

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable DeAndrea G. Benjamin, Circuit Court Judge

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SC Court of Appeals

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.

AMENDED PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Pursuant to Rule 226(d)(1), SCACR, Counsel for Petitioner certifies that a Petition for Rehearing was made to the Court of Appeals on December 6, 2017 (R.pp. 211-20) and denied by the Court of Appeals on February 23, 2018. (R.p. 237).

INTRODUCTION

This case addresses whether a litigant under South Carolina law has a substantive right to dishonestly repudiate an honest settlement agreement. Specifically, this case concerns whether a mediated settlement agreement entered into in September 2002 by the parties and signed by their counsel, but not entered in the court record, which required Respondent to make an initial payment plus ten (10) annual installment payments, is enforceable in 2013 upon default by Respondent on his last installment payment and after the amendment of Rule 43(k), SCRPC in 2009 allowing judicial enforcement of such mediated settlement agreements. This question in turn depends on whether a change in Rule 43(k) pertaining to the enforcement of settlement agreements applies to all cases at the time they are heard regardless of when the suit was originally filed (operates retroactively) or applies only to cases settled after the date of the 2009 change in Rule 43(k) (operates prospectively). Under this Court's precedents, changes in the law that affect only remedies and procedures apply to all cases at the time they are heard in court regardless of whether the changes in the law occurred after the date the cause of action accrued or the case was filed (*i.e.*, operates retroactively). If the change in the law alters a substantive right, the amendment is generally presumed to operate prospectively only. Since this case involves Petitioner's attempted enforcement of his mediated settlement agreement from a legal malpractice action against Respondent, his former attorney, no substantive right in the enforcement of the settlement agreement has been affected, thus requiring the version of Rule

43(k) in effect at the time of the hearing before the trial court to control the settlement enforcement proceedings in this case. Thus, the trial court and the Court of Appeals erred in applying the former version of Rule 43(k) in effect in 2002, when the parties signed their mediated settlement agreement, to void the settlement agreement after Respondent made 10 years of payments instead of applying the current version of Rule 43(k) in effect at the time Respondent repudiated the settlement agreement and Petitioner brought his enforcement action in 2013. This Court should not allow Respondent, a South Carolina licensed and practicing attorney, to damage his former client a second time by repudiating the payment obligation Respondent agreed to and followed for nine years by resorting to a rule of procedure no longer in effect in this State or at the time Respondent breached his settlement agreement.

Also involved in this case is the issue of whether the lower courts should have allowed consideration of Petitioner's motion for reconsideration which addressed the issue of Rule 43(k) as well as Petitioner's earlier arguments that the parties' settlement agreement was admissible pursuant to exceptions under the parol evidence rule. Petitioner timely filed his Rule 59(e) motion for reconsideration with the clerk of court and timely served it on Respondent but belatedly provided a copy of the filed motion to the trial judge more than ten days after filing under Rule 59(g); however, no one was prejudiced by the delay. The lower courts erred in refusing to consider the merits of the arguments raised in the motion for reconsideration where no one was prejudiced by the delay in providing a copy to the trial judge.

Because the evidence is clear and explicit, there is only one logical conclusion that can be reached, that being the Respondent has paid Petitioner only \$385,000 out of his \$400,000 settlement obligation and therefore owes Petitioner \$15,000.

QUESTIONS PRESENTED

- I. Did the Court of Appeals commit reversible error by applying an abrogated version of Rule 43(k), SCRCP, thereby refusing to consider the terms of the Confidential Settlement Agreement executed by the parties when determining whether Respondent had satisfied his Confession of Judgment arising out of the Confidential Settlement Agreement?
- II. Should the Court of Appeals have considered the merits of Petitioner's Motion for Reconsideration which was timely mailed to the Clerk of Court and to Respondent's counsel even though an additional copy was not mailed directly to the presiding judge within ten days of filing?
- III. When considering the parties' Confidential Settlement Agreement in conjunction with the Confession of Judgment, did the Court of Appeals commit reversible error by holding the full record contained evidentiary support for the trial court's finding that Respondent satisfied his \$350,000 Confession of Judgment by payment of \$385,000 to Petitioner?

STATEMENT OF THE CASE

In 2001 Petitioner filed a lawsuit alleging various legal malpractice-related causes of action against Respondent arising out of the parties' business relationship and Respondent's professional legal services. (R.p. 31, lines 14-17). 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. (R.pp. 58-61; R.p. 41, lines 9-21).

Under the terms of the Confidential Settlement Agreement Respondent agreed in paragraph 1 to pay Petitioner "the total sum of \$400,000.00 in complete settlement of all claims..." (R.pp. 58-59).

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.*)

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. (R.pp. 59-60).

Under paragraph 3 of the Confidential Settlement Agreement, Respondent agreed to give Petitioner an executed Confession of Judgment for \$350,000.00 as security for the remaining \$350,000 balance to be paid in installments. (R.p. 60). The Confidential Settlement Agreement also 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 Petitioner’s attorney in escrow until Respondent defaulted on any payments. (*Id.*) The Confidential Settlement Agreement in paragraph 5 required Petitioner 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. (R.p. 61).

Nine days after the mediation Respondent executed a Confession of Judgment dated September 26, 2002. The Confession of Judgment acknowledged that Respondent was indebted to Petitioner as of September 26, 2002 in the principal sum of \$350,000. The Confession of Judgment further recited that it was executed in consideration for Petitioner’s release of all claims against Respondent and dismissal with prejudice of the subject lawsuit captioned Smith v. Fedor, Dkt. No. 2001-CP-40-4203. (R.p. 19 at ¶¶ 3-4).

The Confession of Judgment stated: “The indebtedness owed by [Respondent] to [Petitioner] arose pursuant to a confidential Settlement Agreement between [Respondent] and [Petitioner] dated September 17, 2002 in which the lawsuit referenced above was settled.” (R.p. 20 at ¶ 5).

The Confession of Judgment authorized entry of a judgment against Respondent “in the principal amount of \$350,000.00, less any payment received by [Petitioner] from [Respondent]

through the date of filing hereof.” (R.p. 20 at ¶ 7). The Confession of Judgment provided that it would not be filed “unless and until there has been a default by [Respondent] on his payment obligations as set forth in the Confidential Settlement Agreement.” (R.p. 20 at ¶ 9).

Respondent made an initial payment of \$50,000 as part of the Confidential Settlement Agreement. (R.pp. 65-66 at ¶¶ 3, 12 and 13).

From September 1, 2003 through September 1, 2011 Respondent 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. (R.p. 66 at ¶ 4). Shortly after November 20, 2012, Respondent made a partial payment of \$20,000. (R.p. 66 at ¶ 7).

Respondent made total payments to Petitioner or his attorney of \$385,000. (R.p. 70). Because of Respondent’s failure to make the required payments, Petitioner’s 2002 trial attorney James R. Gilreath filed the Confession of Judgment on February 27, 2013, along with a Partial Satisfaction of Judgment, for default in the unpaid balance of \$15,000. (R.p. 66 at ¶10).

On or about March 26, 2013 Respondent filed a motion pursuant to Rule 60(b)(5), SCRCF, for relief from the Confession of Judgment claiming the debt recited in the Confession of Judgment had been satisfied. (R.pp. 23-25).

Prior to the date of the hearing on Respondent’s motion, Petitioner’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. (R.pp. 54-67).

The trial court, with the Honorable DeAndrea Gist Benjamin presiding, held a hearing on Respondent’s Rule 60(b)(5) motion on August 26, 2013. Counsel for Respondent 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. (R.p. 34, lines 20-24).

The trial court reviewed the Confession of Judgment but declined to review the Confidential Settlement Agreement at the hearing. (R.p. 45, lines 3-6). The trial court granted Respondent'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." (R.p. 13, lines 18-19).

On November 8, 2013, Petitioner's attorney timely mailed Petitioner's Motion for Reconsideration to the Clerk of Court for filing with a duplicate copy to Respondent's counsel. (R.pp. 82-96 and 104). A separate copy of the Motion for Reconsideration was e-mailed to the trial judge's office on June 4, 2014. (R.p. 104).

By a form 4 Order dated July 22, 2014, the trial court denied Petitioner'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." (R.p. 16).

Petitioner, 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 Appeal and Order, July 22, 2014) (R.pp. 106-07 and 115-18). The Court of Appeals heard oral arguments on February 7, 2017, and on November 22, 2017 the Court issued its opinion affirming the circuit court's order. Smith v. Fedor, ___ S.C. ___, 809 S.E.2d 612 (Ct. App. 2017). Petitioner petitioned the Court of Appeals for rehearing *en banc* on December 6, 2017 (R.pp. 211-20), and the Court denied rehearing on February 23, 2018. Petitioner now seeks review of that decision pursuant to Rule 242, SCACR.

SCOPE 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 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).

“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.

ARGUMENT

I. THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR BY APPLYING AN ABROGATED VERSION OF RULE 43(K), SCRPC, THEREBY REFUSING TO CONSIDER THE TERMS OF THE CONFIDENTIAL SETTLEMENT AGREEMENT EXECUTED BY THE PARTIES WHEN DETERMINING WHETHER RESPONDENT 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. (R.p. 61). The Confidential Settlement Agreement was not filed with the Court in 2002. (R.p. 35, lines 10-23). On September 26, 2002 Respondent executed a Confession of Judgment for \$350,000 in

consideration for Petitioner's agreement to release all claims against him and to dismiss the underlying suit with prejudice. (R.p. 19, ¶ 4). According to the Confession of Judgment, the indebtedness it secured "arose pursuant to a confidential Settlement Agreement between [Respondent] and [Petitioner] dated September 17, 2002..." (R.p. 20 at ¶5) (emphasis added). In addition the Confession of Judgment stated Petitioner would not file the confession "until there [was] a default by [Respondent] 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, Petitioner 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 Respondent had paid \$335,000 towards the balance owed under the Confession of Judgment, leaving an unpaid balance of \$15,000. (R.p. 66 at ¶ 10). Thereafter, Respondent filed a motion to be relieved from the judgment pursuant to Rule 60(b)(5), SCRPC. (R.pp. 23-25).

At the August 26, 2013 hearing before the trial court, counsel for Respondent asked the Court to consider only the terms on the face of the Confession of Judgment which provides in part that "[t]he [Respondent] hereby authorizes the entry of an Order and judgment against [Respondent], and in favor of [Petitioner], in the principal amount of \$350,000, less any payments received by [Petitioner] from [Respondent] through the date of filing hereof." (R.p. 20 at ¶ 7). Respondent's counsel asked the trial court to ignore the terms of the Confidential Settlement Agreement specifically referenced in the Confession of Judgment. (R.p. 34, line 13— p. 35, line 3 and p. 40, lines 7-16).

Both parties agreed during the hearing that Respondent had paid sums to Petitioner *in excess of* the \$350,000 amount set forth in the Confession of Judgment. (e.g. R.p. 29, lines 13-15

and p. 46, lines 6-9). However, Petitioner's counsel pointed out to the Court that Respondent had more than one payment obligation to Petitioner under the Confidential Settlement Agreement and that not all Respondent's payments were towards the obligation secured by the Confession of Judgment. (R.p. 33, lines 6-8 and p. 46, lines 1-9). It was therefore necessary to review the referenced Confidential Settlement Agreement to determine if Respondent had met his payment obligations secured by the Confession of Judgment.

In the appealed Order, the trial court declined to consider the terms of the Confidential Settlement Agreement. (R.p. 13, lines 18-19). The Order stated that the 2002 version of Rule 43(k), SCRCPC, 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. (R.pp. 12-13). As a result, the trial court held that the payments in excess of \$350,000 satisfied the Confession of Judgment and then granted Respondent's Motion for Relief from the Confession of Judgment. (R.p. 14).

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

Rule 43(k), SCRCPC regarding settlement agreements of counsel currently states in part:

No agreement between counsel affecting the proceedings in an action shall be binding unless ... reduced to writing and signed by the parties and their counsel.

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

The Confidential Settlement Agreement was obviously reduced to writing and signed by the parties and 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 trial court however held that Rule 43(k), SCRCPC as amended in 2009 and currently in effect did not apply to the matter before the trial court on August 26, 2013. The Court applied

the 2002 version of Rule 43(k) as interpreted by this Court in 2006 in Farnsworth v. Davis Heating & Air Conditioning, Inc., 367 S.C. 623, 627 S.E.2d 724 (2006) and Buckley v. Shealy, 370 S.C. 317, 635 S.E.2d 76, (2006).¹ As a result, the Court declined to consider the parties' Confidential Settlement Agreement. 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), SCRPC 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 issue was addressed by the 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) at issue in that case, should be given retroactive application to cases pending at the time of its enactment. The court's ruling was based on this Court's precedents that a new enactment is to be given retroactive effect "...when the enactment is remedial or procedural in nature..." *Id.* at 124, 528 S.E.2d at 82 (quoting Jenkins v. Meares, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990)); see also Hercules Inc. v. South Carolina Tax Comm'n, 274 S.C. 137, 262 S.E.2d 45 (1980) (holding a statutory change which affects the remedy and not the right is subject to retroactive application).

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.'" Graham v. Dorchester Cnty. Sch. Dist., 339 S.C. at 124, 528 S.E.2d at 82 (quoting Rule 86(a), SCRPC). In

¹ In 1995, this Court stated that, under then-current Rule 43(k), the requirement that settlement agreements be placed on the record "does not apply where the agreement is admitted or has been carried into effect." Ashfort Corp. v. Palmetto Constr. Group, Inc., 318 S.C. 492, 494, 458 S.E.2d 533, 534 n. 1 (1995). When the parties signed the Confidential Settlement Agreement mediated by former Chief Justice David Harwell, Ashfort was the prevailing case law on the procedure for enforcing settlement agreements. Later in 2006 this Court stated that footnote 1 of Ashfort "was misguided dicta." Buckley v. Shealy, 370 S.C. at 322, 635 S.E.2d at 78 n. 2.

this case, Respondent created his payment obligation by agreeing to long-term payments totaling \$400,000 over ten years in exchange for Petitioner's agreement "to write a letter to the Grievance Committee of the Bar providing notice that this case has been resolved to the mutual satisfaction of all parties." (R.p. 61). Respondent recognized his payment obligation by making payments from 2002 through November 2012. (R.pp. 65-66). On February 4, 2013 Respondent repudiated his payment obligation and failed to complete his final installment payment. (R.p. 66 at ¶ 9). Respondent can make no plausible argument that retroactive application of the 2009 amendment of Rule 43(k) is not feasible or would work an injustice since he repudiated the Confidential Settlement Agreement more than three years after its amendment.

This Court has held that changes in the law "creating new remedies to vindicate existing rights are applied retrospectively." Toth v. Square D Co., 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989) (quoting McCaskey v. Shaw, 295 S.C. 372, 368 S.E.2d 672, 673 (Ct. App.1988)). This Court explained that where no new right or cause of action is recognized or no previous immunities abolished, then the change is remedial or procedural and entitled to retroactive application. This Court further explained that a change in the law affecting a breach of contract is entitled to retroactive application because "[i]t is elementary that a cause of action for breach of contract is not a new one." Toth v. Square D Co., 298 S.C. at 9, 377 S.E.2d at 586. Likewise, a change in Rule 43(k) expanding enforcement of settlement agreements to those signed by both parties and their counsel, like this one, does not alter a substantive right but only affects the available remedies. See also Landsman v. Maryland Home Improvement Comm'n, 154 Md. App. 241, 260, 839 A.2d 743, 754 (2003) (holding where a change in the law expands the remedies available for enforcing a contract, no substantive or vested right has been altered since " '[t]he only right taken away is the right dishonestly to repudiate an honest contract... ' ") (quoting

Tyrone W. v. Danielle R., 129 Md. App. 260, 289, 741 A.2d 553 (1999)).

In this case, Respondent reaped the benefits he wanted out of the Confidential Settlement Agreement, which were the dismissal of the lawsuit and Petitioner's letter to the Bar Grievance Committee. Now that Respondent has received all the benefits from the Confidential Settlement Agreement that he wanted, he presently claims the settlement agreement is non-binding when all that remain are his payment obligations. In reality, Respondent is asserting he has a vested, substantive right to dishonestly repudiate an honest settlement agreement. This Court should reject this contention as "contrary to justice and equity." Id.

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 inapplicable. 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, Respondent'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 Respondent is a unilateral statement signed by him alone. Petitioner is not a signatory to the document. The only document Petitioner 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). This 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, this 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 Weinges court further 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, this 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.*, Confession of Judgment) is a part of a larger agreement (*e.g.*, the Confidential Settlement Agreement). As this Court stated:

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. (R.p. 64, ¶¶ 5, 9 and 10). It declares that the indebtedness pertaining to the Confession of Judgment “arose pursuant to a confidential Settlement Agreement between [Respondent] and [Petitioner]”. 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. Parol evidence is admissible to explain ambiguities in the Confession of Judgment.

The trial court noted in its order that both parties agreed during the hearing that Respondent had paid an amount in excess of the \$350,000.00 set forth in the Confession of Judgment. (R.p. 12, lines 13-14). This begs the obvious question – why did Respondent pay more than \$350,000.00 if he were not obligated to do so? Respondent 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 Respondent was making his payments required him to pay additional sums to Petitioner 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 ambiguity in the Confession of Judgment is demonstrated by the struggles the trial

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.

R.p. 35, lines 4-6.

The trial 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.

R.p. 41, line 22—p. 42, line 10.

When the trial 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, Respondent's payment obligation became ambiguous. An uncertainty about the amount of Respondent's indebtedness owed to Petitioner – the subject of the Confession of Judgment – arose when the words of the Confession of Judgment were applied to Respondent's actual payments on the indebtedness. In other words, the trial 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, a court may receive parol

testimony 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 may the 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 clears up the ambiguities arising when the Confession of Judgment is applied to Respondent’s debt payments. Paragraph 1 of the Confidential Settlement Agreement provides that the total settlement amount owed by Respondent is \$400,000, which explains why Respondent paid Petitioner more than \$350,000. (R.p. 58). Paragraph 1.a specifies that Respondent was obligated to make an initial payment of \$50,000 towards the \$400,000 debt. (R.p. 59). Paragraph 1.b specifies that Respondent then owed a balance of \$350,000 to be paid in annual installments of at least \$35,000 starting in September of the following year, 2003. (Id.) Paragraph 3 then provided that Respondent 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. (R.p. 60). 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 payment occurs explains why the Confession of Judgment was filed 10 years after its execution.

The latent ambiguity from the Confession of Judgment is exemplified by the statements of Respondent’s counsel at oral arguments before the trial court. He stated:

The [Respondent] 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.

R.p. 42, line 24—p. 43, line 5.

Respondent'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 Respondent 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 Respondent owed to Petitioner -- 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 latent ambiguities with which the trial 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.

II. THE COURT OF APPEALS SHOULD HAVE CONSIDERED THE MERITS OF PETITIONER'S MOTION FOR RECONSIDERATION WHICH WAS TIMELY MAILED TO THE CLERK OF COURT AND TO RESPONDENT'S COUNSEL.

Respondent in his motion for relief under Rule 60(b), SCRCP, did not raise the issue of whether the trial court had authority under Rule 43(k), SCRCP, to enforce the Confidential Settlement Agreement, nor did he raise it at oral argument before the trial court. The issue argued at the hearing and addressed in Petitioner'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.*, R.p. 39, lines 13-17 and p. 43, 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 trial court Order of October 31, 2013. Because the new

issue of Rule 43(k) first appeared in the trial court's Order of October 31, 2013, Petitioner timely filed a motion for reconsideration of the Order granting Respondent's Motion for Relief. The Motion for Reconsideration asked the trial 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.

Petitioner's Motion for Reconsideration was served on Respondent'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. Petitioner'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 trial court then ruled on Petitioner'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. 16).

The Motion for Reconsideration was timely filed with the Clerk of Court and served on Respondent's counsel. Petitioner 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), SCRCPC ("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), SCRCPC (same). The failure to provide a copy to the presiding judge was an oversight not intended to prejudice any party. Respondent'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. Petitioner submits the Court of Appeals erred in holding the

issues raised in his Motion for Reconsideration were not preserved for appeal.

“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).

This 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 Respondent, Petitioner posits that the lower courts erred in failing to consider his Motion for Reconsideration. Regardless of whether Petitioner’s Motion for Reconsideration was improperly denied on procedural grounds of Rule 59(g), this appeal was timely undertaken within thirty days of the trial 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 COURT OF APPEALS COMMITTED REVERSIBLE ERROR BY HOLDING THAT THE FULL RECORD CONTAINED EVIDENTIARY SUPPORT FOR THE TRIAL COURT'S FINDING THAT RESPONDENT SATISFIED HIS \$350,000 CONFESSION OF JUDGMENT BY PAYMENT OF \$385,000 TO PETITIONER.

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. Respondent agreed to pay Petitioner \$400,000 to settle and dismiss the lawsuit between the parties. (“[Respondent] agrees to pay [Petitioner] 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 [Respondent] agrees to give to [Petitioner] a Confession of Judgment for \$350,000...not to be recorded unless the [Respondent] defaults on any payments.”

As stated in the Petition for Rehearing, the Confidential Settlement Agreement indisputably provides for an indebtedness owed by Respondent to Petitioner of \$400,000. A review of the full record shows that Respondent paid Petitioner only \$385,000. Thus Respondent continues to owe Petitioner \$15,000. (R.p. 218).

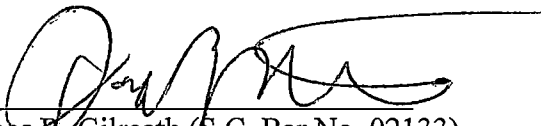
The Confidential Settlement Agreement is a clear and unambiguous contract between the two parties, negotiated with both parties having the benefit of counsel. This Court should therefore enforce the Confidential Settlement Agreement according to its terms and not allow Respondent to short-change his client a second time.

CONCLUSION

For all the above reasons, this Court should accept this Petition for Writ of Certiorari.

Respectfully submitted,

March 30, 2018

By: 
James R. Gilreath (S.C. Bar No. 02133)
William M. Hogan (S.C. Bar No. 65272)
ATTORNEYS FOR PETITIONER

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable DeAndrea G. Benjamin, Circuit Court Judge

RECEIVED
APR 02 2018
SC Court of Appeals

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,

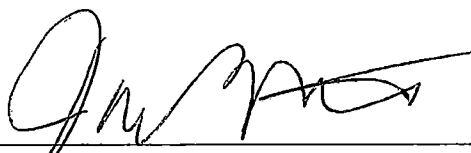
v.

David Fedor,Respondent.

PROOF 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 **Amended Petition for Writ of Certiorari** 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 S. Congress Street
P.O. Box 1175
Winnsboro, South Carolina 29180



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Greenville, South Carolina.

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1999-2000

2000-2001

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March 30, 2018

VIA FEDERAL EXPRESS

Honorable Daniel E. Shearouse
Clerk of Court, Supreme Court of South Carolina
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 29201

RE: *Edwin M Smith, Jr. v. David Fedor*
South Carolina Court of Appeals Case No. 2014-001826
South Carolina Supreme Court Appellate Case No. 2018-000456

RECEIVED
APR 02 2018
SC Court of Appeals

Dear Mr. Shearouse:

Please find enclosed for filing the original and seven (7) copies of the Amended Petition for a Writ of Certiorari ("Amended Petition") regarding the above-captioned Supreme Court appellate case and two copies of the Proof of Service. This is to replace the original Petition we filed Friday, March 30th which was over the 25-page limit. Linda Allen of your office said we could just refile this as an Amended Petition.

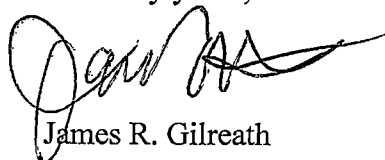
I am sending a copy of the Amended Petition and Proof of Service to the South Carolina Court of Appeals for filing. By copy of this letter to opposing counsel, I am serving her with the same.

Please return a file stamped copy of the Amended Petition and Proof of Service to me in the enclosed envelope.

Thank you for your assistance in this matter. If you have any questions or need anything further, please let me know. If you call Monday or Tuesday, please call on my cell number as I will be in Atlanta. My cell number is (864) 270-1102.

With best regards, I remain.

Sincerely yours,



James R. Gilreath

JRG/kmk

Enclosures

cc: The Honorable Jenny A. Kitchings (w/enclosures)
Katherine Carruth Goode, Esquire (w/enclosures)

SECRET

TOP SECRET

CONFIDENTIAL

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March 30, 2018

VIA FEDERAL EXPRESS

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

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

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APR 02 2018

SC Court of Appeals

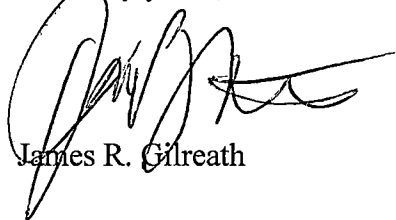
Dear Ms. Kitchings:

Enclosed please find two copies of the Appellant's Amended Petition for Writ of Certiorari and Proof of Service being filed with the South Carolina Supreme Court. Please file these and return a filed-clocked copy to me in the enclosed self-addressed, stamped envelope.

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

With best regards, I remain.

Sincerely yours,



James R. Gilreath

JRG/kmk

Enclosures

cc: Katherine Goode, Esquire (w/enclosures)

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JAMES GILREATH
GILREATH LAW FIRM
110 LAVINIA AVENUE

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GREENVILLE, SC 29601
UNITED STATES US

BILL SENDER

TO HON. JENNY ABBOTT KITCHINGS
SOUTH CAROLINA COURT OF APPEALS
1220 SENATE ST

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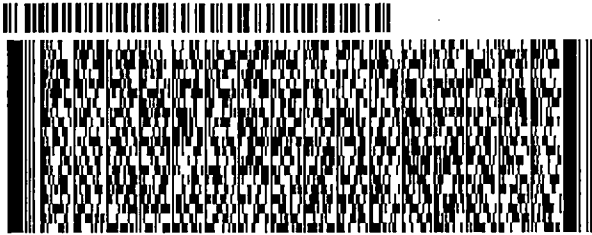
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(803) 734-1890

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PO:

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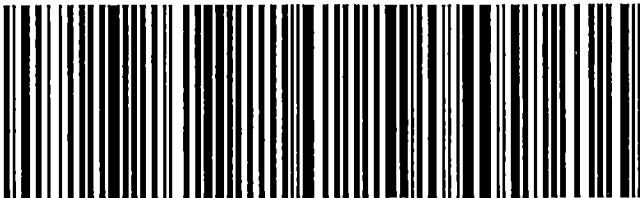
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