DEFENDANT

WE CONSENT
THE GILREATH LAW FIRM, P A

by 
James R. Gilreath

ATTORNEYS FOR PLAINTIFF



STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Edwin M. Smith, Jr.)
Plaintiff,)

Docket No. 01-CP-40-4203

v.)

David A. Fedor,)
Defendant.)

CONFESSION OF JUDGMENT

JEANETTE W. HARBIDE
C.J.P. & G.S.
2013 FEB 27 AM 9:59
FILED
RICHLAND COUNTY

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

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

5. The indebtedness owed by Defendant to Plaintiff arose pursuant to a confidential Settlement Agreement between Defendant and Plaintiff dated September 17, 2002, in which the lawsuit referenced above was settled.

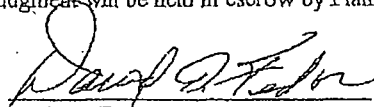
6. Defendant has no defense to the payment of, or right to set off against, the indebtedness, debt, or liability, and Defendant waives, and will not assert or allege, any defense or right to set off with respect to the judgment confessed herein.

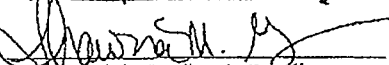
7. The Defendant hereby authorizes the entry of an Order and judgment against Defendant, and in favor of Plaintiff, in the principal amount of \$350,000.00, less any payments received by Plaintiff from Defendant through the date of filing hereof. Thereafter, post-judgment interest shall accrue as allowed by law, until the judgment is paid in full.

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

9. This Confession of Judgment may not be filed unless and until there has been a default by Defendant on his payment obligations as set forth in the Confidential Settlement Agreement.

10. This Confession of Judgment may not be filed unless and until there has been a default by Defendant on his payment obligations as set forth in the Confidential Settlement Agreement. Pending such a default, this Confession of Judgment will be held in escrow by Plaintiff's attorney, James R. Gilreath, Esquire.


David A. Fedor

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

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

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Edwin M. Smith, Jr.,

Plaintiff,

v.

David A. Fedor,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

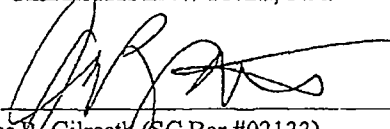
2001-CP-40-4203

PARTIAL SATISFACTION
OF JUDGMENT

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RICHLAND COUNTY
2003 FEB 21 AM 9:43
JEANETTE N. HERBODE
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The Plaintiff, Edwin M. Smith, Jr., holds a Confession of Judgment executed by David Fedor on September 26, 2002, in the original amount of Three Hundred Fifty Thousand Dollars (\$350,000). Subsequent to the execution of the Confession of Judgment, but prior to the recording of same, Edwin M. Smith, Jr. received principal payments from the Defendant of Three Hundred Thirty-Five Thousand Dollars (\$335,000). Edwin M. Smith, Jr., by and through his undersigned counsel, hereby acknowledges a credit to the Confession of Judgment, reducing the unpaid balance therefore to the sum of Fifteen Thousand Dollars (\$15,000) through the date of the recording of the Confession of Judgment. The Confession of Judgment shall otherwise remain in full force and effect.

THE GILREATH LAW FIRM, P.A.

By: 
James R. Gilreath (SC Bar #02133)
110 Lavinia Avenue (29601)
P. O. Box 2147
Greenville, South Carolina 29202
Phone: (864) 242-4727
Fax: (864) 232-4395
jim@gilreathlaw.com

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

Kathleen M. Kohlman

Notary Public for South Carolina

My commission expires: 10/10/13

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
5th JUDICIAL CIRCUIT

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

EDWIN M. SMITH, JR.)
Plaintiff,)

MOTION AND ORDER INFORMATION
FORM AND COVERSHEET

vs.)

DAVIDA FEDOR)
Defendant.)

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

RICHLAND COUNTY
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JEANETTE W. McBRIDE
CLERK, S.C.P. & G.S.

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

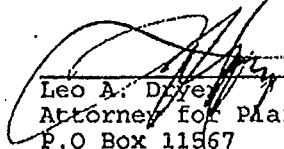
IN THE COURT OF COMMON PLEAS
01-CR-40-42039
DEFENDANT'S 60(b) MOTION

RICHLAND COUNTY
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JEANETTE W. McBRIDE
C.C.P. & C.S.

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

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

Respectfully submitted,

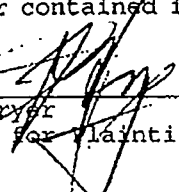


Leo A. Dyer
Attorney for Plaintiff
P.O. Box 11567
Columbia, SC 29211
(803) 926-1235
(803) 826-1276 FAX

March 26, 2013
Columbia, South Carolina

RULE 11 CERTIFICATION

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



Leo A. Dwyer
Attorney for Plaintiff.

motion.doc/13030504/mbp

2013 APR 23 PM 4: 24
JEANETTE W. McBRIDE
C.C.P. & G.S.

RICHLAND COUNTY
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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

COURT OF COMMON PLEAS
2001-CP-40-4203

Edwin M. Smith, Jr.,
Plaintiff,
vs.
David Fedor,
Defendant.

TRANSCRIPT OF RECORD

August 26, 2013
Columbia, South Carolina

B E F O R E:

THE HONORABLE DEANDREA G. BENJAMIN, JUDGE.

A P P E A R A N C E S:

ERIC WILLIAM RUSCHKY, ESQ.
Attorney for the Plaintiff

LEO A. DRYER, JR., ESQ.
Attorney for the Defendant

DEBORAH M. McCURDY, RPR
Official Court Reporter

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

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4 (WHEREUPON, no witnesses were called
5 during these proceedings.)
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10 E X H I B I T S

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13 (WHEREUPON, no exhibits were introduced
14 during these proceedings.)
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Catch me up.

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

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

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

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

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

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

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

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

16 Thank you, Judge.

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

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

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

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

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

1 All right. Yes, sir?

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

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

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

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

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

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

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

1 and therefore inquiring or describing the merits,
2 and so forth, I would object to.

3 THE COURT: All right. In regard to his
4 objection?

5 MR. RUSCHKY: As I was saying, that lawsuit
6 was mediated, which resulted in -- and I've been
7 instructed and do solicit the Court's guidance
8 regarding what has been termed and described as a
9 confidential settlement of agreement. It was
10 reached through the mediation of a retired Chief
11 Justice of the Supreme Court.

12 The original settlement was \$400,000, with
13 \$50,000 paid down upfront, and a judgment, a signed
14 confession of judgment, for the balance of \$350 to
15 be reserved against failure to pay the total \$350.

16 Mr. Fedor made his annual payments up until
17 the last year, when he did not pay the final
18 \$35,000.

19 The parties negotiated. Neither the Grimsley
20 Law Firm nor Mr. Dryer were involved in all of
21 those negotiations.

22 Our position is that Mr. Fedor did not make
23 his final \$35,000 payment, but in fact made a
24 \$20,000 payment, leaving \$15 due on the last
25 payment.

1 When that was not paid ultimately by February
2 of this year, the Plaintiff and his attorney filed
3 the confession of judgment.

4 Now, I understand the Defendant's position
5 that -- and we concede that he has paid a total of
6 \$385,000, but that includes the initial \$50 paid
7 upfront before the confession of judgment for \$350
8 was signed.

9 As I said, with all due respect to Mr. Fedor,
10 his affidavit, which we received Friday, in which
11 he says that he has paid to Plaintiff or his
12 attorney the sum of \$385,000, we agree with that,
13 that sum being in excess of the sum recited in the
14 Defendant's confession of judgment. The confession
15 of judgment does recite the \$350, Your Honor. And
16 the confession of judgment should be deemed
17 satisfied.

18 However, we rely on this confidential
19 settlement, which obviously, because it all arose
20 out of an allegation of malpractice, was treated
21 very confidentially. This case was settled for
22 \$400,000. And so Mr. Fedor still owes \$15,000.

23 I submit that Mr. Fedor's affidavit stretches
24 the limit of credulity. If Mr. Fedor thought that
25 he only owed \$350,000, then why were there

1 negotiations last year regarding the final payment
2 of \$35,000? At that point he had overpaid the
3 judgment of \$350,000.

4 MR. DRYER: Your Honor, I object to any
5 paraphrasing of negotiation from last year. I
6 believe at best it is hearsay and not supported by
7 any affidavit.

8 MR. RUSCHKY: Your Honor, I believe we
9 submitted an affidavit of James Gilreath, who was
10 the attorney for the Plaintiff.

11 THE COURT: I saw that. Let me ask you this.
12 Okay. So -- I'm trying to find the --

13 MR. RUSCHKY: We have the confidential
14 settlement if you'd like to see it, Your Honor.

15 THE COURT: Yes.

16 (Complies.)

17 THE COURT: He is saying he paid \$385.

18 MR. RUSCHKY: Well, he has, including the
19 initial \$50.

20 MR. DRYER: I would renew my objection as to
21 inquiring of the merits, which is this settlement
22 agreement, which is not in the record and is full
23 of scratch-overs and strike-throughs. It is not --
24 it is not clear upon its face.

25 But, again, we are going behind the confession

1 and we are again sorting through the merits, which
2 I don't believe is appropriate. The confession is
3 as far as we need to go.

4 THE COURT: Well, I'm not concerned about the
5 merits. I'm trying to figure out what the
6 agreement was.

7 MR. DRYER: Well, exactly, Your Honor. And
8 the agreement goes behind the confession. We have
9 the confession clear upon its face.

10 THE COURT: What was filed with the Court?
11 Was there anything filed with the Clerk of Court's
12 Office?

13 MR. DRYER: Not until the confession was filed
14 this spring, I believe.

15 MR. RUSCHKY: I believe that's correct, Your
16 Honor.

17 THE COURT: And do we have that, what was
18 filed with the -- my only concern, Mr. Ruschky,
19 about the confidential agreement is -- it has not
20 been made a part of the record in the past; is that
21 correct?

22 MR. DRYER: Exactly.

23 MR. RUSCHKY: Not in the past, Your Honor. We
24 have -- I know Mr. Grimsley's office prepared an
25 affidavit of James R. Gilreath.

1 THE COURT: Okay. I have seen that.

2 MR. RUSCHKY: That has not -- is that filed?

3 THE COURT: It was mailed. I don't see a
4 stamp on it. It was mailed to my office.

5 MR. RUSCHKY: All right. I think the
6 problem --

7 THE COURT: It was e-mailed to my office.

8 MR. RUSCHKY: Okay. I think the problem, Your
9 Honor, is that Mr. Grimsley has been struggling
10 with the 4-page document, which is entitled
11 Confidential Settlement Agreement, because of the
12 term *confidential* at the top of the handwritten
13 document.

14 It bears the signature of Mr. Fedor, his
15 attorney, the Plaintiff, and the Plaintiff's
16 attorney. And it is dated December 17th, 2002. We
17 feel that it is necessary for the Court to see this
18 document if the Court is going to consider the
19 legitimacy of Mr. Dryer's argument that \$385,000
20 has been paid towards the confession of judgment.

21 THE COURT: Well, that's what I -- I mean, I'm
22 not sure I can make a decision. That's what I'm
23 trying to figure out. Mr. Dryer may be able to
24 give us some guidance as to how -- basically you
25 all have an agreement.

1 MR. DRYER: Well, Your Honor --

2 THE COURT: And you want me to --

3 MR. RUSCHKY: We don't -- Mr. Dryer and I
4 weren't in the case back then.

5 THE COURT: Well, there is an agreement that
6 you all -- and he doesn't want it -- I understand
7 he doesn't want it -- it is confidential. He
8 doesn't want it a part of the record. I'm not sure
9 how I can consider it if it is not a part of the
10 record.

11 MR. RUSCHKY: Take it under seal, Your Honor.

12 THE COURT: Well, I thought about that. But
13 how I -- but I'm not sure how I get to the final
14 answer if I don't see the agreement.

15 MR. RUSCHKY: I agree, Your Honor.

16 THE COURT: That is kind of the problem I
17 have. Unless Mr. Dryer has some other suggestion.

18 MR. DRYER: Your Honor, the confession of
19 judgment ended the case. The confession of
20 judgment is clear and concise on its face. Needs
21 no elaboration. Needs nothing further. It recites
22 the sum of \$350,000. And moreover -- and I didn't
23 compose this --

24 THE COURT: No, I see what you are talking --
25 can you -- Mr. Hollis, can you pass that up? I see

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

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

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

7 MR. RUSCHKY: That's it.

8 THE COURT: Okay.

9 (Complies.)

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

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

14 MR. RUSCHKY: It is in the file?

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

19 MR. RUSCHKY: No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Now, I haven't asked in this proceeding for
2 return of any overpayment. I just want to cut the
3 misery here on Mr. Fedor, who has -- well, anyway,
4 I ask that this confession of judgment be read
5 accordingly. He didn't confess for \$400,000, he
6 confessed for \$350. And it is undisputed that that
7 sum and more has been paid.

8 THE COURT: All right.

9 MR. RUSCHKY: Your Honor, granted, the
10 confidential settlement agreement -- I'm sure
11 Mr. Dryer could have drafted a better one. Retired
12 Chief Justice David Harwell drafted it. I believe
13 it is in his handwriting. And if -- I understand
14 why Mr. Dryer is not asking for a refund of \$35,000
15 here, because he is not entitled to it under the
16 terms of the agreement. And the confession of
17 judgment has to be read in the context of the
18 confidential settlement agreement.

19 THE COURT: And that was in 2002, right?

20 MR. RUSCHKY: The settlement agreement is
21 dated September 17th, 2002.

22 THE COURT: All right. Let me ask you this,
23 because this happens sometimes.

24 MR. DRYER: Your Honor --

25 THE COURT: Hold on one second. There is a

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

5 MR. RUSCHKY: Right.

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

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

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

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

23 THE COURT: Okay.

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

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

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

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

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

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

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

1 me proposed orders and in that proposed order if
2 there is any research you need to cite, any case
3 law -- what I'll do is --

4 MR. RUSCHKY: Well, Your Honor, I would also
5 like the opportunity to research submitting
6 something to the Court under seal, because we feel
7 that it is imperative that the Court see this
8 confidential settlement agreement.

9 THE COURT: All right. That will be fine.
10 Strike the part about the proposed orders. If you
11 all -- I'll give you -- how many days do you need
12 to research it, regarding the document coming in
13 under seal?

14 MR. RUSCHKY: On both issues?

15 THE COURT: Both issues.

16 MR. RUSCHKY: Both issues. I'm leaving town a
17 week from Thursday, so --

18 THE COURT: Thirty days?

19 MR. RUSCHKY: Oh, 30 days would be great
20 because I'll turn my work in to the Grimsley law
21 firm and they can file something.

22 THE COURT: Is that okay with you, Mr. Dryer?

23 MR. DRYER: Yes.

24 THE COURT: The only -- he's saying he should
25 be able to -- I'll take -- and I am going to do

1 some research on the confession of judgment and the
2 confidentiality. He's saying that the Court should
3 be able to review it. I'm not going to look at it
4 at this point until I get some authority that
5 says -- or I am able to look at some case law about
6 confidentiality agreement. I know there is some
7 stuff out there, I just haven't --

8 MR. DRYER: Your Honor, I'll say again, the
9 confession ended the case.

10 THE COURT: I understand. And I am going to
11 take a look at that too.

12 MR. DRYER: We didn't draw it up.

13 THE COURT: Yes, sir.

14 MR. DRYER: And it bears all the dignity and
15 finality of a jury verdict, a Court's verdict. It
16 says what it says. And it is clear on its face.

17 By the way, so the record might be complete --

18 THE COURT: Yes, sir.

19 MR. DRYER: -- I don't think it is in dispute,
20 but I would offer the affidavit of Mr. Fedor, which
21 simply affirms that he has paid the sum of
22 \$385,000. And that -- I don't think that is in
23 dispute.

24 THE COURT: No, I don't believe it is.

25 MR. DRYER: So let me --

1 MR. RUSCHKY: Your Honor, which includes
2 \$50,000 that was paid before the confession of
3 judgment.

4 THE COURT: You don't dispute that a total of
5 \$385,000 has been paid?

6 MR. RUSCHKY: Towards \$400,000, no. We don't
7 dispute that he has paid \$385. He has paid \$385,
8 but it includes \$50,000 that was paid before the
9 confession of judgment was signed.

10 MR. DRYER: Well, yes. And I appreciate the
11 graciousness of counsel that they agree; however,
12 it is their confession, quoting:

13 Defendant hereby authorizes the entry of
14 the order in the principal amount less
15 any payments received by Plaintiff from
16 Defendants.

17 And it is undisputed that the Plaintiff has
18 received \$385,000 towards the recited amount of
19 \$350,000. Therefore, this confession has been
20 satisfied.

21 Now, if the Plaintiff chooses to back up and
22 start over and chase the alleged balance of
23 \$15,000, more power to him. But at the moment,
24 this confession is of record, and it plainly has
25 been paid.

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

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

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

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

CERTIFICATE OF REPORTER

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2
3
4 STATE OF SOUTH CAROLINA)
5 COUNTY OF RICHLAND)

6
7
8 I, Deborah M. McCurdy, Official Court Reporter for
9 the Fifth Judicial Circuit of the State of South
10 Carolina, do hereby certify that the foregoing is a
11 true, accurate and complete Transcript of Record of the
12 proceedings had and evidence introduced in the trial of
13 the captioned case, relative to appeal, in the Court of
14 Common Pleas for Richland County, South Carolina, on the
15 26th day of August, 2013.

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

18
19 September 20, 2014

20
21 *s/Deborah M. McCurdy, RPR*

22
23 _____
24 Deborah M. McCurdy, RPR
25 Fifth Circuit Court Reporter

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O	rely [1] 8/18 remarkable [2] 6/12 6/12 remind [1] 4/16 renew [1] 9/20 Reporter [4] 1/25 23/1 23/8 23/23 research [5] 18/24 19/2 19/5 19/12 20/1 reserved [1] 7/15 resolved [1] 4/3 respect [2] 6/5 8/9 respected [2] 6/8 6/20 response [1] 15/6 resulted [1] 7/6 retired [2] 7/10 16/11 return [1] 16/2 review [1] 20/3 reviewed [1] 15/17 RICHLAND [3] 1/2 23/5 23/14 RPR [3] 1/24 23/21 23/23 RUSCHKY [5] 1/18 3/9 3/11 10/18 15/2	submitted [1] 9/9 submitting [1] 19/5 such [1] 4/21 suggestion [1] 12/17 sum [9] 4/4 4/13 4/14 8/12 8/13 8/13 12/22 16/7 20/21 supported [1] 9/6 Supreme [1] 7/11 sure [4] 11/22 12/8 12/13 16/10	
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W
week [1] 19/17
weren't [1] 12/4
what [19] 3/24 5/2 5/12 5/18 7/8 10/5 10/10
10/17 11/21 11/22 12/24 13/1 13/5 15/6
18/14 18/18 19/3 20/16 22/4
whatever [1] 18/2
WHEREUPON [3] 2/4 2/13 22/11
why [4] 8/25 14/22 16/14 18/1
will [3] 18/8 19/9 22/3
WILLIAM [1] 1/18
witnesses [1] 2/4
work [2] 5/2 19/20
writing [3] 4/9 15/19 18/7
wrote [1] 18/11

Y
year [7] 5/15 7/17 8/2 9/1 9/5 13/21 17/3
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Page intentionally omitted per Order of the
Court of Appeals dated September 17, 2015.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

EDWIN M. SMITH, JR.,
Plaintiff,

vs.

DAVID A FEDOR.
Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

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

MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION TO
VACATE JUDGMENT

1. On September 17, 2002, the Plaintiff Edwin M. Smith, Jr. (the "Plaintiff") and the Defendant David A Fedor (the "Defendant"), each represented by counsel, signed a settlement agreement mediated by retired Chief Justice David Harwell, in which the Defendant agreed to pay the Plaintiff "the total sum of \$400,000.00 in complete settlement of all claims" (the Agreement"). A true copy of the Agreement is attached hereto as Exhibit A. The Defendant was to pay \$50,000.00 within three days, and the balance of \$350,000.00 was to be paid in annual installments of \$35,000.00. As security, the Defendant agreed to and did sign a Confession of Judgment for \$350,000.00, to be held in escrow by the Plaintiff's attorney and not to be recorded unless the Defendant defaulted on any payments.

2. On September 26, 2002, the Defendant signed a Confession of Judgment (the "Judgment"), indicating that the Defendant was indebted to the Plaintiff in the principal sum of \$350,000.00 plus all post-judgment interest as allowed by law, beginning from the date of entry of Judgment. A true copy of the Judgment is attached hereto as Exhibit B. The Judgment was executed in consideration for the Plaintiff agreeing to release all claims against the Defendant and dismiss the above captioned matter (the "Suit").

3. The Judgment authorized entry of an Order and judgment against the defendant "in the principal amount of \$350,000.00, less any payments received by Plaintiff from Defendant through the date of filing hereof."

4. The Judgement provided that it would not be filed "unless and until there has been a default by the Defendant on his payment obligations as set forth in the Confidential Settlement Agreement."

5. The Plaintiff contends that such a default has occurred. Therefore, on February 27, 2013, the Judgment was filed. Consistent with the provisions of Paragraph 7 of the Judgment, the Plaintiff also filed a Partial Satisfaction of Judgment, including that the Defendant paid \$335,000.00 of the \$350,000.00 principal amount.

6. On or about March 26, 2013, the Defendant filed a Motion pursuant to SCRCP (60(b) for relief from the Judgment, arguing that the Defendant had paid "an amount in excess of the named \$350,000.00."

7. The Plaintiff submits that the amount of the settlement referred to in the Agreement was \$400,000.00, which consisted of \$50,000.00 paid at or about the time of the settlement, and the balance of \$350,000.00, secured by the execution of the Judgment. Thus, the initial \$50,000.00 was not included in the \$350,000.00 covered by the Judgment.

8. The Plaintiff specifically rejects any suggestion or argument that the initial \$50,000.00, paid on or about September 26, 2002, was to be included in the \$350,000.00 covered by the Judgment.

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

10. At no place within the terms of the Agreement or the Judgment is there a statement or provision that Mr. Fedor would be given credit for the \$50,000.00 payment (made as part of the Agreement) towards the \$350,000.00 due under the terms of the Judgment.

11. At no time during the negotiations with Mr. Swagart over the \$35,000.00 balance due on the Judgment did he ever state or imply that Mr. Fedor should get or expect to get credit for the \$50,000.00 payment made under the provisions of the Agreement.

12. At no time during the negotiations with Mr. Swagart over the \$35,000.00 balance due on the Judgment did he ever state or imply that because of the initial \$50,000.00 being credited to the Judgment, the amount due under the provisions of the Judgment had been over paid by Mr. Fedor and that Mr. Fedor was entitled to a \$15,000.00 refund.

13. It is Plaintiff's firm belief that Mr. Fedor and Mr. Swagart both know that the \$50,000.00 initial payment was not to be credited toward the \$350,000.00 amount due under the provisions of the Judgment.

Submitted this the 3RD day of July 2013.

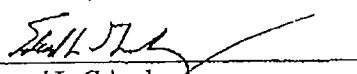

Edward L. Grimsley
Eric Wm. Ruschky
Attorneys for Plaintiff
GRIMSLEY LAW FIRM, LLC
Post Office Box 11682
Columbia, South Carolina 29211
Telephone: (803) 233-1177

EXHIBIT A

Confidential Settlement Agreement

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

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

AB
MM
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~~Defendant will within three (3)
days deliver to Plaintiff's trust in the
sum of \$50,000 to be held in the
trust account of Plaintiff White, Martin &
Reichold to be disbursed to Plaintiff's
personal~~

1. ~~Plaintiff~~ Defendant agrees to
pay Plaintiff the total sum of \$400,000.00
in complete settlement of all claims to be paid

as follows:

a. Defendant shall within three (3) days
of the date of this agreement deliver to
sum of \$50,000.00 to his attorney for
deposit into trust account, to be

distributed to Plaintiff's counsel upon the
execution of all releases and ~~order~~
court order
Stipulation of Dismissal (with prejudice);

b. the balance of \$350,000.00 to

be paid in annual installments of
\$35,000.00 per annum or 15% of Defendant's

gross income (net of taxes) (whichever is greater),
net income, as shown in annual federal
income tax returns, for the calendar year

preceding upon the year in which the

payment is made, each payment to be

made on ^{or before} September 15 of each year beginning

on September 15, 2007, and to be accompanied by a copy

Handwritten initials and marks in the left margin, including "D-R", "M", and "C".

5. Plaintiff agrees to write a letter
to the American Committee of the Bar providing
notice that this case has been resolved
to the mutual satisfaction of all ~~parties~~ parties.

~~This~~

Sept 17, 2002

~~Edwin M. Smith, Jr.~~

Edwin M. Smith, Jr.

Plaintiff

Susan A. Dehrens

Attorney for Plaintiff

David A. Fodor

David A. Fodor

Defendant

Kenneth J. Sargent, Jr.

Attorney for Defendant

EXHIBIT B

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Edwin M. Smith, Jr.)
Plaintiff,)

Docket No. 01-CP-40-4203

v.)

David A. Fedor,)
Defendant.)

CONFESSION OF JUDGMENT

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

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

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

5. The indebtedness owed by Defendant to Plaintiff arose pursuant to a confidential Settlement Agreement between Defendant and Plaintiff dated September 17, 2002, in which the lawsuit referenced above was settled.

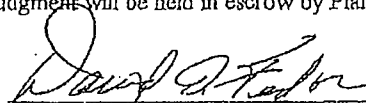
6. Defendant has no defense to the payment of, or right to set off against, the indebtedness, debt, or liability, and Defendant waives, and will not assert or allege, any defense or right to set off with respect to the judgment confessed herein.

7. The Defendant hereby authorizes the entry of an Order and judgment against Defendant, and in favor of Plaintiff, in the principal amount of \$350,000.00, less any payments received by Plaintiff from Defendant through the date of filing hereof. Thereafter, post-judgment interest shall accrue as allowed by law, until the judgment is paid in full.

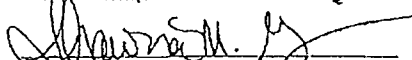
8. The undersigned represents that he signs this Confession of Judgment of his own free will, and that he fully understands the meaning and legal effect hereof.

9. This Confession of Judgment may not be filed unless and until there has been a default by Defendant on his payment obligations as set forth in the Confidential Settlement Agreement.

10. This Confession of Judgment may not be filed unless and until there has been a default by Defendant on his payment obligations as set forth in the Confidential Settlement Agreement. Pending such a default, this Confession of Judgment will be held in escrow by Plaintiff's attorney, James R. Gilreath, Esquire.


David A. Fedor

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


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

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

EDWIN M. SMITH, JR.,
Plaintiff,

vs.

DAVID A FEDOR.
Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

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

AFFIDAVIT OF JAMES R.
GILREATH

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

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

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

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

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

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

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

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

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

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

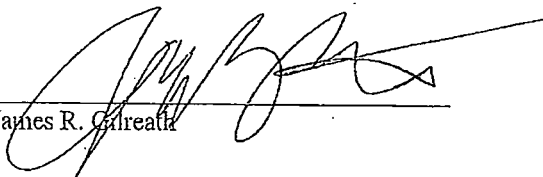
11. The terms of the Agreement specifically provide that an initial \$50,000.00 payment would be made, followed by payment of \$350,000.00 through a series of payments of \$35,000.00 under the provisions of a Confession of Judgment to be executed by Mr. Fedor.

12. At no place within the terms of the Agreement or the Judgment is there a statement or provision that Mr. Fedor would be given credit for the \$50,000.00 payment (made as part of the Agreement) towards the \$350,000.00 due under the terms of the Judgment.

13. At no time during my negotiations with Mr. Swagart over the \$35,000.00 balance due on the Judgment did he ever state or imply that Mr. Fedor should get or expect to get credit for the \$50,000.00 payment made under the provisions of the Agreement.

14. At no time during my negotiations with Mr. Swagart over the \$35,000.00 balance due on the Judgment did he ever state or imply that because of the initial \$50,000.00 being credited to the Judgment, the amount due under the provisions of the Judgment had been over paid by Mr. Fedor and that Mr. Fedor was entitled to a \$15,000.00 refund.

15. It is my firm belief that Mr. Fedor and Mr. Swagart both know that the \$50,000.00 initial payment was not to be credited toward the \$350,000.00 amount due under the provisions of the Judgment.


James R. Gilreath

SWORN to before me this

1ST day of JULY, 2013

Katherine M. Kohlmann
Notary Public, State of SOUTH CAROLINA
My Commission Expires: 10/10/13

5. The indebtedness owed by Defendant to Plaintiff arose pursuant to a confidential Settlement Agreement between Defendant and Plaintiff dated September 17, 2002, in which the lawsuit referenced above was settled.

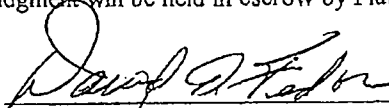
6. Defendant has no defense to the payment of, or right to set off against, the indebtedness, debt, or liability, and Defendant waives, and will not assert or allege, any defense or right to set off with respect to the judgment confessed herein.

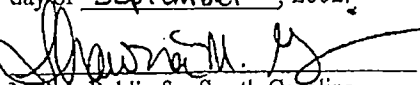
7. The Defendant hereby authorizes the entry of an Order and judgment against Defendant, and in favor of Plaintiff, in the principal amount of \$350,000.00, less any payments received by Plaintiff from Defendant through the date of filing hereof. Thereafter, post-judgment interest shall accrue as allowed by law, until the judgment is paid in full.

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

9. This Confession of Judgment may not be filed unless and until there has been a default by Defendant on his payment obligations as set forth in the Confidential Settlement Agreement.

10. This Confession of Judgment may not be filed unless and until there has been a default by Defendant on his payment obligations as set forth in the Confidential Settlement Agreement. Pending such a default, this Confession of Judgment will be held in escrow by Plaintiff's attorney, James R. Gilreath, Esquire.


David A. Fedor

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

Notary Public for South Carolina
My Commission Expires: 10/17/2001

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

IN THE COURT OF COMMON PLEAS

01-CP-40-4203

AFFIDAVIT OF DAVID FEDOR

BEFORE ME, the undersigned Notary Public in and for the County and State aforesaid, personally appeared David Fedor who under oath affirms that he is the Defendant and that he has paid to the Plaintiff, or his attorney, the sum of \$385,000⁰⁰ that sum being in excess of the sum recited in Defendant's Confession of Judgment and that the Confession of Judgment should be deemed satisfied.

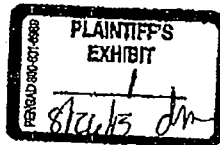
David A Fedor
David A Fedor

 David Fedor

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

John D. Ellis

 Notary Public for the State of SC
 My Commission Expires: 7.29.2020



RECEIVED
JUN 1 1967
FBI - WASH DC

RECEIPT FOR EXHIBITS

Case No. 01-CV-40-4703 Judge D. B. Benjamin
 Plaintiff: Edwin M Smith Jr ~~Plaintiff's~~ Atty. Leo Orger Jr
 Defendant: David A Fedor Def's. Atty. _____
 Date Trial Started: 8/26/13 Date Trial Ended: 8/26/13

Received of Abraham M. [Signature] Court Reporter for the above case, these exhibits:

	Clerk of Court Use
1 <u>P-1 affidavit of David A. Fedor</u>	✓
2	
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This 26 day of August 2013. Page 1 of 1

By: [Signature]
 Richland County Clerk of Court

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

Revised 3/96

September 23, 2013

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

RE: Edwin M. Smith, Jr.

VS: David A. Fedor

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

Dear Ms. Benjamin:

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

Very truly yours,

Leo A. Dryer
DRYER LAW OFFICE

LAD/tat

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

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

IN THE COURT OF COMMON PLEAS

01-CP-40-4203

DEFENDANT/MOVANT
 MEMORANDUM

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

Defendant, relying upon Section 15-35-370 and the status/holding that a Confession of Judgment sustains the same finality as an Order of Judgment, see Southern Porcelian Manufacturing Co. vs. Thew SSC5 (1873):

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

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

The finality of the Confession, as an Order, is further reinforced by the succeeding Section 380 where it provides an Execution may be issued upon a Confession.

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

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

"The Defendant hereby authorizes the entry of an Order and judgment against Defendant, and in favor of Plaintiff, in the principal amount of \$350,000.00, less any payments received (emphasis added) by Plaintiff from Defendant through the date of filing hereof...."

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

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

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

Respectfully Submitted,

Leo A. Dryer
Attorney for Defendant

September _____, 2013

order.doc/13030504/tat

Page intentionally omitted per Order of the
Court of Appeals dated September 17, 2015.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

EDWIN M. SMITH, JR.,
Plaintiff,

vs.

DAVID A FEDOR
Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

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

MEMORANDUM IN SUPPORT OF
ENTERING SETTLEMENT AGREEMENT
INTO EVIDENCE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

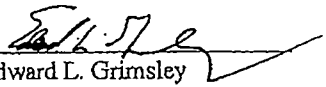
IV. In the alternative the Settlement Agreement should be reviewed *in camera* and sealed by the court should the court find that it can not otherwise review the agreement due to concerns of confidentiality for the document.

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

Conclusion

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

Submitted 25th day of September 2013.


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

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

EDWIN M. SMITH, JR.,)

Plaintiff,)

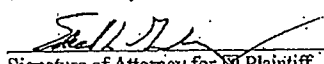
vs.)

DAVID A. FEDOR,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
C/A No. 2001-CP-40-4203

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Edward L. Grimsley Bar No.: 2326 Attorney for the Plaintiff Address: Post Office Box 11682 Columbia, South Carolina 29211 Phone: 803 233 0797 Fax: 803 233 0798 Email: egrimsley@grimsleylaw.com Other:	Defendants Attorney Bar No: Address: Phone: Fax: Email: Other	RECEIVED COURT CLERK NOV 11 2013 11:01 AM
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)		
SECTION I: Hearing Information		
Nature of Motion: Motion for Reconsideration		
Estimated Time Needed: ***Est Time Needed***		Court Reporter Needed: <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO
SECTION II: Motion / Order Type		
<input checked="" type="checkbox"/> Written Motion Attached <input type="checkbox"/> Form Motion - I hereby move for relief or action by the court as set forth in the attached proposed order.		
 Signature of Attorney for <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant		November 8, 2013 Date submitted
SECTION III: Motion Fee		
<input checked="" type="checkbox"/> Paid - Amount: \$25.00 <input type="checkbox"/> Exempt: (check reason)		
<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ <input type="checkbox"/> Other		
JUDGE'S SECTION		
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order <input type="checkbox"/> Other: _____		
JUDGE: _____ Code: _____ Date: _____		
CLERK'S VERIFICATION		
Date Filed: _____		
Collected By: _____		
<input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____		

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Edwin M. Smith, Jr.,
Plaintiff,

v.

David A. Fedor,
Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2001-CP-40-4203

MOTION FOR
RECONSIDERATION

RECEIVED
FEBRUARY 15 PM 4:30
CLERK OF COURT
FIFTH JUDICIAL CIRCUIT

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

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

SUMMARY

The issues in this current matter date back to September 17, 2002 when the parties participated in a mediation conducted by David W. Harwell as mediator. That day the parties entered into a "Confidential Settlement Agreement" personally signed by both parties and their attorneys. The Confidential Settlement Agreement was not recorded with the Court. Shortly thereafter, the parties informed the Court by a letter filed on September 26, 2002 "that a mediated settlement had been reached". That same day, the Defendant also executed a Confession of Judgment for \$350,000 in consideration for the Plaintiff's agreement to release all

claims against him and to dismiss the underlying suit with prejudice. (Confession of Judgment, ¶4). According to the Confession of Judgment, the indebtedness it secured “arose pursuant to a confidential Settlement Agreement between Defendant and Plaintiff dated September 17, 2002...” (Id at ¶5)(emphasis added). In addition the Confession of Judgment stated the Plaintiff would not file the confession “until there [was] a default by Defendant on his payment obligations as set forth in the Confidential Settlement Agreement.” (Id at ¶¶ 9 and 10) (emphasis added).

Ten years after the dismissal of the case, the Plaintiff on February 27, 2013 filed the Confession of Judgment and a Partial Satisfaction of Judgment with the Court. The Partial Satisfaction stated that the Defendant had paid \$335,000 towards the balance owed under the Confession of Judgment, leaving an unpaid balance of \$15,000. Following the entry of the Confession of Judgment, the Defendant filed a motion to be relieved from the judgment pursuant to Rule 60(b)(5), SCRCP.

At the August 26, 2013 hearing, counsel for the Defendant asked the Court to consider only the terms on the face of the Confession of Judgment which provides in part that “[t]he Defendant hereby authorizes the entry of an Order and judgment against Defendant, and in favor of Plaintiff, in the principal amount of \$350,000, less any payments received by Plaintiff from Defendant through the date of filing hereof.” (Confession of Judgment, ¶7). Defendant’s counsel asked this Court to ignore the terms of the Confidential Settlement Agreement specifically referenced in the Confession of Judgment.

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

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

In the subject Order, the Court declined to consider the terms of the Confidential Settlement Agreement. The Order stated that the 2002 version of Rule 43(k), SCRCP, pertaining to the enforceability of settlement agreements, applied to this case and that the 2002 rule prohibited enforcement of the Confidential Settlement Agreement since the agreement was not entered in the court record. As a result, the Court held that the payments in excess of \$350,000 satisfied the Confession of Judgment and granted the Defendant's Motion for Relief from the Confession of Judgment.

ARGUMENT

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

This Court held that Rule 43(k), SCRCP as amended in 2009 and currently in effect did not apply to the matter presently before the Court. The Court applied to this case the 2002 version of Rule 43(k) as interpreted by the Supreme Court in 2006 in *Buckley v. Shealy*, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006). As a result, the Court declined to consider the terms of the Confidential Settlement Agreement the parties executed on September 17, 2002. Under our state's appellate case law, the present version of Rule 43(k) is to be applied to cases currently pending before the Court, including this matter.

As a rule of procedure, the amended Rule 43(k), SCRCP is to be employed in all actions pending before the court at the time of amendment and in all actions heard by the court thereafter. This precise issue was addressed by the South Carolina Court of Appeals in *Graham*

v. Dorchester County School District, 339 S.C. 121, 528 S.E.2d 80 (Ct. App. 2000). The Court upheld the trial judge's ruling that an amendment to the Rules of Civil Procedure, such as Rule 40(j) SCRCF at issue in that case, should be given retroactive application to cases pending at the time of its enactment.

In explaining that amendments to the Rules of Civil Procedure apply retroactively, the Court of Appeals stated:

In cases dealing with statutory law changes, courts have discussed the general rules of prospective and retroactive application. By analogy, those same principles can be applied to determine whether an amended procedural rule should have prospective or retroactive effect...

Our Supreme Court has held that statutes are presumed to be entitled to prospective construction unless there is an express provision or a clear legislative intent to the contrary. *Hercules Inc. v. South Carolina Tax Comm'n*, 274 S.C. 137, 262 S.E.2d 45 (1980) (holding a statute which has the effect of tolling a statute of limitations affects the remedy and not the right and is therefore subject to retroactive application). A principal exception is remedial or procedural statutes are generally held to operate retrospectively. *Id.*; see *Jenkins v. Meares*, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990) ("Our decisions recognize a presumption that statutory enactments are to be given prospective rather than retroactive effect. An exception to this presumption arises when the enactment is remedial or procedural in nature, such as a statute of limitations.").

The South Carolina Rules of Civil Procedure provide that the rules, which initially took effect on July 1, 1985, would "govern all proceedings in civil actions brought after they take effect." Rule 86(a), SCRCF. Moreover, the rules also govern "all further proceedings in actions then pending" unless to do so "would not be feasible or would work injustice." *Id.*; see *McGann v. Mungo*, 287 S.C. 561, 340 S.E.2d 154 (Ct.App.1986) (holding the new rules of civil procedure apply to all further proceedings in pending actions); James F. Flanagan, *South Carolina Civil Procedure* 583 (2d ed. 1996) ("Rule 86(a) made these rules applicable to cases then pending at the time of [sic] rules were adopted. A similar result follows when new civil rules are promulgated.").

Graham v. Dorchester Cnty. Sch. Dist., 339 S.C. 121, 124, 528 S.E.2d 80, 81-82 (Ct.App. 2000)¹

(emphasis added).

¹ See also *Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 443 S.E.2d 906 (1994) (holding that the same rules of construction used in interpreting statutes apply in interpreting the South Carolina Rules of Civil Procedure).

Defendant can make no plausible argument that retroactive application of the 2009 amendment of Rule 43(k) is not feasible or would work an injustice. When this case was mediated and settled in September 2002, Rule 43(k) at that time was interpreted and applied by the Supreme Court under its ruling in *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533 (1995). In *Ashfort*, the Supreme Court allowed two exceptions to the requirement that agreements between counsel must be entered on the record to be binding. The court stated that “[t]he rule does not apply where the agreement is admitted or has been carried into effect.” *Id* at 493-94, 458 S.E.2d at 534 n.1. Therefore in 2002, settlement agreements that (1) had been admitted by the parties, or (2) carried into effect did not have to be entered on the record to be enforceable by the court.

In this case, the Confidential Settlement Agreement has been admitted by the parties since both parties personally signed the agreement along with their counsel. In addition, the case was dismissed with prejudice, and the Defendant admittedly made over \$350,000 in payments since then. So the Confidential Settlement Agreement has been carried into effect. Thus under the *Ashfort* application of Rule 43(k) in effect in 2002, the Confidential Settlement Agreement did not have to be entered on the record and was enforceable without court review when the parties signed their mediated Confidential Settlement Agreement on September 17, 2002.

It was not until 2006 in *Farnsworth v. Davis Heating & Air Conditioning, Inc.* that the Supreme Court declined to continue following the two exceptions it previously enunciated in footnote 1 in *Ashfort*. See *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 623, 627 S.E.2d 724 (2006). With the *Farnsworth* and *Buckley* rulings in 2006, the Supreme Court began requiring “admitted” settlement agreements to be placed before the trial court.

Since the current version of Rule 43(k) follows the same requirements in force in 2002 when the parties executed the Confidential Settlement Agreement, it would work no hardship on the Defendant to apply the present version of Rule 43(k). The Defendant should have expected the lawful agreement to be enforceable in 2002 and should expect the same now as well. With no resulting injustice, the current version of Rule 43(k) governs this matter, making the Confidential Settlement Agreement binding on the parties.

II. Exceptions to the parol evidence rule allow admission of the Confidential Settlement Agreement for Court consideration.

The parol evidence rule bars admission of extrinsic evidence if the writing on its face appears to express the whole agreement. *Blackwell v. Faucett*, 117 S.C. 60, 108 S.E.2d 295 (1921). Conversely, when a document on its face does not appear to express the whole agreement, the parol evidence rule is not applicable. See *Lingefelt v. Forest Hills Homes, Inc.*, 305 S.C. 197, 200-01, 406 S.E.2d 394, 396 (Ct. App. 1991) (allowing admission of parol agreement that was not intended to be replaced by and merged into litigated agreement). As explained below, the Defendant's unilaterally signed Confession of Judgment was not intended to be the complete agreement of the parties, making the Confidentiality Settlement Agreement admissible.

A. A confession of judgment is not an integrated agreement barring parol evidence but is a starting point for the investigation of outside evidence.

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

The parol evidence rule is one of substantive contract law, not a rule of evidence. *Gilliland v. Elmwood Properties*, 301 S.E. 295, 302, 391 S.E. 2d 577, 581 (1990). The parol evidence rule therefore has no application to the unilateral Confession of Judgment. In fact, the

Confession of Judgment is a document whose very purpose is to guide the reader to extrinsic evidence about the terms of the subject debt or obligations.

South Carolina Code § 15-35-360 provides that a Confession of Judgment “must state concisely the facts out of which it arose . . .” S.C. Code Ann. §15-35-360(2)(emphasis added). The South Carolina Supreme Court has stated that “all the statute required was a concise, not a particular or detailed statement of the facts out of which the indebtedness arose.” *Weinges v. Cash*, 15 S.C. 44 (1881) (emphasis in original). Since the confession of judgment statute required that the statement be a concise statement of facts, the legislature did not intend the confession of judgment to be an all-encompassing, integrated, document. To that same point, the Supreme Court stated “what I think the statute intended [a creditor] should have is sufficient of the facts to enable him to inquire into the transaction and to form his opinion of the honesty of the judgment from the facts he shall ascertain.” *Id.* (emphasis in original).

The Supreme Court further explained that the concisely stated facts in a confession of judgment are not meant to be the only facts a third party reading the confession of judgment can accept about the debtor’s debt. It is the obligation of the third party reading the confession of judgment to further investigate the circumstances behind the debt. The Supreme Court expounded on that point by stating:

A creditor who was disposed to question this [confession of] judgment would not, of course, accept the debtor’s statement as correct even if it had been full to the minutest detail. All he would want to know would be what was claimed to be the origin and consideration of the debt, and he would inquire for himself into the details.

Id. at 65-66.

The Supreme Court also explained that a third party reading the confession of judgment would use the concisely stated facts out of which the judgment arose to investigate extrinsic

evidence to determine how much ought to be due. *Id.* at 66. Thereon, Supreme Court pronounced:

... With these facts furnished to him by the statement, the creditor would have it in his power, by his own investigations, to ascertain how much ought to be due, and it is not to be expected that his action in the premises would be influenced by any details that might be contained in the statement, but by the result of his own investigations, which the facts there stated enabled him to institute...

Id. (emphasis added).

As the Court later stated in the opinion, the confession of judgment is designed to provide the origin and consideration of the debt in order that a third party would then have "such starting point [to] . . . proceed with his own investigations. . ." *Id.* The purpose of the Confession of Judgment is to direct this Court to extrinsic evidence—in this case to the Confidential Settlement Agreement—to ascertain the amounts due.

B. Collateral agreement exception allows introduction of the Confidential Settlement Agreement as the parties' larger master agreement.

Closely related to the independent agreement exception to the parol evidence rule, previously discussed in Plaintiff's Memorandum in Support of Entering Settlement Agreement into Evidence, is the collateral agreement exception where the litigated agreement (*i.e.*, the Confession of Judgment) is a part of a larger agreement (*e.g.*, the Confidential Settlement Agreement). As stated by the South Carolina Supreme Court:

While it is a general rule that a contract in writing, complete in all its terms, draws into it all parol contracts preceding it, yet . . . if it is only a part of a general whole, it is perfectly competent to supply all those missing qualities by testimony giving all the precedent agreements of the parties.

City of Greenville v. Washington American League Baseball Club, 205 S.C. 495, 32 S.E.2d 777, 782 (1945) (holding oral agreement to provide facilities and lighting for baseball team was the larger agreement out of which real estate lease grew and therefore was admissible parol

evidence); *see also Parr v. Parr*, 268 S.C. 58, 64, 231 S.E.2d 695, 697 (1977)(holding where deed referenced another agreement on "other valuable consideration", extrinsic evidence was admissible to explain the other agreement referenced in the deed).

This is precisely the situation at issue in this case. The Confession of Judgment in three places references the Confidential Settlement Agreement. It also declares that the indebtedness pertaining to the Confession of Judgment "arose pursuant to a confidential Settlement Agreement between Defendant and Plaintiff". The Confession of Judgment explicitly provides that it is part of an overall larger agreement entered into by the parties. In the words of the *Parr* court, the Confidential Settlement Agreement is simply explanatory of what the parties' overall agreement was. The Confidential Settlement Agreement is therefore admissible to explain the parties' larger agreement which contains the Confession of Judgment as one of its parts.

C. Inducement exception permits use of Confidential Settlement Agreement.

Parol evidence is admissible to show an outside agreement that was an inducement to the execution of the document at issue. In other words, the Confidential Settlement Agreement is admissible since it was the agreement that induced the Defendant to sign the Confession of Judgment. *See Knighton v. Des Portes Mercantile Co.*, 119 S.C. 340, 112 S.E. 343 (1922) (holding that existence of extrinsic agreement between parties, under which one party signed promissory note, may always be shown when enforcement of the obligation is attempted since promissory note would never have been signed without the extrinsic contemporaneous parol agreement).

The South Carolina Supreme Court described the inducement exception as follows:

Further, it is proper to admit testimony in proof of a contemporaneous or independent agreement on the same subject matter, the meaning of which is not at variance with the principle agreement. Especially is this true

when the purpose of such contemporaneous or independent agreement was to induce the execution of and entering into the principle agreement.

Gantt v. Van der Hoek, 251 S.C. 307, 317-18, 162 S.E.2d 267, 272 (1968).

The inducement principle stated in *Gantt* is precisely the circumstance we have in this case. The Confession of Judgment states:

Defendant executed this Confession of Judgment in consideration of the Plaintiff's agreement to release all claims against him and to dismiss with prejudice that certain lawsuit captioned Edwin M. Smith, Jr. v. David A. Fedor, docket number 2001-CP-40-4203.

Confession of Judgment, ¶ 4.

The Defendant then states in the next paragraph:

The indebtedness owed by Defendant to Plaintiff arose pursuant to a Confidential Settlement Agreement between Defendant and Plaintiff dated September 7, 2002 in which the lawsuit referenced above was settled.

(Confession of Judgment, ¶ 5).

Clearly, the release Defendant received from Plaintiff and the dismissal of the lawsuit he obtained from Plaintiff, as part of the Confidential Settlement Agreement, induced Defendant to execute the Confession of Judgment. As the very inducement for executing the Confession of Judgment, the Confidential Settlement Agreement, as specifically referenced in the Confession of Judgment, is admissible to explain the agreement surrounding the Confession of Judgment. Cf. *Ray v. S.C. Nat'l Bank*, 281 S.C. 170, 173, 314 S.E.2d 359, 360 (Ct. App. 1984) (barring evidence of alleged oral agreement of a condition precedent not expressed in the unconditional promissory note).

D. Parol evidence is admissible to explain ambiguities.

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

at p. 2. This begs the obvious question -- why did the Defendant pay more than \$350,000.00 if he were not obligated to do so? The Defendant has made no claim in these proceedings for a refund of the excess, nor has he made a refund claim in any other forum or manner. It is quite apparent there are more terms to the parties' agreement than those contained in the Confession of Judgment. The Confidential Settlement Agreement pursuant to which the Defendant was making his payments required him to pay additional sums to the Plaintiff over and above the \$350,000.00 secured by the Confession of Judgment. Only a review of the Confidential Settlement Agreement can explain this discrepancy between the amounts paid and the debt secured by the Confession of Judgment.

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

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

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

Paragraph 6 of the Confession of Judgment states as follows:

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

Confession of Judgment, ¶ 6 (emphasis added).

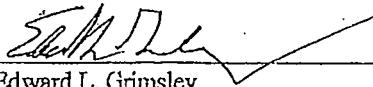
Under paragraph 6 the Defendant waived the right to set off payments made on one obligation against payments owed under another obligation. The Confession of Judgment does not detail which payments are prohibited from being set off against the \$350,000 debt. As is obvious by the Defendant's payments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

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

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

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

Respectfully submitted,



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Columbia, South Carolina 29211
Telephone: (803) 233-1177

November 8, 2013
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
PLEAS

COUNTY OF RICHLAND

EDWIN M. SMITH, JR.,

Plaintiff,

vs.

DAVID A. FEDOR,

Defendant.

) IN THE COURT OF COMMON

) FIFTH JUDICIAL CIRCUIT

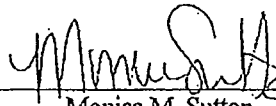
) C/A # 2001-CP-40-4203

) CERTIFICATE OF SERVICE

RECEIVED 10 PM 11/08/13
COURT CLERK
FIFTH JUDICIAL CIRCUIT
COLUMBIA, SOUTH CAROLINA

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

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



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

Page intentionally omitted per Order of the
Court of Appeals dated September 17, 2015.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

EDWIN M. SMITH, JR.,

Plaintiff,

vs.

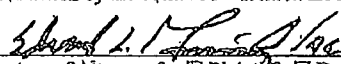
DAVID A. FEDOR,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
C/A No. 2001-CP-40-4203R

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

RICHLAND COUNTY
FILED
2014 AUG -4 PM 2:19
JEANETTE M. NORRIS
C.D. 2, S.S.

Plaintiff's Attorney: Edward L. Grimsley Bar No.: 2326 Attorney for the Plaintiff Address: Post Office Box 11682 Columbia, South Carolina 29211 Phone: 803 233 0797 Fax: 803 233 0798 Email: egrimsley@grimsleylaw.com Other:	Defendants Attorney Bar No: Address: Phone: Fax: Email: Other:
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: Motion for Reconsideration Estimated Time Needed: .30 Court Reporter Needed: <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	
SECTION II: Motion / Order Type	
<input checked="" type="checkbox"/> Written Motion Attached <input type="checkbox"/> Form Motion - I hereby move for relief or action by the court as set forth in the attached proposed order. <div style="display: flex; justify-content: space-between;"> <div style="text-align: center;">  Signature of Attorney for <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant </div> <div style="text-align: center;"> August 4, 2014 Date submitted </div> </div>	
SECTION III: Motion Fee	
<input checked="" type="checkbox"/> Paid - Amount: \$25.00 <input type="checkbox"/> Exempt: (check reason)	<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect. <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court, or, reduced to writing from motion made in open court per judge's instructions <input type="checkbox"/> Name of Court Reporter: _____ <input type="checkbox"/> Other
JUDGE'S SECTION	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order <input type="checkbox"/> Other: _____ <div style="display: flex; justify-content: space-between;"> <div>JUDGE: _____</div> <div>Code: _____ Date: _____</div> </div>	
CLERK'S VERIFICATION	
Collected By: _____ Date Filed: _____ <input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTSTED - AMOUNT DUE: _____	

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Edwin M. Smith, Jr.,
Plaintiff,

v.

David A. Fedor,
Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2001-CP-40-4203 R

MOTION FOR
RECONSIDERATION

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

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

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

ARGUMENT

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

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

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

Motion for Reconsideration has been denied because the Court did not receive a copy of the motion within ten days of the motion being filed.

Order of July 22, 2014.

The undersigned would show this Court as set forth below that the Motion for Reconsideration was timely filed with the Court. Plaintiff acknowledges that a copy of the filed Motion for Reconsideration may have inadvertently not been delivered to the presiding judge. See Rule 59(g), SCRCF (“A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion.”); see also Rule 52(d), SCRCF (same). The failure to provide a copy to the presiding judge was inadvertent and not intended to prejudice any party. Defendant’s counsel was mailed a copy of the motion at the same time it was mailed to the Clerk of Court and is therefore on notice of the issues raised in the original Motion for Reconsideration. Plaintiff thereby requests that the Court relieve him from the dismissal of his Motion for Reconsideration under Rule 60(b)(1), SCRCF.

“The ten day requirement of Rule [59] is... a rule of limitation, not a rule of jurisdiction ... [and] does not affect the jurisdiction of the court.” In re Beard, 359 S.C. 351, 358, 597 S.E.2d 835, 838 (Ct. App. 2004) (quoting Standard Fed. Sav. & Loan Ass'n v. Mungo, 306 S.C. 22, 26 n. 1, 410 S.E.2d 18, 20 n. 1 (Ct.App.1991)). Rules 52(d) and 59(g) are thus more in the nature of rules designed for the court’s administrative convenience and are not meant to be inflexible rules of jurisdiction. Cf. Fed. R. Civ. P. 52 and 59 (no requirement for attorney service of motion on presiding judge); cf. also Rule 59(g), A.R.Civ.P. (“Presentation of any post-trial motion to a judge is not required in order to perfect its making” under Alabama version of Rule 59). Given the lack of prejudice on Defendant, Plaintiff asks this Court to consider his Motion for Reconsideration on its merits.

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

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

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

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

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

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

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

Rule 52(b) states:

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

Rule 52(b), SCRPC.

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

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

Rule 59(b) and (e), SCRPC.²

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

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

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

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

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

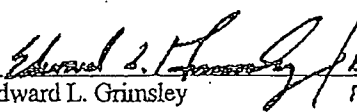
CONCLUSION

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

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

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

Respectfully submitted,


Edward L. Grimsley *BE 6 WITH PERMISSION*
Eric Wm. Ruschky
Attorneys for Plaintiff
GRIMSLEY LAW FIRM, LLC
Post Office Box 11682
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Telephone: (803) 233-1177

July 31, 2014
Columbia, South Carolina.

Exhibit A

GRIMSLEY LAW FIRM, LLC
Attorneys at Law

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Edward L. Grimsley*

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bjgrimsley@grimsleylaw.com

* Also admitted in North Carolina

Edward L. Grimsley
Benjamin E. Grimsley *

November 8, 2013

*Lounesse
Williams*

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

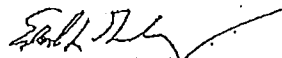
Re: **Edwin M. Smith, Jr. vs. David A. Fedor, et al.**
Case No.: 2001-CP-40-4203

Dear Ms. McBride:

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

I appreciate your assistance in this matter.

Sincerely,


Edward L. Grimsley

ELG/mtris
Enclosures

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

dberjaminLC @ SCCourts.org. 6/14

STATE OF SOUTH CAROLINA
PLEAS

COUNTY OF RICHLAND

EDWIN M. SMITH, JR.,

Plaintiff,

vs.

DAVID A. FEDOR,

Defendant.

) IN THE COURT OF COMMON

) FIFTH JUDICIAL CIRCUIT

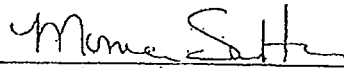
C/A # 2001-CP-40#203

CERTIFICATE OF SERVICE

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

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

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



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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable DeAndrea Gist Benjamin, Circuit Court Judge

Case No. 2001-CP-40-4203

EDWIN M. SMITH, JR. APPELLANT,

v.

DAVID A. FEDOR, RESPONDENT.

NOTICE OF APPEAL

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

August 21, 2014

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AUG 25 2014

SC Court of Appeals

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ATTORNEY FOR RESPONDENT

RECEIVED
AUG 25 2014
SC Court of Appeals

EXHIBIT A

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 01CP4004203R

Edwin M Jr Smith

David A Fedor

PLAINTIFF(S)

Edwards A G & Sons Incorporated

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

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

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

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

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

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

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

James R. Gilreath

Edward L. Grimsley

Leo A. Dryer Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____

Jeanette W. McBride

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AUG 25 2014

SCRPC Form 4C (10/2011)

SC Court of Appeals

SCANNED

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
EDWIN M. SMITH, JR.,)
)
PLAINTIFF,)
)
vs.)
)
DAVID FEDOR)
)
DEFENDANT.)

COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
Case Number: 2001-CP-40-4203

2013 OCT 31 AM 10:21
JEANNETTE W. MERRIS
C.C.P. & G.S.
RICHLAND COUNTY
FILED

ORDER

This matter came before the Court on August 26, 2013 at a hearing on Defendant's motion to be relieved from a confession of judgment. Present at the hearing were Eric Ruschky, Esquire, counsel for Plaintiff, and Leo A. Dryer, Esquire, counsel for Defendant. After considering the law, the memoranda submitted by the parties, the arguments of counsel, and all matters submitted, Defendant's motion to be relieved from the confession of judgment is **GRANTED.**

BACKGROUND

This case dates back to the filing of the summons and complaint on December 12, 1998. However, the underlying merits of the suit are not presently at issue. After several years of litigation, the Court was informed by a letter filed on September 26, 2002 that a "mediated settlement had been reached in the case." Subsequently, on November 4, 2002, an Order of Dismissal (with Prejudice) signed by The Honorable G. Thomas Cooper was filed with the Court. Thereafter, on September 17, 2002, the parties and their attorneys executed a written instrument titled "Confidential Settlement Agreement." This document was never recorded with the Court. The Defendant also executed a Confession of Judgment in consideration for the

Plaintiff's agreement to release all claims against him and to dismiss the underlying suit with prejudice.

Nearly eleven years after the dismissal of the case, on February 27, 2013, the Plaintiff filed the Confession of Judgment and a Partial Satisfaction of Judgment with the Court. Following the entry of the Confession of Judgment, the Defendant filed a motion pursuant to Rule 60(b)(5), SCRCF to be relieved from judgment. This motion was filed on April 23, 2013.

At the hearing held on August 26, 2013, Counsel for the Defendant urged the Court to consider only the terms on the face of the Confession of Judgment, which provides, in pertinent part, that "[t]he Defendant hereby authorizes the entry of the Order and judgment against Defendant, and in favor of Plaintiff, in the principal amount of \$350,000.00, less any payments received by Plaintiff from Defendant through the date of filing hereof. Thereafter, post-judgment interest shall accrue as allowed by law, until the judgment is paid in full."

Both parties conceded during the hearing that the Defendant has paid an amount in excess of the \$350,000.00 set forth in the Confession of Judgment. However, Counsel for the Plaintiff urged the Court to also consider certain provisions set forth by the parties in the confidential settlement agreement referenced above. According to Plaintiff's Counsel, the terms of the settlement agreement would demonstrate to the Court that the Defendant failed to satisfy his obligations, as set forth in the settlement agreement; thus, making the entry of the Confession of Judgment proper.

DISCUSSION

I: Confidential Settlement Agreement

At the time the settlement agreement was executed in 2002, Rule 43(k), SCRCF provided in relevant part that "No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel

and entered in the record, or unless made in open court and noted upon the record." Reed v. Associated Investments of Edisto Island, Inc., 339 S.C. 148, 152, 528 S.E.2d 94, 96 (Cl. App. 2000). Rule 43(k), SCRCF was later amended in 2009 to provide a third method for creating an enforceable settlement agreement, which permits parties to a settlement to reduce the agreement to a writing signed by the parties and their counsel.

In this matter, the parties acknowledged that the 2002 confidential settlement agreement was never entered into the record. Consequently, the parties failed to adhere to the version of Rule 43(k), SCRCF in effect at the time of the execution of the settlement, which renders the purported confidential settlement agreement not binding on this Court. See Buckley v. Shealy, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006) ("Because the purported agreement the parties reached following mediation was neither entered into the court's record nor acknowledged in open court and placed upon the record, Rule 43(k), SCRCF, plainly provides that the agreement is unenforceable."). Assuming arguendo that 2002 confidential settlement agreement complied with the 2009 amendment of Rule 43(k), SCRCF because it was reduced to writing and signed by the parties and their counsel, the agreement is still unenforceable because the amendment was prospective and not retrospective in nature. See Hercules Inc. v. S.C. Tax Comm'n, 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980) (statutes are to be construed prospectively unless there is an express provision or a clear legislative intent to the contrary). As a result, the Court will not consider the terms of the confidential settlement agreement executed by the parties.

II. Confession of Judgment

Confessions of judgment share the legal significance of a judgment entered by the Court. "Though no adjudication is in fact required in entering a judgment of confession without action, ... it has all the qualities, incidents, and attributes of other judgments, and cannot be valid unless

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entered in a court which might have legally pronounced the same judgment in a contested action." Triangle Auto Spring Co. v. Gromlovitz, 270 S.C. 386, 389, 242 S.E.2d 430, 431 (1978) (quoting Ex parte Ware Furniture Co., 49 S.C. 20, 27 S.E. 9 (1897)). Rule 60(b)(5), SCRPC provides that a judgment can be set aside if the judgment has been satisfied. Perry v. Heirs at Law of Gadsden, 357 S.C. 42, 48, 590 S.E.2d 502, 505 (Ct. App. 2003).

The confession of judgment at issue provides that "[t]he Defendant hereby authorizes the entry of the Order and judgment against Defendant, and in favor of Plaintiff, in the principal amount of \$350,000.00, less any payments received by Plaintiff from Defendant through the date of filing hereof." At the hearing, both of the parties agreed that the Defendant has in fact paid more than \$350,000.00. Thus, I find that the judgment was satisfied, and the Defendant is entitled to be relieved from the confession of judgment.

ORDER

For the foregoing reasons, Defendant's Motion for Relief from the Confession of Judgment is **GRANTED**.

AND IT IS SO ORDERED.



DeAndrea Gist Benjamin
Presiding Judge

October 30, 2013
Columbia, South Carolina

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EXHIBIT B

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

JUDGMENT IN A CIVIL CASE

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

Edwin M. Smith, Jr.

David A. Fedor

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : Motion for Reconsideration has been denied because the Court did not receive a copy of the motion within ten days of the motion being filed.

INFORMATION FOR THE PUBLIC INDEX

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

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

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

Circuit Court Judge: WFB Judge Code 2161 Date 7-22-14

For Clerk of Court Office Use Only

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

Edwin L. Grimsley

Leo A. Dryer

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

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JUL 28 2014

Gilreath Law Firm, P.A.

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AUG 25 2014

SC Court of Appeals

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OCT 16 2015

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable DeAndrea Gist Benjamin, Circuit Court Judge

Case No. 2001-CP-40-4203

EDWIN M. SMITH, JR. APPELLANT,

v.

DAVID A. FEDOR, RESPONDENT.

PROOF OF SERVICE OF NOTICE OF APPEAL

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

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

August 21, 2014

William M. Hogan

William M. Hogan (S.C. Bar #65272)
James R. Gilreath (S.C. Bar #02133)
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AUG 25 2014

SC Court of Appeals

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ATTORNEYS FOR APPELLANT

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AUG 25 2014
SC Court of Appeals

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OCT 16 2015

SC Court of Appeals

Certificate of Counsel

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

October 13, 2015

William M. Hogan

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

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

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ATTORNEYS FOR APPELLANT

5

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

OCT 16 2015

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 BRIEF OF APPELLANT

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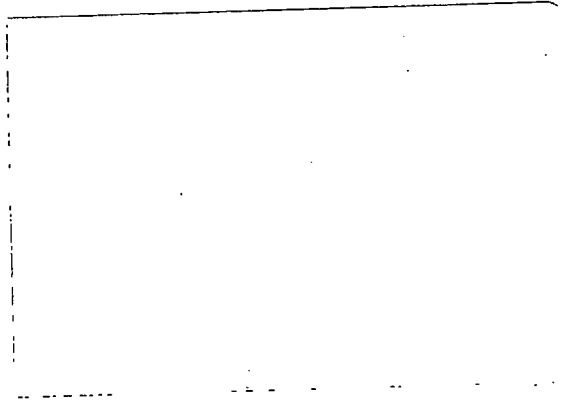


TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF ISSUES ON APPEAL 2

STATEMENT OF THE CASE..... 3

STANDARD OF REVIEW 7

ARGUMENT 8

I. THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR IN REFUSING TO CONSIDER THE CONFIDENTIAL SETTLEMENT AGREEMENT EXECUTED BY THE PARTIES WHEN DETERMINING WHETHER DEFENDANT HAD SATISFIED HIS CONFESSION OF JUDGMENT ARISING OUT OF THE CONFIDENTIAL SETTLEMENT AGREEMENT. ... 8

 A. The current version of Rule 43(k) is applied retrospectively, making the Confidential Settlement Agreement enforceable. 10

 B. Exceptions to the parol evidence rule allow admission of the Confidential Settlement Agreement for Court consideration. 14

 1. A confession of judgment is not an integrated agreement barring parol evidence but is a starting point for the investigation of outside evidence..... 15

 2. Collateral agreement exception allows introduction of the Confidential Settlement Agreement as the parties' larger master agreement..... 17

 3. Inducement exception permits use of Confidential Settlement Agreement..... 18

 4. Parol evidence is admissible to explain ambiguities in the Confession of Judgment..... 20

 C. Amount stated in the Confession of Judgment is logically consistent with the debt Defendant owed Plaintiff under the Confidential Settlement Agreement..... 23

II. THE TRIAL COURT SHOULD HAVE CONSIDERED THE MERITS OF PLAINTIFF'S MOTION FOR RECONSIDERATION WHICH WAS TIMELY MAILED TO THE CLERK OF COURT AND TO DEFENDANT'S COUNSEL.....24

III. THE CONFIDENTIAL SETTLEMENT AGREEMENT IS SUFFICIENTLY CLEAR, EXPLICIT AND UNAMBIGUOUS SUCH THAT THIS COURT SHOULD REMAND THIS CASE TO THE TRIAL COURT WITH INSTRUCTIONS TO DENY DEFENDANT'S RULE 60(B) MOTION..... 27

CONCLUSION.....28

TABLE OF AUTHORITIES

Cases	Page
<u>Ashfort Corp. v. Palmetto Constr. Group, Inc.</u> , 318 S.C. 492, 458 S.E.2d 533 (1995).....	12, 13
<u>Beaufort Cnty. Sch. Dist. v. United Nat. Ins. Co.</u> , 392 S.C. 506, 709 S.E.2d 85 (Ct. App. 2011).....	20, 21
<u>Blackwell v. Faucett</u> , 117 S.C. 60, 108 S.E.2d 295 (1921)	14
<u>Bob Jones Univ. v. Strandell</u> , 344 S.C. 224, 543 S.E.2d 251 (Ct. App. 2001)	21
<u>Buckley v. Shealy</u> , 370 S.C. 317, 635 S.E.2d 76 (2006)	11
<u>Camp v. Camp</u> , 386 S.C. 571, 689 S.E.2d 634 (2010)	26
<u>City of Greenville v. Washington American League Baseball Club</u> , 205 S.C. 495, 32 S.E.2d 777 (1945)	16, 17
<u>Collins Music Co. v. IGT</u> , 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002).....	7
<u>Coon v. Coon</u> , 356 S.C. 342, 588 S.E.2d 624 (Ct. App. 2003)	26
<u>Elam v S.C. Dept. of Transp.</u> , 361 S.C. 9, 602 S.E.2d 772 (2004).....	7
<u>Ellie, Inc. v. Miccichi</u> , 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004).....	17
<u>Farnsworth v. Davis Heating & Air Conditioning, Inc.</u> , 367 S.C. 623, 627 S.E.2d 724 (2006)	13
<u>Fields v. J. Haynes Waters Builders, Inc.</u> , 376 S.C. 545, 658 S.E.2d 80 (2008).....	7, 8
<u>Gallagher v. Evert</u> , 353 S.C. 59, 577 S.E.2d 217 (Ct. App. 2002)	25
<u>Gamble v. Int'l Paper Realty Corp. of S.C.</u> , 323 S.C. 367, 474 S.E.2d 438 (1996).....	8
<u>Gantt v. Van der Hoek</u> , 251 S.C. 307, 162 S.E.2d 267 (1968).....	18
<u>Gilliland v. Elmwood Prop.</u> , 301 S.E. 295, 391 S.E. 2d 577 (1990)	14
<u>Graham v. Dorchester Cnty. Sch. Dist.</u> , 339 S.C. 121, 528 S.E.2d 80 (Ct. App. 2000)	11, 12

<u>Green v. Lewis Truck Lines, Inc.</u> , 314 S.C. 303, 443 S.E.2d 906 (1994)	12
<u>Hercules Inc. v. South Carolina Tax Comm'n</u> , 274 S.C. 137, 262 S.E.2d 45 (1980).....	12
<u>Hill v. S. Carolina Dep't of Health & Env'tl. Control</u> , 389 S.C. 1, 698 S.E.2d 612 (2010)	8
<u>Jenkins v. Meares</u> , 302 S.C. 142, 394 S.E.2d 317 (1990).....	12
<u>Jones v. State</u> , 382 S.C. 589, 677 S.E.2d 20 (2009)	26
<u>Knighton v. Des Portes Mercantile Co.</u> , 119 S.C. 340, 112 S.E. 343 (1922).....	18
<u>Lingefelt v. Forest Hills Homes, Inc.</u> , 305 S.C. 197, 406 S.E.2d 394 (Ct. App. 1991)	14
<u>McGann v. Mungo</u> , 287 S.C. 561, 340 S.E.2d 154 (Ct. App.1986).....	12
<u>Parr v. Parr</u> , 268 S.C. 58, 231 S.E.2d 695 (1977).....	17
<u>Perry v. Heirs at Law of Gadsden</u> , 357 S.C. 42, 590 S.E.2d 502 (Ct. App. 2003)	7
<u>Ray v. S.C.Nat'l Bank</u> , 281 S.C. 170, 314 S.E.2d 359 (Ct. App. 1984).....	19
<u>S.C. Dept. of Transp. v. M&T Enter. of Mt. Pleasant, LLC</u> , 379 S.C. 645, 667 S.E.2d 7 (Ct. App. 2008).....	27
<u>Saro Inv. v. Ocean Holiday P'ship</u> , 314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994)	7
<u>Standard Fed. Sav. & Loan Ass'n v. Mungo</u> , 306 S.C. 22, 410 S.E.2d 18 (Ct. App.1991)	25
<u>Weinges v. Cash</u> , 15 S.C. 44 (1881).....	15
<u>Windsor Green Owners Ass'n, Inc. Allied Signal, Inc.</u> , 362 S.C. 12, 605 S.E.2d 750 (Ct. App. 2004).....	27

Statutes

S.C. Code Ann. §15-35-360(2)	15, 23
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Other Authorities

James F. Flanagan, *South Carolina Civil Procedure* 583 (2d ed. 1996) 12

Rules

Rule 203(b)(1), SCACR..... 25

Rule 7(b)(1), SCRCF 26

Rule 40(j), SCRCF 11

Rule 43(k), SCRCF 10, 11, 12, 13, 14, 24, 28

Rule 52(d), SCRCF 25

Rule 59(g), SCRCF 25, 26

Rule 60(b), SCRCF 1,2, 3, 5, 6, 7, 8, 9, 23, 26

Rule 86(a), SCRCF 12

Fed. R. Civ. P. 52..... 25

Fed. R. Civ. P. 59..... 25

Rule 59(g), A.R.Civ.P..... 26

INTRODUCTION

This case presents the issue of whether the Lower Court, when ruling on a Rule 60(b)(5), SCRCP, motion to discharge a confession of judgment, should consider documents beyond the confession of judgment in determining if the debtor has met his financial obligations to his creditor. More specifically, this case involves the question of whether the Lower Court should have reviewed a written settlement agreement signed by the parties and their counsel during a mediation, where the settlement agreement specified: (1) the debtor-defendant's (Respondent's) payment obligations to the plaintiff (Appellant), and (2) the terms of a confession of judgment to secure the defendant's installment payments to the plaintiff.

In brief, the appellant Edwin M. Smith, Jr. ("Plaintiff") sued respondent David A. Fedor ("Defendant") for fraud and other related causes of action. The parties entered into a written confidential settlement agreement ("Confidential Settlement Agreement") drafted by the mediator David W. Harwell at the conclusion of their mediation on September 17, 2002. The Confidential Settlement Agreement required Defendant to pay Plaintiff \$400,000, payable by an initial payment of \$50,000, followed by ten (10) annual installment payments of \$35,000 beginning the following year on September 1, 2003. To secure the \$350,000 payable in annual installments, the Confidential Settlement Agreement required Defendant to execute a confession of judgment for the \$350,000 balance owed. After the agreed-upon date for the initial \$50,000 payment, Defendant executed on September 26, 2002 the \$350,000 confession of judgment ("Confession of Judgment") which expressly stated it arose pursuant to the parties' Confidential Settlement Agreement.

Beginning the year following the mediated Confidential Settlement Agreement and for the subsequent nine years, Defendant paid \$335,000 of installment payments. After paying an overall total of \$385,000 (\$50,000 down payment plus \$335,000 of installment payments) towards the \$400,000 obligation, Defendant quit paying his installment payments. Plaintiff then filed the Confession of Judgment for the remaining debt of \$15,000 (\$400,000 obligation less \$50,000 initial payment less \$335,000 of installment payments). Defendant claimed since he paid \$385,000 and the Confession of Judgment was for \$350,000, he did not have to make any more payments and was entitled to be relieved from the Confession of Judgment. Defendant argued that the Lower Court could look at extrinsic evidence of the payments he made but was not entitled to review the Confidential Settlement Agreement to determine his payment obligations. Defendant claimed the Lower Court could look only at the Confession of Judgment to determine his payment obligations. The Lower Court agreed, and this appeal followed.

STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge commit reversible error in refusing to consider the terms of the Confidential Settlement Agreement executed by the parties when determining whether Defendant had satisfied his Confession of Judgment arising out of the Confidential Settlement Agreement?
2. Should the Lower Court have considered the merits of Plaintiff's Motion for Reconsideration which was timely mailed to the Clerk of Court and to Defendant's counsel even though an additional copy was not mailed directly to the presiding judge?

3. Is the parties' Confidential Settlement Agreement sufficiently clear, explicit and unambiguous such that this Court should remand this case to the Lower Court with instructions to deny Defendant's Rule 60(b) motion?

STATEMENT OF THE CASE

The history of the proceedings in the Lower Court is as follows:

1. In 2001 Plaintiff filed a lawsuit alleging various fraud related causes of action, legal malpractice and breach of contract against Defendant arising out of the parties' business relationship and Defendant's professional legal services. (Tr. p. 6:14-17) (R. p. 23, lines 14-17).
2. On September 17, 2002 the parties conducted mediation before former Supreme Court Chief Justice David Harwell. Pursuant to the mediation, the parties entered into a written Confidential Settlement Agreement that date. Both parties and their attorneys signed the Confidential Settlement Agreement written by the mediator. (Confidential Settlement Agreement; Tr. p. 16:9-21) (R. pp. 50-53; R. p. 33, lines 9-21).
3. Under the terms of the Confidential Settlement Agreement Defendant agreed in paragraph 1 to pay Plaintiff "the total sum of \$400,000.00 in complete settlement of all claims..." (Confidential Settlement Agreement pp. 1-2) (R. pp. 50-51).
4. Under paragraph *1.a* of the Confidential Settlement Agreement, the \$400,000 settlement was to be paid by an initial \$50,000 payment to be delivered within three (3) days of the Confidential Settlement Agreement. (*Id.*)
5. Under paragraph *1.b* of the Confidential Settlement Agreement, the balance of

\$350,000.00 was to be paid in annual installments of at least \$35,000.00 on September 1 of each year beginning September 1, 2003 until paid in full. (Id. at 2-3) (R. pp. 51-52).

6. Under paragraph 3 of the Confidential Settlement Agreement, Defendant agreed to give Plaintiff an executed Confession of Judgment for \$350,000.00 as security for the remaining \$350,000 balance to be paid in installments. (Id. at 3) (R. p. 52).
7. The Confidential Settlement Agreement stated in paragraph 3 the amount of the Confession of Judgment “shall be net of all payments made to date.” Paragraph 3 further stated that the Confession of Judgment would be held by Plaintiff’s attorney in escrow until Defendant defaulted on any payments. (Id.) (R. p. 52).
8. The Confidential Settlement Agreement in paragraph 5 required Plaintiff to write a letter to the South Carolina Bar Grievance Committee providing notice that the parties’ case had been resolved to the mutual satisfaction of all parties. (Id. at 4) R. p. 53).
9. Nine days after the mediation Defendant executed a Confession of Judgment dated September 26, 2002. The Confession of Judgment acknowledged that Defendant was indebted to Plaintiff as of September 26, 2002 in the principal amount of \$350,000. The Confession of Judgment further recited that it was executed in consideration for Plaintiff agreeing to release all claims against Defendant and to dismiss with prejudice the subject lawsuit captioned Smith v. Fedor, Docket No. 2001-CP-40-4. (Confession of Judgment at ¶¶ 3-4) (R. p. 11).
10. The Confession of Judgment stated: “The indebtedness owed by Defendant to Plaintiff arose pursuant to a confidential Settlement Agreement between

Defendant and Plaintiff dated September 17, 2002 in which the lawsuit referenced above was settled.” (Id. at ¶ 5) (R. p. 12).

11. The Confession of Judgment authorized entry of a judgment against Defendant “in the principal amount of \$350,000.00, less any payment received by Plaintiff from Defendant through the date of filing hereof.” (Id. at ¶ 7) (R. p. 12).
12. The Confession of Judgment provided that it would not be filed “unless and until there has been a default by Defendant on his payment obligations as set forth in the Confidential Settlement Agreement.” (Id. at ¶ 9) (R. p. 12).
13. Defendant made an initial payment of \$50,000 as part of the Confidential Settlement Agreement. (Gilreath Aff. at ¶12) (R. p. 58).
14. From September 1, 2003 through September 1, 2011 Defendant made nine annual installment payments of \$35,000 each for a total of \$315,000 of installment payments, leaving a balance due of \$35,000. (Id. at ¶ 4) (R. p. 58).
15. On September 1, 2012 Defendant failed to make an installment payment. (Id. at ¶¶ 4-5) (R. p. 58).
16. Shortly after November 20, 2012 Defendant made a payment of \$20,000. (Id. at ¶ 7) (R. p. 58).
17. Defendant made total payments to Plaintiff or his attorney of \$385,000 in this case. (Resp’t Aff.) (R. p. 62).
18. On February 27, 2013 Plaintiff’s 2002 trial attorney James R. Gilreath filed the Confession of Judgment, along with a Partial Satisfaction of Judgment, for default in the unpaid balance of \$15,000. (Gilreath Aff. at ¶10) (R. p. 58).
19. On or about March 26, 2013 Defendant filed a motion pursuant to Rule 60(b)(5),

- SCRCP, for relief from the Confession of Judgment claiming the debt recited in the Confession of Judgment had been satisfied. (Def.'s 60(b) Mot.) (R. pp. 15-17).
20. Prior to the date of the hearing on Defendant's motion, Plaintiff's counsel submitted to the trial judge (1) a Memorandum in Opposition to Defendant's Motion to Vacate Judgment which included as exhibits the Confidential Settlement Agreement and the Confession of Judgment, and (2) an affidavit of James R. Gilreath which included the same exhibits as Plaintiff's Memorandum in Opposition. (Mem. Opp'n Def.'s Mot. Vacate J.) (R. p. 46-59).
 21. The Lower Court, with the Honorable DeAndrea Gist Benjamin presiding, held a hearing on Defendant's Rule 60(b)(5) motion on August 26, 2013. The Lower Court heard oral arguments from counsel for both parties. Counsel for Defendant objected to any inquiry into the Confidential Settlement Agreement on the basis that it was not in the record, was full of scratch-overs and strike-throughs and was not clear upon its face. (Tr. p. 9:20-24) (R. p. 26, lines 20-24).
 22. The Lower Court reviewed the Confession of Judgment but declined to review the Confidential Settlement Agreement at the hearing. (Id. at p. 20:3-6) (R. p. 37, lines 3-6).
 23. The Lower Court granted Defendant's Rule 60(b)(5) motion by order filed October 31, 2013 ("Order"). The Order stated: "...As a result, the Court will not consider the terms of the confidential settlement agreement executed by the parties." (Order p.3:18-19, Oct. 31, 2013) (R. p. 5, lines 18-19).
 24. On November 8, 2013, Plaintiff's attorney timely mailed Plaintiff's Motion for Reconsideration to the Clerk of Court for filing with a duplicate copy to

Defendant's counsel. (R. pp. 74-88 and 96). A separate copy of the Motion for Reconsideration was e-mailed to the trial judge's office on June 4, 2014. (Ex. A to (Second) Mot. Recons. filed Aug. 4, 2014) (R. p. 96).

25. By a form 4 Order dated July 22, 2014, the Lower Court denied Plaintiff's first Motion for Reconsideration stating: "Motion for Reconsideration has been denied because the Court did not receive a copy of the motion within ten days of the motion being filed." (Order, July 22, 2014) (R. p. 8).
26. Plaintiff, following receipt on July 28, 2014 of the form 4 Order mailed by the Clerk of Court on July 24, 2014, timely served his Notice of Appeal on August 21, 2014. (See Aug. 21, 2014 Notice of Appeal¹ and Order, July 22, 2014) (R. pp. 98-99 and 107-109).

STANDARD OF REVIEW

"A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief." Perry v. Heirs at Law of Gadsden, 357 S.C. 42, 46, 590 S.E.2d 502, 504 (Ct. App. 2003). "...[M]otions for relief under Rule 60(b) are addressed to the discretion of the court and appellate review is limited to determining whether the trial court abused its discretion." Saro Inv. v. Ocean Holiday P'ship, 314 S.C. 116, 124, 441 S.E.2d 835, 840 (Ct. App. 1994): "An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon

¹ On August 4, 2014 Plaintiff's counsel filed and served on defense counsel and the trial judge a second Motion for Reconsideration for Lower Court review of the July 22, 2014 order. As of August 21, 2014, no ruling had been made on the second Motion for Reconsideration. Under the filing requirements of Elam v S.C. Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004) and Collins Music Co. v. IGT, 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002) which held that a second post-trial motion did not toll the deadline for filing a notice of appeal, Plaintiff proceeded with this appeal within the appeal deadline related to his first Motion for Reconsideration.

factual findings that are without evidentiary support.” Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 555, 658 S.E.2d 80, 85-86 (2008); see also Saro Inv. v. Ocean Holiday P’ship, supra (holding trial judge abused its discretion and committed reversible error by not considering Rule 60(b) motion with the view of determining if plaintiff’s judgment had prospective application).

“The admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal.” Gamble v. Int’l Paper Realty Corp. of S.C., 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996). “...[T]o warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice.” Fields v. J. Haynes Waters Builders, Inc., 376 S.C. at 557, 658 S.E.2d at 86 . Prejudice is a reasonable probability that the fact-finder's determination was influenced by the challenged evidence or the lack thereof. Id.; see also Hill v. S. Carolina Dep't of Health & Envtl. Control, 389 S.C. 1, 14, 698 S.E.2d 612, 619 (2010).

ARGUMENT

I. THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR IN REFUSING TO CONSIDER THE CONFIDENTIAL SETTLEMENT AGREEMENT EXECUTED BY THE PARTIES WHEN DETERMINING WHETHER DEFENDANT HAD SATISFIED HIS CONFESSION OF JUDGMENT ARISING OUT OF THE CONFIDENTIAL SETTLEMENT AGREEMENT.

The issues in this matter date back to September 17, 2002 when the parties participated in a mediation conducted by David W. Harwell as mediator. That day the parties entered into a “Confidential Settlement Agreement” personally signed by both parties and their attorneys. (Confidential Settlement Agreement p. 4) (R. p. 53). The

Confidential Settlement Agreement was not filed with the Court in 2002. (Tr. p. 10:10-23) (R. p. 27, lines 10-23). On September 26, 2002 Defendant executed a Confession of Judgment for \$350,000 in consideration for Plaintiff's agreement to release all claims against him and to dismiss the underlying suit with prejudice. (Confession of Judgment, ¶4) (R. p. 11). According to the Confession of Judgment, the indebtedness it secured "arose pursuant to a confidential Settlement Agreement between Defendant and Plaintiff dated September 17, 2002..." (Id. at ¶5) (R. p. 12) (emphasis added). In addition the Confession of Judgment stated Plaintiff would not file the confession "until there [was] a default by Defendant on his payment obligations as set forth in the Confidential Settlement Agreement." (Id. at ¶¶ 9 and 10) (R. p. 12) (emphasis added).

Ten years after the dismissal of the case, Plaintiff on February 27, 2013 filed the Confession of Judgment and a Partial Satisfaction of Judgment with the Richland County Clerk of Court. The Partial Satisfaction stated that Defendant had paid \$335,000 towards the balance owed under the Confession of Judgment, leaving an unpaid balance of \$15,000. (Gilreath Aff. ¶10) (R. p. 58). Following the entry of the Confession of Judgment, Defendant filed a motion to be relieved from the judgment pursuant to Rule 60(b)(5), SCRPC. (R. p. 15-17).

At the August 26, 2013 hearing before the Lower Court, counsel for Defendant asked the Court to consider only the terms on the face of the Confession of Judgment which provides in part that "[t]he Defendant hereby authorizes the entry of an Order and judgment against Defendant, and in favor of Plaintiff, in the principal amount of \$350,000, less any payments received by Plaintiff from Defendant through the date of filing hereof." (Confession of Judgment, ¶7) (R. p. 12). Defendant's counsel asked the

Lower Court to ignore the terms of the Confidential Settlement Agreement specifically referenced in the Confession of Judgment. (Tr. pp. 9:13 – 10:3 and 15:7-16) (R. p. 26, line 13—p. 27, line 3 and p. 32, lines 7-16).

Both parties agreed during the hearing that Defendant had paid sums to Plaintiff *in excess of* the \$350,000 amount set forth in the Confession of Judgment. (e.g. Tr. pp. 4:13-15 and 21:6-9) (R. p. 21, lines 13-15 and p. 38, lines 6-9). However, Plaintiff's counsel pointed out to the Court that Defendant had more than one payment obligation to Plaintiff under the Confidential Settlement Agreement and that not all Defendant's payments were towards the obligation secured by the Confession of Judgment. (Tr. pp. 8:6-8 and 21:1-9) (R. p. 25, lines 6-8 and p. 38, lines 1-9). It was therefore necessary to review the referenced Confidential Settlement Agreement to determine if Defendant had met his payment obligations secured by the Confession of Judgment.

In the subject Order, the Lower Court declined to consider the terms of the Confidential Settlement Agreement. (Order p.3:18-19, Oct. 31, 2013) (R. p. 5, lines 18-19). The Order stated that the 2002 version of Rule 43(k), SCRCPP, pertaining to the enforceability of settlement agreements, applied to this case and that the 2002 rule prohibited enforcement of the Confidential Settlement Agreement since the agreement was not entered in the court record. (*Id.* pp. 2-3) (R. pp. 4-5). As a result, the Lower Court held that the payments in excess of \$350,000 satisfied the Confession of Judgment and then granted Defendant's Motion for Relief from the Confession of Judgment. (R. p. 6).

- A. The current version of Rule 43(k) is applied retrospectively, making the Confidential Settlement Agreement enforceable.**

Rule 43(k), SCRCPP regarding settlement agreements of counsel currently states:

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, or reduced to writing and signed by the parties and their counsel.

Rule 43(k), SCRCP (emphasis added).

The Confidential Settlement Agreement was obviously reduced to writing, was signed by the parties and also by their counsel. The Confidential Settlement Agreement met all three requirements of the current Rule 43(k) underlined above and is thus enforceable under current Rule 43(k).

The Lower Court however held that Rule 43(k), SCRCP as amended in 2009 and currently in effect did not apply to the matter before the Lower Court on August 26, 2013. The Court applied to this case the 2002 version of Rule 43(k) as interpreted by the Supreme Court in 2006 in Buckley v. Shealy, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006). As a result, the Court declined to consider the terms of the Confidential Settlement Agreement the parties executed on September 17, 2002. Under our state's appellate case law, the present version of Rule 43(k) is to be applied to cases currently pending before the trial court, including this matter.

As a rule of procedure, the amended Rule 43(k), SCRCP is to be employed in all actions pending before the court at the time of amendment and in all actions heard by the court thereafter. This precise issue was addressed by this Court in Graham v. Dorchester County School District, 339 S.C. 121, 528 S.E.2d 80 (Ct. App. 2000). The Court upheld the trial judge's ruling that an amendment to the Rules of Civil Procedure, such as Rule 40(j) SCRCP at issue in that case, should be given retroactive application to cases pending at the time of its enactment.

In explaining that amendments to the Rules of Civil Procedure apply retroactively, this Court stated:

In cases dealing with statutory law changes, courts have discussed the general rules of prospective and retroactive application. By analogy, those same principles can be applied to determine whether an amended procedural rule should have prospective or retroactive effect...

Our Supreme Court has held that statutes are presumed to be entitled to prospective construction unless there is an express provision or a clear legislative intent to the contrary. Hercules Inc. v. South Carolina Tax Comm'n, 274 S.C. 137, 262 S.E.2d 45 (1980) (holding a statute which has the effect of tolling a statute of limitations affects the remedy and not the right and is therefore subject to retroactive application). A principal exception is remedial or procedural statutes are generally held to operate retrospectively. Id.; see Jenkins v. Meares, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990) (“Our decisions recognize a presumption that statutory enactments are to be given prospective rather than retroactive effect. An exception to this presumption arises when the enactment is remedial or procedural in nature, such as a statute of limitations.”).

The South Carolina Rules of Civil Procedure provide that the rules, which initially took effect on July 1, 1985, would “govern all proceedings in civil actions brought after they take effect.” Rule 86(a), SCRCP. Moreover, the rules also govern “all further proceedings in actions then pending” unless to do so “would not be feasible or would work injustice.” Id.; see McGann v. Mungo, 287 S.C. 561, 340 S.E.2d 154 (Ct. App. 1986) (holding the new rules of civil procedure apply to all further proceedings in pending actions); James F. Flanagan, *South Carolina Civil Procedure* 583 (2d ed. 1996) (“Rule 86(a) made these rules applicable to cases then pending at the time of [sic] rules were adopted. A similar result follows when new civil rules are promulgated.”).

Graham v. Dorchester Cnty. Sch. Dist., 339 S.C. 121, 124, 528 S.E.2d 80, 81-82 (Ct. App. 2000)² (emphasis added).

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

² See also Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 443 S.E.2d 906 (1994) (holding that the same rules of construction used in interpreting statutes apply in interpreting the South Carolina Rules of Civil Procedure).

injustice.” Id. Defendant can make no plausible argument that retroactive application of the 2009 amendment of Rule 43(k) is not feasible or would work an injustice.

When this case was mediated and settled in September 2002, Rule 43(k) at that time was interpreted and applied by the Supreme Court under its ruling in Ashfort Corp. v. Palmetto Constr. Group, Inc., 318 S.C. 492, 458 S.E.2d 533 (1995). In Ashfort, the Supreme Court allowed two exceptions to the requirement that agreements between counsel must be entered on the record to be binding. The court stated that “[t]he rule does not apply where the agreement is admitted or has been carried into effect.” Id. at 493-94, 458 S.E.2d at 534 n.1. Therefore in 2002, settlement agreements that (1) had been admitted by the parties, or (2) carried into effect did not have to be entered on the record to be enforceable by the court.

In this case, the Confidential Settlement Agreement has been admitted by the parties since both parties personally signed the agreement along with their counsel. In addition, the case was dismissed with prejudice, and Defendant admittedly made over \$350,000 in payments since then. So the Confidential Settlement Agreement had been carried into effect. Thus under the Ashfort application of Rule 43(k) in effect in 2002, the Confidential Settlement Agreement did not have to be entered on the record and was enforceable without court review when the parties signed their mediated Confidential Settlement Agreement on September 17, 2002.

It was not until 2006 in Farnsworth v. Davis Heating & Air Conditioning, Inc. that the Supreme Court declined to continue following the two exceptions it previously enunciated in footnote 1 in Ashfort. See Farnsworth v. Davis Heating & Air Conditioning, Inc., 367 S.C. 623, 627 S.E.2d 724 (2006). With the Farnsworth and

Buckley rulings in 2006, the Supreme Court began requiring “admitted” settlement agreements to be placed before the trial court.

Since the current version of Rule 43(k) follows the same requirements in force in 2002 when the parties executed the Confidential Settlement Agreement, it would work no hardship on Defendant to apply the present version of Rule 43(k). Defendant should have expected the lawful agreement to be enforceable in 2002 and should expect the same now as well. With no resulting injustice, the current version of Rule 43(k) governs this matter, making the Confidential Settlement Agreement binding on the parties.

B. Exceptions to the parol evidence rule allow admission of the Confidential Settlement Agreement for Court consideration.

The parol evidence rule bars admission of extrinsic evidence if the writing on its face appears to express the whole agreement. Blackwell v. Faucett, 117 S.C. 60, 108 S.E.2d 295 (1921). Conversely, when a document on its face does not appear to express the whole agreement, the parol evidence rule is not applicable. See Lingevelt v. Forest Hills Homes, Inc., 305 S.C. 197, 200-01, 406 S.E.2d 394, 396 (Ct. App. 1991) (allowing admission of parol agreement that was not intended to be replaced by and merged into litigated agreement). As explained below, Defendant’s unilaterally signed Confession of Judgment was not intended to be the complete agreement of the parties, making the Confidentiality Settlement Agreement admissible.

1. A confession of judgment is not an integrated agreement barring parol evidence but is a starting point for the investigation of outside evidence.

The Confession of Judgment signed by Defendant is a unilateral statement signed by him alone. Plaintiff is not a signatory to the document. The only document Plaintiff signed is the Confidential Settlement Agreement.

The parol evidence rule is one of substantive contract law, not a rule of evidence. Gilliland v. Elmwood Prop., 301 S.E. 295, 302, 391 S.E. 2d 577, 581 (1990). Since the parties' agreement is embodied in the Confidential Settlement Agreement, the parol evidence rule has no application to the unilateral Confession of Judgment. In fact, the Confession of Judgment is a document whose very purpose is to guide the reader to extrinsic evidence about the terms of the subject debt or obligations.

South Carolina Code §15-35-360 provides that a Confession of Judgment "must state concisely the facts out of which it arose . . ." S.C. Code Ann. §15-35-360(2)(emphasis added). The South Carolina Supreme Court has stated that "all the statute required was a concise, not a particular or detailed statement of the facts out of which the indebtedness arose." Weinges v. Cash, 15 S.C. 44 (1881) (emphasis in original). Since the confession of judgment statute required that the statement be a concise statement of facts, the legislature did not intend the confession of judgment to be an all-encompassing, integrated, document. To that same point, the Supreme Court stated "what I think the statute intended [a creditor] should have is sufficient of the facts to enable him to inquire into the transaction and to form his opinion of the honesty of the judgment from the facts he shall ascertain." Id. (emphasis in original).

The Supreme Court further explained that the concisely stated facts in a confession of judgment are not meant to be the only facts a third party reading the confession of judgment can accept about the debtor's debt. It is the obligation of the third party reading the confession of judgment to further investigate the circumstances behind the debt. The Supreme Court expounded on that point by stating:

A creditor who was disposed to question this [confession of] judgment would not, of course, accept the debtor's statement as correct even if it had been full to the minutest detail. All he would want to know would be what was claimed to be the origin and consideration of the debt, and he would inquire for himself into the details.

Weinges v. Cash, 15 S.C. at 65-66.

The Supreme Court also explained that a third party reading the confession of judgment would use the concisely stated facts out of which the judgment arose to investigate extrinsic evidence to determine how much ought to be due. Id. at 66.

Thereon, the Supreme Court pronounced:

... With these facts furnished to him by the statement, the creditor would have it in his power, by his own investigations, to ascertain how much ought to be due, and it is not to be expected that his action in the premises would be influenced by any details that might be contained in the statement, but by the result of his own investigations, which the facts there stated enabled him to institute...

Id. (emphasis added).

As the Court later stated in the opinion, the confession of judgment is designed to provide the origin and consideration of the debt in order that a third party would then have "such starting point [to] . . . proceed with his own investigations. . ." Id. The purpose of the Confession of Judgment is to direct this Court to extrinsic evidence –in this case to the Confidential Settlement Agreement – to ascertain the amounts due.

2. Collateral agreement exception allows introduction of the Confidential Settlement Agreement as the parties' larger master agreement.

Closely related to the independent agreement exception to the parol evidence rule is the collateral agreement exception where the litigated agreement (*i.e.*, the Confession of Judgment) is a part of a larger agreement (*e.g.*, the Confidential Settlement Agreement). As stated by the South Carolina Supreme Court:

While it is a general rule that a contract in writing, complete in all its terms, draws into it all parol contracts preceding it, yet . . . if it is only a part of a general whole, it is perfectly competent to supply all those missing qualities by testimony giving all the precedent agreements of the parties.

City of Greenville v. Washington American League Baseball Club, 205 S.C. 495, 32 S.E.2d 777, 782 (1945) (holding oral agreement to provide facilities and lighting for baseball team was the larger agreement out of which real estate lease grew and therefore was admissible parol evidence); see also Parr v. Parr, 268 S.C. 58, 64, 231 S.E.2d 695, 697 (1977) (holding where deed referenced another agreement on "other valuable consideration", extrinsic evidence was admissible to explain the other agreement referenced in the deed).

This Court has explained how the law in this state construes multiple instruments known to all parties and executed to accomplish an agreed purpose, stating:

In South Carolina, two contracts executed at different times relating to the same subject matter, entered into by the same parties, are to be construed as one contract and considered as a whole...[W]here one of the contracts explains, amplifies, or limits the other, those provisions will be given effect between the parties so that the whole agreement, as actually contracted by the parties, may be effectuated...One contract draws contractual sustenance from the other.

Ellie, Inc. v. Miccichi, 358 S.C. 78, 93, 594 S.E.2d 485, 492-93 (Ct. App. 2004).

The presence of collateral agreements drawing contractual sustenance from each other is precisely the situation existing in this case. The Confession of Judgment in three places references the Confidential Settlement Agreement. It declares that the indebtedness pertaining to the Confession of Judgment "arose pursuant to a confidential Settlement Agreement between Defendant and Plaintiff". The Confession of Judgment explicitly provides that it is part of an overall larger agreement entered into by the parties. In the words of the Parr court, the Confidential Settlement Agreement is explanatory of what the parties' overall agreement was. The Confidential Settlement Agreement is therefore admissible to explain the parties' larger agreement which contains the Confession of Judgment as one of its parts.

3. Inducement exception permits use of Confidential Settlement Agreement.

Parol evidence is admissible to show an outside agreement that was an inducement to the execution of the document at issue. In other words, the Confidential Settlement Agreement is admissible since it was the agreement that induced Defendant to sign the Confession of Judgment. See Knighton v. Des Portes Mercantile Co., 119 S.C. 340, 112 S.E. 343 (1922) (holding that existence of extrinsic agreement between parties, under which one party signed promissory note, may always be shown when enforcement of the obligation is attempted since promissory note would never have been signed without the extrinsic contemporaneous parol agreement).

The South Carolina Supreme Court described the inducement exception as follows:

Further, it is proper to admit testimony in proof of a contemporaneous or independent agreement on the same subject matter, the meaning of which is not at variance with the principle agreement. Especially is this true when the purpose of such

contemporaneous or independent agreement was to induce the execution of and entering into the principle agreement.

Gantt v. Van der Hoek, 251 S.C. 307, 317-18, 162 S.E.2d 267, 272 (1968).

The inducement principle stated in Gantt is exactly the circumstance we have in this case. The Confession of Judgment states:

Defendant executed this Confession of Judgment in consideration of the Plaintiff's agreement to release all claims against him and to dismiss with prejudice that certain lawsuit captioned Edwin M. Smith, Jr. v. David A. Fedor, docket number 2001-CP-40-4.

Confession of Judgment, ¶ 4 (R. p. 11).

Defendant then states in the next paragraph:

The indebtedness owed by Defendant to Plaintiff arose pursuant to a Confidential Settlement Agreement between Defendant and Plaintiff dated September 7, 2002 in which the lawsuit referenced above was settled.

(Confession of Judgment, ¶ 5) (R. p. 12).

Clearly, the release Defendant received from Plaintiff and the dismissal of the lawsuit he obtained from Plaintiff, as part of the Confidential Settlement Agreement, induced Defendant to execute the Confession of Judgment. As the very inducement for executing the Confession of Judgment, the Confidential Settlement Agreement, as specifically referenced in the Confession of Judgment, is admissible to explain the agreement surrounding the Confession of Judgment. *Cf. Ray v. S.C.Nat'l Bank*, 281 S.C. 170, 173, 314 S.E.2d 359, 360 (Ct. App. 1984) (barring evidence of alleged oral agreement of a condition precedent not expressed in the unconditional promissory note).

4. Parol evidence is admissible to explain ambiguities in the Confession of Judgment.

The Court noted in its order that both parties agreed during the hearing that Defendant had paid an amount in excess of the \$350,000.00 set forth in the Confession of Judgment. (Order at p. 2, October 31, 2013) (R. p. 4, lines 13-14). This begs the obvious question – why did Defendant pay more than \$350,000.00 if he were not obligated to do so? Defendant has made no claim in these proceedings for a refund of the excess, nor has he made a refund claim in any other forum or manner. It is quite apparent there are more terms to the parties' agreement than those contained in the Confession of Judgment. The Confidential Settlement Agreement pursuant to which Defendant was making his payments required him to pay additional sums to Plaintiff over and above the \$350,000.00 secured by the Confession of Judgment. Only a review of the Confidential Settlement Agreement can explain this discrepancy between the amounts paid and the debt secured by the Confession of Judgment.

The ambiguous nature of the Confession of Judgment is demonstrated by the struggles the Lower Court encountered trying to understand the parties' agreement solely from the Confession of Judgment. At oral argument the trial judge voiced her dilemma stating:

Well, I'm not concerned about the merits. I'm trying to figure out what the agreement was.

Tr. p. 10:4-6 (R. p. 27, lines 4-6).

The Lower Court again showed its inability to comprehend the terms of the parties' settlement from reviewing only the Confession of Judgment, stating:

All right. Let me ask you this, because this happens sometimes... There is a settlement and then there is – I'm trying to figure out, how did we get to

the confession being filed in the earlier part of this year? I mean, apparently something – of February 2013...The problem I have is, I don't know if there was some other discussion, but there is a confession that is signed, and it says \$350,000 about 10 years later – 10, 11 years later.

Tr. pp. 16:22 – 17:10 (R. p. 33, line 22—p. 34, line 10).

When the Lower Court applied the terms of the Confession of Judgment, which stated an indebtedness of \$350,000 as of September 26, 2002, with the actual payments of \$385,000 combined with the filing of the Confession of Judgment eleven years after its execution, Defendant's payment obligation became ambiguous. An uncertainty about the amount of Defendant's indebtedness owed to Plaintiff – the subject of the Confession of Judgment – arose when the words of the Confession of Judgment were applied to Defendant's actual payments on the indebtedness. In other words, the Lower Court faced a latent ambiguity when interpreting the Confession of Judgment. See Beaufort Cnty. Sch. Dist. v. United Nat. Ins. Co., 392 S.C. 506, 526, 709 S.E.2d 85, 95 (Ct. App. 2011)(stating “[a] latent ambiguity exists when there is no defect arising on the face of the instrument, but arising when attempting to apply the words of the instrument to the object or subject described).

When confronted with a latent ambiguity in a contract, this Court has held that parol testimony may be received in construing the instrument containing the latent ambiguity. Id. This Court has further held that this principle applies to documents executed by only one party. See Bob Jones Univ. v. Strandell, 344 S.C. 224, 231, 543 S.E.2d 251, 254 (Ct. App. 2001) (allowing admission of extrinsic evidence to clarify latent ambiguity in a will). Not only does this Court allow the admission of extrinsic evidence to clear up a latent ambiguity, “a court may admit extrinsic evidence to determine whether a latent ambiguity exists.” Id.

In this case the Confidential Settlement Agreement would clarify the ambiguities arising from the Confession of Judgment when applied to the debt payments made by Defendant. Paragraph 1 of the Confidential Settlement Agreement provides that the total settlement amount owed by Defendant is \$400,000, which explains why Defendant paid more than \$350,000 to Plaintiff. Paragraph 1.a specifies that Defendant was obligated to make an initial payment of \$50,000 towards the \$400,000 debt. Paragraph 1.b specifies that Defendant then owed a balance of \$350,000 which was to be paid in annual installments of at least \$35,000 starting in September of the following year, 2003. Paragraph 3 then provided that Defendant would sign a Confession of Judgment for the remaining \$350,000 balance (after payment of the initial \$50,000) which would be held over course of the installment payments until there was a default. With installment payments of \$35,000 per year, the payments would last 10 years or until September 2012. The specified payment schedule of 10 years combined with the requirement that the Confession of Judgment not be recorded until a default in payments occurs explains why the Confession of Judgment was filed 10 years and 5 months after its execution.

The latent ambiguity contained in the Confession of Judgment is exemplified by the statements of Defendant's counsel at oral arguments before the Lower Court. He stated:

The Defendant acknowledges that he has paid – and it is undisputed -- \$385,000.

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

Tr. pp. 17:24 – 18:5 (R. p. 34, line 24—p. 35, line 5).

Defendant's payment of \$385,000 is confusing when viewed only in the light of

the Confession of Judgment with its \$350,000 stated indebtedness. In actuality, though, it is not anybody's guess why Defendant paid \$385,000 when the Confession of Judgment is examined along with the Confidential Settlement Agreement. The Confidential Settlement Agreement makes it clear there were two payment obligations Defendant owed to Plaintiff -- one being the initial \$50,000 payment and the other being the remaining \$350,000 balance to be paid in annual installments starting in 2003. The collection of the Confession of Judgment is a classic example of a latent ambiguity that is precisely explained by the terms of the Confidential Settlement Agreement.

The latent ambiguities with which the Lower Court struggled at oral argument are easily cleared up by a review of the Confidential Settlement Agreement -- the very document the Confession of Judgment stated it was founded on.

C. Amount stated in the Confession of Judgment is logically consistent with the debt Defendant owed Plaintiff under the Confidential Settlement Agreement.

Defendant's counsel at oral argument argued that if the total debt to be paid was \$400,000, Plaintiff's attorney who drafted the Confession of Judgment "should have put \$400[,000] in the confession". (Tr. p. 14:18-25) (R. p. 31, line 18-25). Since \$350,000 was stated in the Confession of Judgment, Defendant claims that a total of only \$350,000 must be owed.

But putting \$400,000 in the Confession of Judgment would be illogical. When Defendant made the initial payment of \$50,000 towards the \$400,000 total debt, only \$350,000 was then due. Why would any debtor sign a confession of judgment for \$400,000 when all he owed at the time of signing the confession was \$350,000? A confession of judgment represents money due or to become due, not amounts that have

already been paid and are no longer owed. See S.C. Code Ann. §15-35-360(2) (confession of judgment "... must show that the sum confessed therefor is justly due or to become due").

Most importantly, the Confidential Settlement Agreement stated in paragraph 3 that the amount of the Confession of Judgment "shall be net of all payments made to date." (Confidential Settlement Agreement p. 3) (R. p. 52). Since the initial \$50,000 payment had already been made as of the date of the Confession of Judgment, the parties' Confidential Settlement Agreement called for the Confession of Judgment to state the net balance then due of \$350,000.

II. THE TRIAL COURT SHOULD HAVE CONSIDERED THE MERITS OF PLAINTIFF'S MOTION FOR RECONSIDERATION WHICH WAS TIMELY MAILED TO THE CLERK OF COURT AND TO DEFENDANT'S COUNSEL.

Defendant in his motion for relief under Rule 60(b), SCRPC, did not raise the issue of whether the Lower Court had authority under Rule 43(k), SCRPC, to enforce the Confidential Settlement Agreement, nor did he raise it at oral argument before the court. The issue argued at the hearing and addressed in Plaintiff's post-hearing brief submitted prior to the Order centered on the admissibility of the Confidential Settlement Agreement under the parol evidence rule. (see e.g., Tr. pp. 14:13-17 and 18:1-5) (R. p. 31, lines 13-17 and p. 35, lines 1-5). Neither the trial judge nor any of the parties mentioned Rule 43(k) at oral argument. The first time the subject of Rule 43(k) was broached in this case was in the Lower Court Order of October 31, 2013. Because the new issue of Rule 43(k) first appeared in the Lower Court's Order of October 31, 2013, Plaintiff timely filed a motion for reconsideration of the Order granting Defendant's Motion for Relief. The Motion for Reconsideration asked the Lower Court to alter its ruling on the basis that the

proper application of Rule 43(k) allowed the court to review and enforce the parties' Confidential Settlement Agreement. The arguments on Rule 43(k) submitted to the Lower Court in Plaintiff's Motion for Reconsideration are the same arguments presented in this appeal.

Plaintiff's Motion for Reconsideration was served on Defendant's counsel and simultaneously mailed to the Richland County Clerk of Court for the Court of Common Pleas on November 8, 2013, less than ten days after the date of the Order. Plaintiff's trial counsel, however, did not send an additional copy of the Motion for Reconsideration to the trial judge's chambers until June 4, 2014.

The Lower Court then ruled on Plaintiff's Motion for Reconsideration by a Form 4 order dated July 22, 2014 which stated:

Motion for Reconsideration has been denied because the Court did not receive a copy of the motion within ten days of the motion being filed.

Order, July 22, 2014 (R. p. 8).

The Motion for Reconsideration was timely filed with the Clerk of Court and served on Defendant's counsel. Plaintiff acknowledges that a copy of the filed Motion for Reconsideration was inadvertently not delivered to the presiding judge within ten days of filing. See Rule 59(g), SCRCF ("A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion."); see also Rule 52(d), SCRCF (same). The failure to provide a copy to the presiding judge was an oversight not intended to prejudice any party. Defendant's counsel was mailed a copy of the motion at the same time it was mailed to the Clerk of Court. He was therefore on notice of the issues raised in the Motion for Reconsideration.

Plaintiff submits the Lower Court erred in failing to consider the merits of his Motion for Reconsideration.

“The ten day requirement of Rule [59] is... a rule of limitation, not a rule of jurisdiction ... [and] does not affect the jurisdiction of the court.” In re Beard, 359 S.C. 351, 358, 597 S.E.2d 835, 838 (Ct. App. 2004) (quoting Standard Fed. Sav. & Loan Ass'n v. Mungo, 306 S.C. 22, 26 n. 1, 410 S.E.2d 18, 20 n. 1 (Ct. App.1991). Rules 52(d) and 59(g) are thus more in the nature of rules designed for the trial court’s administrative convenience and are not meant to be inflexible rules of jurisdiction. “The notes to Rule 59, SCRCF, indicate that subsection (g) was added to help insure the judge is promptly notified that the motion has been filed.” Gallagher v. Evert, 353 S.C. 59, 63, 577 S.E.2d 217, 219 (Ct. App. 2002)(holding that failure to transmit a copy of the motion to the circuit court does not affect the tolling provision of Rule 203(b)(1), SCACR); cf. Fed. R. Civ. P. 52 and 59 (no requirement for attorney service of motion on presiding judge); cf. also Rule 59(g), A.R.Civ.P. (“Presentation of any post-trial motion to a judge is not required in order to perfect its making” under Alabama version of Rule 59).

The South Carolina Supreme Court has held that our courts should not apply an overly technical reading of the rules regarding motions for reconsideration where the motion does not prejudice either party and the court is able to deal fairly with the matter raised in the motion. See Camp v. Camp, 386 S.C. 571, 689 S.E.2d 634 (2010)(holding that the appellate court should review a motion for reconsideration not meeting the particularity requirement of Rule 7(b)(1), SCRCF, where the trial court was able to both comprehend the motion and deal with it fairly). Given the lack of prejudice on Defendant, Plaintiff posits that the Lower Court erred in failing to consider his Motion

for Reconsideration on its merits. Regardless of whether Plaintiff's Motion for Reconsideration was improperly denied on procedural grounds of Rule 59(g), this appeal was timely undertaken within thirty days of the Lower Court's ruling on the Motion for Reconsideration. See Coon v. Coon, 356 S.C. 342, 346, 588 S.E.2d 624, 626 (Ct. App. 2003) (holding appellant was not required to file notice of appeal until after trial court issued its order denying appellant's motion to reconsider for failure to comply with Rule 59(g)); see also Jones v. State, 382 S.C. 589, 677 S.E.2d 20 (2009) (reversing judgment of trial court where trial court denied appellant's motion for reconsideration for failure to comply with service requirement of Rule 59(g)).

III. THE CONFIDENTIAL SETTLEMENT AGREEMENT IS SUFFICIENTLY CLEAR, EXPLICIT AND UNAMBIGUOUS SUCH THAT THIS COURT SHOULD REMAND THIS CASE TO THE TRIAL COURT WITH INSTRUCTIONS TO DENY DEFENDANT'S RULE 60(B) MOTION.

The appellate courts of this State have long held that "[o]ne of the cardinal rules of contract interpretation is to ascertain and give effect to the intention of the parties.

S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 12 (Ct. App. 2008). This Court has further explained:

The construction of a clear and unambiguous contract presents a question of law for the court...

* * * *

It is also a question of law whether the language of a contract is ambiguous... Where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it... A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.

Id., 667 S.E.2d at 13.

“If a contract’s language is clear and capable of legal construction, this Court’s function is to interpret its lawful meaning and the intent of the parties as found in the agreement.” Windsor Green Owners Ass’n, Inc. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004).

In this case, the Confidential Settlement Agreement dated September 17, 2002 is clear and unambiguous. Defendant agreed to pay Plaintiff \$400,000 to settle and dismiss the lawsuit between the parties. (“Defendant agrees to pay Plaintiff the total sum of \$400,000 in complete settlement of all claims...”). The \$400,000 sum was broken into two parts – a \$50,000 initial payment to be delivered “within three (3) days of the date of this agreement” and “the balance of \$350,000 to be paid in annual installments of \$35,000” beginning in 2003. “As security Defendant agrees to give to Plaintiff a Confession of Judgment for \$350,000...not to be recorded unless the Defendant defaults on any payments.”

The Confidential Settlement Agreement plainly provides for an indebtedness owed by Defendant to Plaintiff of \$400,000. It is uncontroverted that Defendant paid Plaintiff only \$385,000. Thus Defendant continues to owe Plaintiff \$15,000.

The Confidential Settlement Agreement is a clear and unambiguous contract between the two parties, negotiated with both parties having the benefit of counsel. This Court’s function therefore is to enforce the Confidential Settlement Agreement according to its terms.

CONCLUSION

The Confession of Judgment was explicitly founded on the parties’ Confidential Settlement Agreement of September 17, 2002. That agreement was enforceable by the

Lower Court under Rule 43(k), SCRPC as existed on the dates of the Confidential Settlement Agreement and Confession of Judgment and on the date of Lower Court's hearing on August 26, 2013. In addition, the Confidential Settlement Agreement was a collateral agreement with the Confession of Judgment, thus requiring the Confession of Judgment to be interpreted in conjunction with the Confidential Settlement Agreement. Further, the Confession of Judgment was not an integrated agreement barring extrinsic evidence, but was an instrument containing latent ambiguities only understood in the light of the Confidential Settlement Agreement. The Confession of Judgment, when interpreted in conjunction with the Confidential Settlement Agreement, is clear and unambiguous. This Court should reverse the Lower Court's grant of Defendant's Motion for Relief from the Confession of Judgment and enforce the Confession of Judgment filed for the remaining \$15,000 owed by Defendant to Plaintiff.

Respectfully submitted,

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October 13, 2015
Greenville, South Carolina.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable DeAndrea Gist Benjamin, Circuit Court Judge

RECEIVED

OCT 16 2015

SC Court of Appeals

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

EDWIN M. SMITH, JR. APPELLANT,

vs.

DAVID FEDOR, RESPONDENT.

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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EDWIN M. SMITH, JR.APPELLANT,

vs.

DAVID FEDOR,RESPONDENT.

PROOF OF SERVICE

This is to certify that I have this day served counsel for the Appellant in the foregoing matter with a copy of the **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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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

RECEIVED
OCT 26 2015
SC Court of Appeals

Edwin M. Smith, Jr.,

Appellant,

v.

David Fedor,

Respondent

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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

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TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues on Appeal	1
Statement of the Case	1
Standard of Review	5
Argument	7
Conclusion	22

TABLE OF AUTHORITIES

Cases:

<i>American Fed. Bank, FSB, v. Number One Main Joint Venture</i> , 321 S.C. 169, 467 S.E.2d 439 (1996)	21
<i>Ashfort Corp. v. Palmetto Constr. Group, Inc.</i> , 318 S.C. 492, 458 S.E.2d 533 (1995)	14, 16
<i>Atlantic Coast Builders & Contractors, LLC v. Lewis</i> , 398 S.C. 323, 730 S.E.2d 282 (2012)	6, 8
<i>Buckley v. Shealy</i> , 370 S.C. 317, 635 S.E.2d 76 (2006)	14
<i>Busillo v. City of North Charleston</i> , 404 S.C. 604, 745 S.E.2d 142 (Ct. App. 2013)	6, 9, 22
<i>Butler v. Town of Edgefield</i> , 328 S.C. 238, 493 S.E.2d 838 (1997)	7
<i>Camp v. Camp</i> , 386 S.C. 571, 689 S.E.2d 634 (2010)	20
<i>Clark v. Cantrell</i> , 339 S.C. 369, 529 S.E.2d 528 (2000)	11, 19
<i>CoastalStates Bank v. Hanover Homes of South Carolina, LLC</i> , 408 S.C. 510, 759 S.E.2d 152 (Ct. App. 2014).....	6, 9, 22
<i>Conran v. Joe Jenkins Realty, Inc.</i> , 263 S.C. 332, 210 S.E.2d 309 (1974)	5, 6
<i>Coon v. Coon</i> , 356 S.C. 342, 588 S.E.2d 624 (Ct. App. 2003)	20
<i>Deep Keel, LLC v. Atlantic Private Equity Group, LLC</i> , 413 S.C. 58, 773 S.E.2d 607 (Ct. App. 2015).....	11, 19
<i>Dicks & Gillam, Inc. v. Cleland</i> , 295 S.C. 124, 367 S.E.2d 430 (Ct. App. 1988)	6
<i>Duncan v. Little</i> , 384 S.C. 420, 682 S.E.2d 788 (2009)	18
<i>Farnsworth v. Davis Heating & Air Conditioning, Inc.</i> , 367 S.C. 634, 627 S.E.2d 724 (2006)	14, 16
<i>Gallagher v. Evert</i> , 353 S.C. 59, 577 S.E.2d 217 (Ct. App. 2002).....	20
<i>Graham v. Dorchester County Sch. Dist.</i> , 339 S.C. 121, 528 S.E.2d 80 (Ct. App. 2000)	14, 15

<i>Gurganious v. City of Beaufort</i> , 317 S.C. 481, 454 S.E.2d 912 (Ct. App. 1995).....	7
<i>Hercules Inc. v. South Carolina Tax Comm'n</i> , 274 S.C. 137, 262 S.E.2d 45 (1980)	14, 15
<i>Heritage Fed. Savs. & Loan Assoc. v. Eagle Lake & Golf Condominiums</i> , 318 S.C. 535, 458 S.E.2d 561 (Ct. App. 1995).....	19
<i>I'On, L.L.C. v. Town of Mt. Pleasant</i> , 338 S.C. 406, 526 S.E.2d 716 (2000)	7
<i>Jones v. Lott</i> , 387 S.C. 339, 692 S.E.2d 900 (2010).....	6, 8
<i>Jones v. State</i> , 382 S.C. 589, 677 S.E.2d 20 (2009)	20, 21
<i>Kennedy v. South Carolina Retirement Sys.</i> , 349 S.C. 531, 564 S.E.2d 322 (2001)	7, 10
<i>Manios v. Nelson, Mullins, Riley & Scarborough, LLP</i> , 389 S.C. 126, 697 S.E.2d 644 (Ct. App. 2010).....	21
<i>Mason v. Mason</i> , 412 S.C. 28, 770 S.E.2d 405 (Ct. App. 2015)	6, 8
<i>McCall v. IKON</i> , 380 S.C. 649, 670 S.E.2d 695 (Ct. App. 2008)	6
<i>McChurg v. Deaton</i> , 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008), <i>aff'd</i> , 395 S.C. 85, 716 S.E.2d 887 (2011).....	7, 9
<i>Perry v. Heirs at Law of Gadsden</i> , 357 S.C. 42, 590 S.E.2d 502 (Ct. App. 2003)	11
<i>Price v. Investors Title Ins. Co.</i> , Opinion No. 2011-UP-359 (June 30, 2011),.....	15
<i>Smallwood v. Smallwood</i> , 392 S.C. 574, 709 S.E.2d 543 (Ct. App. 2011)	6, 9
<i>South Carolina Dep't of Soc. Servs. v. Williams</i> , 412 S.C. 458, 772 S.E.2d 279 (Ct. App. 2015)	5
<i>Southern Atl. Fin. Servs., Inc., v. Middleton</i> , 356 S.C. 444, 590 S.E.2d 27 (2003)	19
<i>State v. Attardo</i> , 263 S.C. 546, 211 S.E.2d 868 (1975)	6
<i>State v. Rich</i> , 293 S.C. 172, 359 S.E.2d 281 (1987)	11, 19
<i>Stevens & Wilkinson of South Carolina, Inc., v. City of Columbia</i> , 409 S.C. 563, 762 S.E.2d 693 (2014)	6, 9, 10, 22

<i>Triangle Auto Spring Co. v. Gromlovitz</i> , 270 S.C. 386, 242 S.E.2d 430 (1978)	12, 18
<i>Ex parte Ware Furniture Co.</i> , 49 S.C. 20, 27 S.E. 9 (1897).....	12
<i>Weaver v. Recreation Dist.</i> , 328 S.C. 83, 492 S.E.2d 79 (1997).....	6
<i>Weinges v. Cash</i> , 15 S.C. 44 (1881)	16, 17
<i>Wise v. Hardin</i> , 5 S.C. 325 (1874).....	17

Statutes:

S.C. Code Ann. § 15-35-360.....	17
---------------------------------	----

Rules of Court:

Rule 208(b)(2), South Carolina Appellate Court Rules.....	1, 7
Rule 220(c), South Carolina Appellate Court Rules.....	7
Rule 7(b)(6), South Carolina Rules of Civil Procedure.....	20
Rule 43(k), South Carolina Rules of Civil Procedure.....	13, 14, 15, 16
Rule 59(e), South Carolina Rules of Civil Procedure.....	6, 9, 20
Rule 59(g), South Carolina Rules of Civil Procedure.....	19, 20, 21
Rule 60(b)(5), South Carolina Rules of Civil Procedure.....	2, 3, 7, 22
Rule 901(a), South Carolina Rules of Evidence	11, 19

Other Authorities:

Jean H. Toal, Shahin Vafai & Robret Muckenfuss, <i>Appellate Practice in South Carolina</i> , at 65 (1999)	10
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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 Gilreath¹ 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 [Plaintiff'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), SCRPC.

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), SCRCF. 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), SCRCF); *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), SCRCF); *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), SCRPC. 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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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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STATE OF SOUTH CAROLINA
In the Court of Appeals

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Respondent

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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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

RECEIVED

The Honorable DeAndrea Gist Benjamin, Circuit Court Judge

OCT 16 2015

SC Court of Appeals

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

EDWIN M. SMITH, JR. APPELLANT,

vs.

DAVID FEDOR,RESPONDENT.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. THE “TWO ISSUE RULE” DOES NOT REQUIRE AFFIRMANCE OF THE LOWER COURT’S ORDER..... 1

II. ALL ISSUES RAISED IN APPELLANT’S INITIAL BRIEF WERE PROPERLY PRESERVED FOR APPEAL. 2

III. ALL DOCUMENTS RECITED AND PRESENTED IN THIS APPEAL WERE PROPERLY PRESENTED TO THE LOWER COURT AND RESPONDENT..... 5

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 7

V. LOWER COURT COMMITTED AN ERROR OF LAW AND AN ABUSE OF DISCRETION IN REFUSING TO CONSIDER AND ENFORCE THE CONFIDENTIAL SETTLEMENT AGREEMENT..... 8

CONCLUSION.....11

TABLE OF AUTHORITIES

Cases

Allen v. S.C. Public Employee Ben. Auth., 411 S.C. 611,
769 S.E.2d 666 (2015) 8

Bowers v. Bowers, 304 S.C. 65, 403 S.E.2d 127 (Ct. App. 1991) 6

Denton Cnty v. Huther, 43 S.W.3d 665 (Tex. Ct. App. 2001) 3

Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004)..... 3

Godfrey v. Heller, 311 S.C. 516, 429 S.E.2d 859 (Ct. App. 1993) 5

Graham v. Dorchester County Sch. Dist., 339 S.C. 121,
528 S.E.2d 80 (Ct. App. 2000)..... 8

Hercules Inc. v. South Carolina Tax Comm’n, 274 S.C. 137,
262 S.E.2d 45 (1980) 8

Herron v. Century BMW, 395 S.C. 461,
719 S.E.2d 640 (2011) 1, 2

Pelican Bldg. Ctrs v. Dutton, 311 S.C. 56,
427 S.E.2d 673 (1993) 5

Price v. Investors Title Ins. Co., Opinion No. 2011-UP-359
(June 30, 2011)..... 8

State v. Davis, 336 S.C. 348, 520 S.E.2d 614 (1999) 8

Weinges v. Cash, 15 S.C. 44 (1881) 9

Wise v. Hardin, 5 S.C. 325 (1874)..... 9

Woodson v. DLI Properties, LLC, 406 S.C. 517,
753 S.E.2d 428 (2014) 7

Rules

Rule 6(d), SCRCF 6

Rule 43(k), SCRCF 4, 5

Rule 59(e), SCRCF 5

Rule 60(b), SCRCF 6

Rule 210(c), SCACR 6

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), SCRCF 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

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-

²The 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), SCRPC (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

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
Greenville, South Carolina.

THE STATE OF SOUTH CAROLINA
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The Honorable DeAndrea Gist Benjamin, Circuit Court Judge

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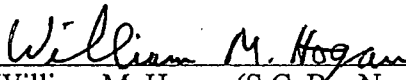
EDWIN M. SMITH, JR. APPELLANT,

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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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EDWIN M. SMITH, JR.APPELLANT,

vs.

DAVID FEDOR,RESPONDENT.

PROOF OF SERVICE

This is to certify that I have this day served counsel for the Appellant in the foregoing matter with a copy of the **FINAL BRIEF OF APPELLANT, FINAL REPLY BRIEF OF APPELLANT, 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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October 16, 2015
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**THE STATE OF SOUTH CAROLINA
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Edwin M. Smith, Jr., Appellant,

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David Fedor, Respondent.

Appellate Case No. 2014-001826

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 5523
Heard February 7, 2017 – Filed November 22, 2017

AFFIRMED

James R. Gilreath and William Mitchell Hogan, both of
The Gilreath Law Firm, PA, of Greenville for Appellant.

Katherine Carruth Goode, of Winnsboro, for Respondent.

LOCKEMY, C.J.: Edwin Smith, Jr. appeals the trial court's order granting David Fedor's motion for relief from judgment, arguing (1) the trial court erred in refusing to consider the confidential settlement agreement in determining whether Fedor satisfied the confession of judgment, (2) the trial court should have considered the merits of Smith's motion for reconsideration even though it was not provided to the court within ten days of filing, and (3) this court should remand the matter to the trial court for denial of the motion for relief from judgment because the confidential settlement agreement is sufficiently clear, explicit, and unambiguous. We affirm.

FACTS

In 1998, Smith filed a lawsuit against Fedor, which resulted in a "mediated settlement" in 2002. As part of the settlement, Fedor executed a confession of judgment for \$350,000 plus post-judgment interest to serve as security against the debt owed to Smith; in return, Smith released all claims and dismissed his lawsuit with prejudice. The confession of judgment provided,

5. The indebtedness owed by [Fedor] to [Smith] arose pursuant to a Confidential Settlement Agreement between [Fedor] and [Smith] dated September 17, 2002, in which the lawsuit . . . was settled. . . .

7. [Fedor] hereby authorizes the entry of an Order and judgment against [him,] and in favor of [Smith,] in the principal amount of \$350,000, less any payments received by [Smith] from [Fedor] through the date of filing hereof. . . .

The confession of judgment also stated it "may not be filed" until Fedor defaulted on his obligations "as set forth in the Confidential Settlement Agreement."

On February 27, 2013, Smith filed the confession of judgment and a partial satisfaction of judgment with the trial court. The partial satisfaction of judgment claimed Fedor paid \$335,000 but still owed \$15,000 pursuant to the confession of judgment. Fedor moved for relief from judgment pursuant to Rule 60(b)(5), SCRCP, asserting he had paid Smith more than \$350,000, satisfying the debt. Smith filed a response to Fedor's motion for relief, stating the confidential settlement agreement required Fedor to pay a total sum of \$400,000—\$50,000 up front, followed by annual installment payments of \$35,000 secured by the confession of judgment. Smith contended the \$50,000 initial payment was not included in the \$350,000 debt secured by the confession of judgment, and neither the agreement nor the judgment indicated the initial payment of \$50,000 would be credited toward the \$350,000.

On August 26, 2013, the trial court held a hearing on Fedor's motion for relief from judgment. At the hearing, both parties agreed Fedor had paid \$385,000 to Smith; the dispute concerned whether Fedor owed Smith an additional \$15,000. Fedor argued the confession of judgment stated only the amount of \$350,000, he had satisfied the judgment, and was not obligated to pay any additional amount. Fedor entered an affidavit into evidence stating he "paid to [Smith] . . . the sum of

\$385,000[,] that sum being in excess of the sum recited in [Fedor]'s Confession of Judgment and that the Confession of Judgment should be deemed satisfied." Fedor asserted the confession of judgment is final and the parties cannot "inquire behind the confession and seek to now reargue the merits." Smith countered that the parties settled for \$400,000, as provided for by the confidential agreement, and Fedor still owed \$15,000. Smith mentioned an affidavit from James Gilreath that stated the total amount due was \$400,000 including \$50,000 to be paid prior to the signing of the confession of judgment, but the Gilreath Affidavit was never offered or entered into evidence. Smith conceded Fedor had paid \$385,000, but that included the initial \$50,000 payment; thus, Smith maintained Fedor had paid only \$335,000 of the amount secured by the confession of judgment.

Fedor objected to any introduction or discussion of the confidential settlement agreement, which he said was not in evidence, "full of scratch-overs and strike-throughs," and "not clear upon its face." Fedor contended "the confession of judgment ended the case" and was "clear and concise on its face" that the amount owed was \$350,000. Smith countered that "the confession of judgment . . . ha[d] to be read in the context of the [four]-page confidential settlement agreement." The trial court requested the parties submit memoranda regarding when a confession of judgment is satisfied and whether the confidential settlement agreement was admissible.

Fedor submitted a memorandum, in which he argued the confession of judgment was satisfied because the parties did not dispute that Fedor had paid over \$350,000 and the confession of judgment receives the same finality as an order of judgment. Additionally, Fedor contended the court should not consider the confidential settlement agreement because the confession of judgment contained the "final word/judgment." Smith filed a memorandum, arguing the trial court should admit and consider the confidential settlement agreement because it met the exception to the parol evidence rule stated in *Smith v. McCann*.¹

¹ 289 S.C. 452, 457, 346 S.E.2d 720, 724 (1986) (noting "parol evidence may be admitted to show a separate and independent agreement, which is not inconsistent with the terms of a contemporaneous or subsequent written agreement, if it can be inferred that the parties did not intend the written paper to be a complete integration of the agreement").

In the order granting Fedor's motion for relief from judgment, the trial court concluded (1) the version of Rule 43(k), SCRCP² applicable at the time of the execution of the agreement rendered the confidential settlement agreement not binding on the court, (2) the 2009 amendment to Rule 43(k) was only prospective, and (3) the confession of judgment was satisfied based on the parties' agreement at the hearing that Fedor had paid more than \$350,000.

On November 8, 2013, Smith filed a motion for reconsideration, arguing (1) Rule 43(k) is retrospective and the confidential settlement agreement is therefore enforceable, (2) the agreement is admissible pursuant to several exceptions to the parol evidence rule, (3) the agreement lacked any specific provisions requiring confidentiality and Fedor's default on the obligations contained in the agreement rendered any non-disclosure requirement no longer applicable, and (4) the confession of judgment prohibited set-off of payments.

On July 22, 2014, the trial court issued a Form 4 order denying the motion for reconsideration "because the [c]ourt did not receive a copy of the motion within ten days of the motion being filed." Smith filed a subsequent motion for reconsideration, arguing the original motion was timely because it was properly mailed to Fedor and the clerk of court and Fedor suffered no prejudice from the failure to provide the court with the motion within ten days of filing. Smith re-submitted his original motion and requested the trial court consider the merits.³ The trial court ultimately denied the motion in a Form 4 order on September 5, 2014. This appeal followed.

STANDARD OF REVIEW

"The decision to grant or deny a motion for relief from judgment lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 336, 644 S.E.2d 793, 795 (Ct. App. 2007). "An abuse of discretion arises

² In 2002, when the agreement was executed, Rule 43(k) provided, "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." In 2009, the rule was amended to provide a third method—if the agreement is "reduced to writing and signed by the parties and their counsel." Rule 43(k), SCRCP.

³ Smith filed and served his notice of appeal on August 21, 2014, before the trial court ruled on his second motion for reconsideration.

where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *Id.*

LAW/ANALYSIS

I. Confidential Settlement Agreement

In 2002, Rule 43(k), SCRPC, provided, "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 Reed v. Associated Invs. of Edisto Island, Inc.*, 339 S.C. 148, 152, 528 S.E.2d 94, 96 (Ct. App. 2000) (quoting the version of Rule 43(k) that remained in effect in 2002). In 2009, the rule was amended to provide a third method for making such an agreement enforceable—if the agreement is "reduced to writing and signed by the parties and their counsel." Rule 43(k), SCRPC. "In other words, an agreement is non-binding until a condition is satisfied. Until a party is bound, she is entitled to withdraw her assent." *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637, 627 S.E.2d 724, 725 (2006). "Rule 43(k) applies to settlement agreements." *Id.* at 637, 627 S.E.2d at 726. The rule "is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation." *Ashfort Corp. v. Palmetto Constr. Grp., Inc.*, 318 S.C. 492, 493-94, 458 S.E.2d 533, 534 (1995).

In *Farnsworth*, our supreme court reversed the trial court's granting of the respondent's motion to compel the appellant to comply with a settlement agreement because Rule 43(k) had not been satisfied. 367 S.C. at 636, 627 S.E.2d at 725. The respondent's attorney had signed a letter received from the appellant that offered a settlement, but the parties never entered the written document on the record. *Id.* The appellant rescinded the agreement and the court concluded, "As soon as [the respondent] received notice of rescission, the letter signed by counsel ceased representing an agreement. The [trial] court, therefore, ordered [the appellant] to comply with an agreement that did not exist." *Id.* at 637, 627 S.E.2d at 725; *see also* Rule 43(k), SCRPC (stating a written agreement between counsel is not binding unless "signed by counsel and entered in the record").

We find the trial court was correct in deciding the former version of Rule 43(k) applies to the confidential settlement agreement because the settlement agreement was signed in September 2002, before the rule was amended. Because the settlement agreement does not comply with the prior version of Rule 43(k), the agreement is not binding on the court. *See Hercules Inc. v. S.C. Tax Comm'n*, 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980) (stating the general rule is that statutes are

to be construed prospectively rather than retroactively, absent an express provision or a clear legislative intent to the contrary). 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) (providing new rules of civil procedure apply to proceedings in actions pending at the time the rule is amended). The underlying lawsuit was dismissed with prejudice in 2002, and Smith did not file the confession of judgment until 2013. Therefore the trial court correctly found Rule 43(k) applied only prospectively.

II. Motion to Alter or Amend Judgment

The trial court properly denied Smith's motion for reconsideration because he failed to provide the motion to the trial judge within ten days of filing. Rule 59(g) would lack any purpose if trial courts committed error by denying the motion for failure to comply with the rule. Further, our language in *Gallagher v. Evert*, 353 S.C. 59, 63-64, 577 S.E.2d 217, 219 (Ct. App. 2002) implies a trial court may deny the motion solely on the basis of the rule. See 353 S.C. at 63, 577 S.E.2d at 219 ("Because the [trial] court found it appropriate to hear the matter, we find no error in the [trial] court's decision to decide the motion *despite* [the appellant's] failure to comply with Rule 59(g), SCRPC." (emphasis added)). Accordingly, the trial court properly denied Smith's motion for reconsideration because he did not timely provide a copy of the motion to the judge.

Because the trial court did not err in denying Smith's motion for reconsideration, the arguments presented in that motion are unpreserved. The trial court never ruled on Smith's arguments that the agreement was admissible pursuant to exceptions to the parol evidence rule. Moreover, Smith raised several exceptions to the parol evidence rule in his motion for reconsideration that had not been raised before the trial court issued its order. See *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) ("A party cannot use Rule 59(e)[, SCRPC] to present to the court an issue the party could have raised prior to judgment but did not."). Consequently, none of Smith's arguments concerning exceptions to the parol evidence rule are preserved for review.

III. Confession of Judgment

According to Rule 60(b)(5) of the South Carolina Rules of Civil Procedure, "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . [if] the judgment has been satisfied" In order to correctly

find the Confession of Judgment satisfied, the trial court must have found Fedor paid \$350,000 to Smith after the execution of the Confession of Judgment. *See* S.C. Code Ann. § 15-35-360(2) (2005) (providing a judgment by confession "must show that the sum confessed therefor is justly due or to become due"). The evidence before the trial court included the Fedor affidavit, which stated Fedor "has paid to [Smith] ... the sum of \$385,000[,] that sum being in excess of the sum recited in [Fedor]'s Confession of Judgment and that the Confession of Judgment should be deemed satisfied;" the Confidential Settlement Agreement, which was not enforceable; and the affidavit from James Gilreath. While there was competing evidence, we cannot say the trial court abused its discretion in granting Fedor's motion for relief from judgment in this case. *Stearns*, 373 S.C. at 336, 644 S.E.2d at 795 ("An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support."). Accordingly, we affirm the trial court's granting of Fedor's motion to be relieved from judgment.

Conclusion

Based on the foregoing analysis, the circuit court's order is

AFFIRMED

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

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. 1

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. 3

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..... 4

IV. Petition for Rehearing En Banc. 5

CONCLUSION..... 6

TABLE OF AUTHORITIES

CASES

<u>Farnsworth v. Davis Heating & Air Conditioning, Inc.</u> , 367 S.C. 634, 627 S.C.2d 724 (2006).....	3
<u>Foman v. Davis</u> , 371 U.S. 178, 83 S.Ct. 227 (1962)	5
<u>Graham v. Dorchester Cty. Sch. Dist.</u> , 339 S.C. 121, 528 S.E.2d 80 (Ct. App. 2000).....	1, 2, 3, 5
<u>Patton v. Miller</u> , 420 S.C. 471, 804 S.E.2d 252 (2017).....	4
<u>Smith v. Fedor</u> , Op. No. 5523 (S.C. Ct. App. filed Nov. 22, 2017)	2

OTHER AUTHORITIES

1985 S.C. Acts No. 100, § 3	4
James F. Flannigan, South Carolina Civil Procedure (2d ed. 1996).....	4

RULES

Rule 219(a), SCACR	5
Rule 221(a), SCACR	1
Rule 40, SCRCP.....	2
Rule 40(a), (b), and (j)	2
Rule 40(c)(3).....	2
Rule 40(j)	2
Rule 43(k), SCRCP	1, 3, 4
Rule 59(g)	4
Rule 60(b)	1

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), SCRCR, 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, SCRCP, 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), SCRCF, 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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ATTORNEYS FOR APPELLANT

December 5, 2017
Greenville, South Carolina.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable DeAndrea Gist Benjamin, Circuit Court Judge

RECEIVED
DEC 06 2017
SC Court of Appeals

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

EDWIN M. SMITH, JR. APPELLANT,

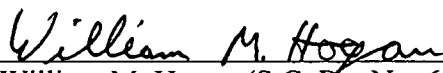
vs.

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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December 5, 2017
Greenville, South Carolina.

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), SCRCF. Moreover, the rules *also govern* “**all further proceedings in actions then pending**” unless to do so “would not be feasible or would work injustice.” *Id.*; see McGann v. Mungo, 287 S.C. 561, 340 S.E.2d 154 (Ct.App. 1986) (holding the new rules of civil procedure apply to all further proceedings in pending actions); James F. Flanagan, *South Carolina Civil Procedure* 583 (2d ed. 1996) (“Rule 86(a) made these rules applicable to cases then pending at the time of [sic] rules were adopted. *A similar result follows when new civil rules are promulgated.*”).

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), SCRCF. 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), SCRCF.

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), SCRPC. 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:

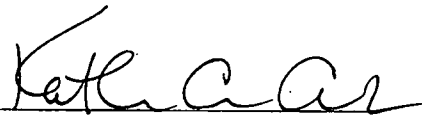
A hearing or rehearing *en banc* is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

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,



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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,

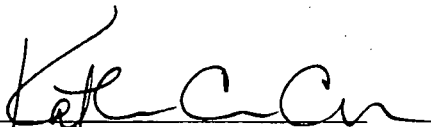
v.

David Fedor,

Respondent,

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.


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The South Carolina Court of Appeals

Edwin M. Smith, Jr., Appellant,

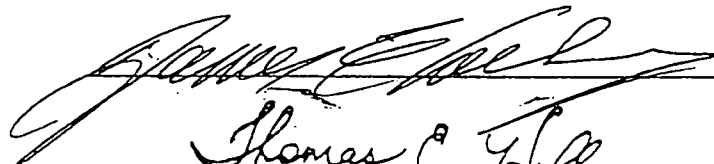
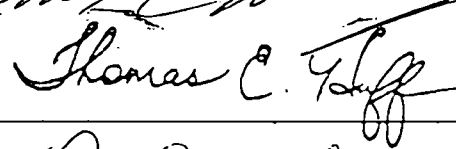
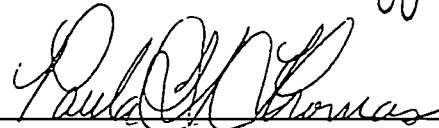
v.

David Fedor, Respondent.

Appellate Case No. 2014-001826

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:
William Mitchell Hogan, Esquire
James R. Gilreath, Esquire
Katherine Carruth Goode, Esquire

FILED

February 23, 2018