THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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

Opinion No. 5523 (S.C. Ct. App. filed Nov. 22, 2017)
Appellate Case No. 2018-000456

Edwin M. Smith, Jr.,

Petitioner,

v.

David Fedor,

Respondent

RETURN TO AMENDED PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Pursuant to Rule 242(f) of the South Carolina Appellate Court Rules, Respondent provides this counter-statement of the questions presented:

1. Should certiorari be denied with respect to the Court of Appeals' affirmance of the lower court's grant of relief from the confession of judgment, based on a determination that the lower court did not abuse its discretion in finding the judgment was satisfied?

2. Should certiorari be denied with respect to the Court of Appeals' affirmance of the lower court's finding that the 2009 amendment to Rule 43(k), SCRCP, applies prospectively and that the "Confidential Settlement Agreement" is not binding on the court?

3. Should certiorari be denied with respect to the Court of Appeals' affirmance of the lower court's denial of the motion for reconsideration and the Court of Appeals' conclusion that the parol evidence arguments are not preserved?

COUNTER-STATEMENT OF THE CASE

This case stems from a dispute between Petitioner, Edwin M. Smith, Jr., and Respondent, David Fedor, with respect to a confession of judgment executed by Respondent in a 2001 Richland County case. The confession of judgment was filed in the lower court in 2013. Respondent moved for relief from the judgment on the basis that it had been satisfied. The lower court granted that motion, due to Respondent's having paid an amount in excess of the confessed amount. In a unanimous opinion filed November 22, 2017, the Court of Appeals affirmed the judgment of the lower court, and Petitioner now seeks certiorari review of that decision.

In his Amended Petition for Writ of Certiorari (hereafter, "Petition") and in his previous filings in the Court of Appeals, Petitioner has sought a remedy not available under the procedural posture of this case. This case was ***not*** an action by Petitioner to enforce a settlement agreement. It was an action by Respondent for relief from a confession of judgment that had been satisfied. In his Petition in this Court (in its

introduction, statement of the case, and argument), as in his prior filings, Petitioner has made 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. Respondent's attorney in the lower court[1] 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. App. p. 34, lines 20-24; p. 35, lines 19-21; p. 40, lines 13-17; p. 43, lines 8-10. He further objected and disputed opposing counsel's assertions as to the origin of the document. App. p. 41, lines 11-13; p. 43, 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 Petitioner's briefs in the Court of Appeals and in his Petition in this Court are not supported by any evidence and should be disregarded.

In his Petition, Petitioner makes inflammatory comments attacking and impugning Respondent personally. Those comments are inappropriate, are not based on evidentiary support, and should be disregarded.

Contrary to the representations made in the Petition's introduction and statement of the case, the relevant proceedings in the lower court are recited below and submitted as Respondent's counter-statement of the case, pursuant to Rule 242(f) of the South Carolina Appellate Court Rules.

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[1] In the lower court and at the inception of the appeal, Respondent was represented by Leo A. Dryer. Mr. Dryer passed away prior to the filing of the Respondent's initial brief in the Court of Appeals, and the undersigned attorney, who was not involved in the lower court proceedings, assumed Respondent's representation in the appeal.

Petitioner brought this action against Respondent in 2001 in the Richland County Court of Common Pleas. In 2002, Respondent executed a confession of judgment, in the amount of $350,000, less any payments received by Petitioner from Respondent through the date of filing of the confession of judgment. App. pp. 19-20. The action was dismissed with prejudice by order of dismissal dated October 29, 2002, filed November 4, 2002. App. p. 18.

On February 27, 2013, Petitioner 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. App. pp. 21-22. As of that date, however, it is undisputed that Respondent had in fact paid to Petitioner $385,000, a sum in excess of the confessed amount of $350,000. App. pp. 12, 33, 46, 70.

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. App. pp. 23-24. Petitioner opposed this motion. App. p. 4.

A hearing was held August 26, 2013, before Judge DeAndrea Gist Benjamin. App. p. 26. At the hearing, Respondent submitted an affidavit which recited he had paid Petitioner the sum of $385,000. App. pp. 45, 70. Respondent's affidavit was received without objection. App. pp. 45-46, 70-72. No other evidence was presented by either party. Counsel for Petitioner repeatedly conceded that Respondent had paid Petitioner $385,000. App. pp. 33, 46. Counsel for Petitioner even stated the confession of judgment should be deemed satisfied. App. p. 33, lines 15-17.

It appears that an affidavit of attorney James Gilreath[2] was submitted by Petitioner to the judge prior to the hearing. *See* App. p. 34, lines 8-11; p. 35, 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. App. p. 72. 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 hearsay. App. p. 34, lines 4-6, 20-24; p. 35, lines 19-21; p. 40, lines 13-17; p. 43, 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.[3]

Also not in the case file maintained by the Richland County Clerk of Court are three memoranda that were apparently submitted to the lower court judge.[4] One was

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[2] Although attorney Gilreath was not listed as counsel of record for Petitioner in the proceedings with respect to the Rule 60(b)(5) motion in the court below, he has acted as Petitioner's attorney throughout this appeal, both in the Court of Appeals and in this Court.

[3] The Court of Appeals found "the Gilreath affidavit was never offered or entered into evidence." App. p. 206. Petitioner did not challenge this finding in his petition for rehearing in the Court of Appeals or in his Petition in this Court.

[4] Upon reviewing the lower court file and not finding the Gilreath affidavit or the three memoranda referenced above, 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

Petitioner's "Memorandum in Opposition to Defendant's Motion to Vacate Judgment." App. pp. 54-56. Following the hearing before Judge Benjamin, it appears each party made an additional submission: Petitioner's "Memorandum in Support of Entering Settlement Agreement into Evidence" and Respondent's "Defendant/Movant Memorandum." App. pp. 73-75, 77-81.

On October 30, 2013, Judge Benjamin signed an order granting Respondent's motion to be relieved from the confession of judgment. App. pp. 11-14. The court declined to consider the purported confidential settlement agreement. App. pp. 12-13. The court held the confession of judgment, "in the principal amount of $350,000.00, less ***any*** payments received by [Petitioner] from [Respondent] through the date of filing hereof," had been satisfied by Respondent's payment to Petitioner of more than $350,000. App. p. 14 (emphasis in order). Finding the judgment was satisfied, the court held Respondent was entitled to be relieved from the confession of judgment. *Id.*

Petitioner filed a motion for reconsideration of the court's order. App. pp. 83-95. 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 Petitioner's earlier memoranda and they were not cited or argued at the hearing held August 26, 2013.[5] On July 22, 2014, Judge Benjamin signed a Form 4 order denying the motion for

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ultimately 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.

[5] The Court of Appeals held that the exceptions to the parol evidence rule raised for the first time in the motion for reconsideration were not preserved, citing *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct.App. 1990), and quoting, "'A party cannot use Rule 59(e)[, SCRCP] to present to the court an issue the party could have raised prior to judgment but did not.'" App. p. 209. Neither the petition for rehearing in the Court of Appeals nor the Petition in this Court challenged this ruling.

reconsideration because the court did not receive a copy of the motion within ten days of the motion being filed. App. p. 16. Thereafter, Petitioner 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. App. pp. 99-103. By Form 4 order dated September 5, 2014, the court again denied Petitioner's motion for reconsideration. App. p. 17.

The Court of Appeals affirmed the judgment of the lower court. Petitioner sought rehearing *en banc* in the Court of Appeals, which Respondent opposed. App. pp. 211-36. The Court of Appeals denied rehearing by order dated February 23, 2018. App. p. 237.

STANDARDS GOVERNING CERTIORARI REVIEW AND ERROR PRESERVATION

On certiorari, review by the Supreme Court is confined to the correction of errors of law. *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 472, 674 S.E.2d 154, 161 (2009). On certiorari, the Court does not review factual findings unless wholly unsupported by the evidence. *Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009).

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). 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*, 409 S.C. at 567, 762 S.E.2d at 695. An argument first raised in the Rule 59(e) motion is not preserved. *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005); *Smallwood v.*

Smallwood, 392 S.C. 574, 583, 709 S.E.2d 543, 547-48 (Ct.App. 2011). Questions not raised in a petition for rehearing in the Court of Appeals may not be raised in a petition for writ of certiorari in the Supreme Court. *See* Rule 242(d)(2), SCACR; *Mazloom v. Mazloom*, 392 S.C. 403, 403-04, 709 S.E.2d 661, 661 (2011). Where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds, because the unappealed ground becomes the law of the case. *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012); *Robinson v. Estate of Harris*, 388 S.C. 630, 641 n.8, 698 S.E.2d 222, 228 n.8 (2010).

ARGUMENT

Because Respondent has restated Petitioner's questions presented with a counter-statement of the questions presented, this Return addresses the issues in accordance with that counter-statement, not in the order presented in the Petition. The Petition should be denied, because there are no errors to correct in the rulings of the Court of Appeals, and the Court of Appeals' findings, like those of the lower court, have evidentiary support. Certiorari review is not appropriate under the controlling standards. *See Hollman*, 384 S.C. at 577, 683 S.E.2d at 498; *Laffitte*, 381 S.C. at 472, 674 S.E.2d at 161. Moreover, many of the arguments in the Petition are not properly before the Court due to Petitioner's non-compliance with preservation requirements, as set forth more fully below.

The Court of Appeals' decision analyzed three issues under three separate headings: (I) Confidential Settlement Agreement, (II) Motion to Alter or Amend Judgment, and (III) Confession of Judgment. App. pp. 208-10. The Court of Appeals correctly analyzed each of these issues, correctly found the judgment was satisfied, and correctly affirmed the lower court's order. This Court should deny a writ of certiorari.

I. CERTIORARI SHOULD BE DENIED WITH RESPECT TO THE COURT OF APPEALS' AFFIRMANCE OF THE LOWER COURT'S GRANT OF RELIEF FROM THE CONFESSION OF JUDGMENT, BASED ON A DETERMINATION THAT THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN FINDING THE JUDGMENT WAS SATISFIED.

The third issue decided by the Court of Appeals is dispositive of the issue before the lower court and on appeal – whether the confession of judgment was satisfied so as to warrant granting Respondent's motion for relief from judgment. App. pp. 209-10. The Petition attempts to challenge the Court's determination of this issue under his third question presented, which asserts there was not evidentiary support for the lower court's finding. This assertion is not preserved, and it is also unfounded. This Court should deny certiorari, on both procedural and substantive grounds.

Procedurally, Petitioner's third question presented is not preserved because it was not raised to the Court of Appeals in the petition for rehearing. The petition for rehearing raised three challenges to the Court of Appeals' opinion in its first three sections, and it included a fourth section seeking rehearing *en banc* based on the contentions in the first two sections. App. pp. 214-18. The first two sections of the petition for rehearing addressed the Court of Appeals' analysis under heading I of its opinion, "Confidential Settlement Agreement." *See* App. 208-09, 214-17. The third section addressed the Court of Appeals' analysis under heading II of its opinion, "Motion to Alter or Amend Judgment." App. pp. 209, 217-18. The petition for rehearing did not address any aspect of the analysis under heading III of the opinion, "Confession of Judgment." App. pp. 209-10. Nowhere in the petition for rehearing did Petitioner argue that there was not evidence in the record to support the lower court's ruling that the judgment was satisfied or challenge the Court of Appeals' determination that the lower court's ruling had evidentiary support

and therefore was not an abuse of discretion. The challenge now made under Petitioner's third question presented is not properly before this Court.

As a prerequisite to certiorari review in the Supreme Court, a party must seek rehearing by the Court of Appeals of any question to be raised in his petition for writ of certiorari: "Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." *See* Rule 242(d)(2), SCACR; *Mazloom* 392 S.C. at 403-04, 709 S.E.2d at 661. The Court of Appeals' conclusion that the lower court's ruling had evidentiary support, even though there was "competing evidence," is not challenged in the petition for rehearing, and that conclusion is the law of the case. *See Mazloom*, 392 S.C. at 404, 709 S.E.2d at 661; *Robinson*, 388 S.C. at 641 n.8, 698 S.E.2d at 228 n.8; *Holly Hill Lumber Co. v. McCoy*, 210 S.C. 440, 442, 43 S.E.2d 143, 143 (1947). Because Petitioner did not raise his third question presented in his petition for rehearing, he is procedurally barred from seeking certiorari review of that question.

Substantively, the Court of Appeals correctly analyzed the issue before it. A court's decision to grant relief from judgment based on grounds set out in Rule 60(b), including on the basis that the judgment has been satisfied, is reviewed under an abuse of discretion standard. *See Ware v. Ware*, 404 S.C. 1, 10, 743 S.E.2d 817, 822 (2013); *Belle Hall Plantation Homeowner's Ass'n, Inc. v. Murray*, 419 S.C. 605, 617, 799 S.E.2d 310, 316 (Ct.App. 2017); *Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 336, 644 S.E.2d 793, 795 (Ct.App. 2007); *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 47, 590 S.E.2d 502, 504 (Ct.App. 2003) (all stating standard of review for rulings on Rule 60(b) motions). An abuse of discretion occurs when the determination is controlled by an

error of law or based on factual conclusions that are without evidentiary support. *Ware*, 404 S.C. at 10, 743 S.E.2d at 822; *Stearns*, 373 S.C. at 336, 644 S.E.2d at 795. The Court of Appeals correctly applied this standard. App. p. 210.

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.

App. p. 20, ¶ 7 (emphasis added). The evidence presented at the hearing August 26, 2013, established that Respondent paid to Petitioner $385,000, an amount in excess of the confessed amount of $350,000. App. p. 70. Indeed, Petitioner concedes Respondent paid $385,000 to Petitioner. App. pp. 33, 46. 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. Petitioner's own counsel stated on the record at the hearing, "the confession of judgment should be deemed satisfied." App. p. 33, lines 16-17. The lower court did not abuse its discretion in finding the judgment is satisfied and in granting relief from the confession of judgment. App. p. 14.

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* App. pp. 77-81, 83-87, Petitioner argues that the parol evidence rule allows for modification of the clear, plain, and unambiguous language of the confession of judgment. To the contrary, the parol evidence rule is applicable in the area of ***contract*** construction. It is not a principle 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 lower 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).

App. pp. 13-14.

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. Although Petitioner invoked the parol evidence rule in the court below, in the Court of Appeals, and in his Petition in this Court, he specifically acknowledges it ***does not apply to a confession of judgment***, stating, "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* Petition, pp. 12-13 (emphasis added); App. p. 140 (emphasis added). By Petitioner's own admission, parol evidence simply cannot be considered to modify the terms of the confession of judgment.

In reviewing the lower court's analysis of the confession of judgment and motion for relief, the Court of Appeals reviewed the evidence and stated it included Respondent's affidavit, which recited payment of $385,000, a sum in excess of the judgment; the confidential settlement agreement, which the Court deemed unenforceable (a correct legal conclusion, as discussed in Argument II, *infra* at 12-16, and the Gilreath affidavit. Finding there was "competing evidence," the Court of Appeals held the lower court did not abuse its discretion in granting relief from the judgment, since that decision was based on a factual conclusion that was not without evidentiary support. App. p. 210. This determination was not controlled by any error of law, and it was not wholly unsupported

by the evidence, as required for certiorari review. *See Hollman*, 384 S.C. at 577, 683 S.E.2d at 498; *Laffitte*, 381 S.C. at 472, 674 S.E.2d at 161.

Even if the settlement agreement could or should have been considered, which Respondent disputes, the Court of Appeals' decision on the evidence remains correct. If the agreement were considered, the evidence is still "competing," and the lower court's judgment has evidentiary support in Respondent's affidavit. Having evidentiary support, it is not an abuse of discretion. The Court of Appeals' determination also has evidentiary support, so as not to be an appropriate subject of certiorari review. This Court should deny the Petition as to its third question presented. Because that issue is dispositive, the Court should also deny the Petition in its entirety.

II. CERTIORARI SHOULD BE DENIED WITH RESPECT TO THE COURT OF APPEALS' AFFIRMANCE OF THE LOWER COURT'S FINDING THAT THE 2009 AMENDMENT TO RULE 43(k), SCRCP, APPLIES PROSPECTIVELY AND THAT THE "CONFIDENTIAL SETTLEMENT AGREEMENT" IS NOT BINDING ON THE COURT.

In his first question presented and the arguments thereunder, Petitioner contends the Court of Appeals erred in affirming the lower court's determination that Rule 43(k) of the South Carolina Rules of Civil Procedure, as in effect prior to its 2009 amendment, precluded consideration of the purported "Confidential Settlement Agreement" because that agreement is not binding on the court. The lower court and the Court of Appeals correctly analyzed this issue.

Both the lower court and the Court of Appeals premised their decisions on application of Rule 43(k), as in effect in 2002 when the parties entered into the purported agreement. The analysis by both courts of the applicability of Rule 43(k) was correct. Moreover, their decisions are also supported by additional grounds, set out below.

1. Rule 43(k), SCRCP.

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

> No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record.

See Rule 43(k) (2002). This rule applies to settlement agreements. *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 637, 627 S.E.2d 724, 726 (2006); *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 494-95, 458 S.E.2d 533, 534-35 (1995). As the lower court's order found, the parties acknowledge that the purported confidential settlement agreement was never entered into the record. App. p. 13. 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*, 367 S.C. at 638, 627 S.E.2d at 726.

Petitioner contends a 2009 amendment to Rule 43(k) should be applied retrospectively. The lower court and Court of Appeals correctly found the 2009 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 County Sch. Dist.*, 339 S.C. 121, 124, 528 S.E.2d 80, 81-82 (Ct.App. 2000). Both the lower court and the Court of Appeals correctly found the

amendment to Rule 43(k) in 2009 did not apply retroactively to an agreement allegedly entered into in 2002.

Petitioner 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* Petition, p. 10; App. pp. 137-38. To the contrary, *Graham* does not dictate retroactive application of the 2009 rule change in this case, for several reasons. First, *Graham* addressed a change in a different rule, Rule 40(j), a rule with a clearly procedural purpose. *See Graham*, 339 S.C. at 123-25, 528 S.E.2d at 81-82. It did not address the question whether a settlement agreement is binding on the court.

Second, the passage in *Graham* quoted by Petitioner addressed the applicability of rule changes to actions ***pending when the change was adopted*** or brought thereafter. *See Graham*, 339 S.C. at 124, 528 S.E.2d at 82, *quoting* Rule 86(a), SCRCP. Here, the 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). As the Court of Appeals correctly recognized, the exception in *Graham*, which applies new rules of procedure to matters ***pending at the time of the rule change,*** is not applicable in this case, since the case was dismissed with prejudice in 2002 and the confession of judgment was not filed until 2013. App. p. 209.

Third, and most importantly, retroactive application of the amended Rule 43(k) is ***not feasible*** and ***would work serious injustice***, not only in this case but in countless others, and therefore is contrary to the significant limiting language of Rule 86(a) and *Graham*. *See Graham*, 339 S.C. at 124, 528 S.E.2d at 82. Retroactive application of the amended 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 2009 rule change, formerly deemed not binding on the court, would suddenly gain vitality. Retroactive application of the amended Rule 43(k) would undermine and undo the finality that existed in cases concluded prior to the 2009 amendment. 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 that 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 and Court of Appeals correctly applied the version of Rule 43(k) in effect in 2002 when the purported agreement was made and the case was dismissed.

In a paragraph beginning on page 11 and continuing to the first line of page 12 of the Petition, Petitioner makes a new argument, citing cases not previously raised in any of his lower court or appellate filings (including two Maryland cases), that changes in the law creating new remedies to vindicate existing rights are applied retrospectively, and that this principle should apply to the construction of Rule 43(k). This argument, never made before in either the lower court or the Court of Appeals, is not preserved. However, if it is considered, the cited authority actually supports the decisions of the lower court and Court

of Appeals applying the amended Rule 43(k) only prospectively. In *Toth v. Square D Co.*, 298 S.C. 6, 377 S.E.2d 584 (1989), cited by Petitioner, this Court recognized that "'[p]rospective application is required when liability is created where formerly none existed.'" *Toth*, 298 S.C. at 8, 377 S.E.2d at 587 (citation omitted). Such is the case with the 2009 amendment to Rule 43(k), which makes enforceable a class of agreements previously deemed unenforceable. The new argument based on *Toth* does not alter the consistent line of South Carolina authority strictly applying the prior language of Rule 43(k). *See Buckley*, 370 S.C. at 322, 635 S.E.2d at 78; *Farnsworth*, 367 S.C. at 638, 627 S.E.2d at 726. Indeed, in *Farnsworth*, this Court disavowed *dictum* in a footnote in *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533 (1995), that tended to undermine strict application of the language of Rule 43(k). *See Farnsworth*, 367 S.C. at 637-38, 627 S.E.2d at 726. The newly-cited authorities do not override the holdings of this Court's Rule 43(k) precedents.

2. Parol Evidence Rule.

Notwithstanding Petitioner's acknowledgement in his Petition and prior filings that the parol evidence rule ***does not apply to the confession of judgment***, discussed *supra* at 11, Petitioner nonetheless puts forth arguments based on the parol evidence rule, arguments raised for the first time in the motion for reconsideration[6] or on appeal and

[6] Petitioner's "Memorandum in Support of Entering Settlement Agreement into Evidence" invoked the exception to the parol evidence rule stated in *Smith v. McCann*, 289 S.C. 452, 457, 346 S.E.2d 720, 724 (1986), quoting a passage from that decision. Thereafter, Petitioner abandoned that argument and authority, instead invoking different aspects of the parol evidence rule under different authorities in his motion for reconsideration and appellate filings. The parol evidence arguments and authorities raised for the first time in his motion for reconsideration are not preserved. Similarly, the additional parol evidence arguments first made in his appellate brief also are not preserved. *See Dixon*, 362 S.C. at 399, 608 S.E.2d at 845; *Stevens*, 409 S.C. at 567, 762 S.E.2d at 695.

therefore not preserved. *See Dixon*, 362 S.C. at 399, 608 S.E.2d at 845; *Stevens*, 409 S.C. at 567, 762 S.E.2d at 695. Essentially, Petitioner 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 Petitioner concedes elsewhere in his Petition and his brief filed in the Court of Appeals. *See* Petition, pp. 12-13; App. p. 140.

Petitioner asserts that the purported settlement agreement is admissible to explain ambiguities in the confession of judgment. *See* Petition, pp. 15-18. Only the first paragraph of this argument was raised below, and it was raised for the first time in the motion for reconsideration. App. pp. 92-93 (Argument D). The remainder of the argument, from the last line of page 15 through the end of Argument I on page 18 of the Petition, and the authorities cited in support of this argument, were never raised in the court below but were raised for the first time in Petitioner's opening brief in the Court of Appeals. App. pp. 145-149. Accordingly, these arguments are unpreserved. *See Dixon*, 362 S.C. at 399, 608 S.E.2d at 845; *Stevens*, 409 S.C. at 567, 762 S.E.2d at 695. Moreover, the language of the confession is clear and unambiguous. Petitioner 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 lower court correctly refused to consider the extraneous document.

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 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 Petitioner, whose attorney drafted the confession of judgment. App. 39, lines 1-3; p. 33, lines 15-23.

3. Sufficiency of Confession of Judgment.

In the parol evidence section of his argument, Petitioner challenges the sufficiency of the confession of judgment based on a 1881 decision, a decision which Petitioner cites out of context. *See* Petition, pp. 13-14; App. pp. 140-41. This argument was made for the first time in the motion for reconsideration and is unpreserved. *See Dixon*, 362 S.C. at 399, 608 S.E.2d at 845. However, it also is unfounded.

The case on which Petitioner 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 long-standing precedent make clear that the amount confessed does not have to be equal to 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 Petitioner's claim, 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).[7]

4. Evidentiary Foundation.

As noted in this Return's counter-statement of the case, the authenticity of and foundation for admission of the purported settlement agreement were not established. No testimony was taken at the hearing of August 26, 2013. The Gilreath affidavit was not offered or admitted into evidence. The purported confidential settlement agreement was not admitted into evidence. Petitioner did not call any witness to lay a foundation for the admission of the purported agreement.

[7] A third requirement of S.C. Code Ann. § 15-35-360, addressing contingent liabilities, is inapplicable here.

Respondent's trial counsel made numerous specific objections to the factual assertions made by opposing counsel and to any consideration of the agreement. App. p. 34, lines 4-6, 20-24; p. 35, lines 19-22; p. 40, lines 13-17; p. 43, lines 8-13. Had ***any*** evidentiary support been introduced by counsel for Petitioner, Respondent's trial counsel would have had an opportunity to cross-examine Petitioner's witnesses concerning the making of the alleged agreement, the identity of its drafter,[8] 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 the Gilreath affidavit might be argued to authenticate the document, that affidavit also was not offered into evidence, and Respondent's trial counsel therefore 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 Petitioner's factual recitals based on those documents throughout his Petition and his prior briefs in the Court of Appeals.

[8] Petitioner's own attorneys made conflicting representations as to who drafted the purported agreement, attorney Ruschky claiming the drafter was retired Chief Justice David Harwell, App. p. 41, lines 11-12, and attorney Gilreath claiming the drafter was an attorney by the name of Swagart, App. p. 65, ¶ 3.

III. SHOULD CERTIORARI BE DENIED WITH RESPECT TO THE COURT OF APPEALS' AFFIRMANCE OF THE LOWER COURT'S DENIAL OF THE MOTION FOR RECONSIDERATION AND THE COURT OF APPEALS' CONCLUSION THAT THE PAROL EVIDENCE ARGUMENTS ARE NOT PRESERVED.

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

> A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion.

See Rule 59(g), SCRCP. By order dated July 22, 2014, the court denied the motion for reconsideration because of Petitioner's non-compliance with this rule. App. p. 16. The Court of Appeals affirmed the court's denial on this basis. App. p. 209.

Under his second question presented, Petitioner claims the lower court erred in failing to consider his motion for reconsideration and the Court of Appeals erred in finding the issues raised in his motion for reconsideration were not preserved. These claims are unfounded, for multiple reasons.

First, the determination by the Court of Appeals that certain issues were not preserved due to the lower court's denial of the motion for reconsideration applied solely to Petitioner's parol evidence rule arguments. The Court of Appeals did not find the Rule 43(k) arguments were not preserved, and it squarely addressed the merits of those arguments under heading I of its opinion, "Confidential Settlement Agreement." App. pp. 208-09.

Second, the Court of Appeals held Petitioner's parol evidence arguments were not preserved on a second, separate basis – that they were raised for the first time in his motion for reconsideration. App. p. 209. Petitioner did not challenge this ruling in his petition for rehearing, and it is the law of the case. Where a decision is based on more than one

ground, the appellate court will affirm unless the appellant appeals all grounds, because the unappealed ground becomes the law of the case. *Atlantic Coast Builders*, 398 S.C. at 328, 730 S.E.2d at 284; *Robinson*, 388 S.C. at 641 n.8; 698 S.E.2d at 228 n.8. As pointed out in detail in the Final Brief of Respondent filed in the Court of Appeals, App. pp. 170-72, incorporated herein by reference, the arguments made on appeal with respect to the parol evidence rule were first made in the motion for reconsideration or on appeal. The Court of Appeals correctly found the parol evidence rule arguments to be unpreserved on this basis, independently of its ruling based on failure to timely submit a copy of the motion for reconsideration to the judge as required by Rule 59(g). Under the circumstances, there is no reason to grant a writ of certiorari as to the Rule 59(g) ruling.

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

address or correct this assertion. *See Gallagher*, 353 S.C. at 63, 577 S.E.2d at 219. In this case, the Court of Appeals correctly concluded *Gallagher* implies a trial court may deny the motion solely on the basis of non-compliance with Rule 59(g). App. p. 209.

Petitioner'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 petitioner's motion for reconsideration for failure to comply with service requirement of Rule 59(g)" is misleading. *See* Petition, p. 21; App. p. 152. 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, prior to the Court of Appeals' decision in this case.

The language of the rule is mandatory, using the word "shall." *See* Rule 59(g), SCRCP. The conduct of 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. Petitioner filed a second motion for reconsideration, refiled the original motion for reconsideration, and asked the court to review the original motion on the merits. App. pp. 99-105. The court then issued an order denying the motion for reconsideration. App. p. 17. Petitioner has not been denied appellate review as the result of the first order that denied his motion, and his Rule 43(k) arguments made in the first motion were given full consideration by the Court of Appeals. The only arguments not considered by the Court of Appeals were those pertaining to the parol evidence rule, arguments the Court deemed unpreserved on a separate and independent basis. App. p. 209. Because Petitioner failed to challenge the Court's ruling that those arguments were unpreserved on other grounds, that ruling is the law of the case, and there is no appropriate basis for a grant of certiorari to review this issue.

CONCLUSION

For the reasons set forth above and the additional reasons stated in Respondent's filings in the Court of Appeals, App. pp. 158-85, 221-34, incorporated herein by reference, this Court should deny the Amended Petition for Writ of Certiorari.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
In the Court of Appeals

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S.C. SUPREME COURT

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

Opinion No. 5523 (S.C. Ct. App. filed Nov. 22, 2017)
Appellate Case No. 2018-000456

Edwin M. Smith, Jr.,

Petitioner,

v.

David Fedor,

Respondent

PROOF OF SERVICE

I certify that I have served a copy of the respondent's Return to Amended Petition for Writ of Certiorari and this 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, on April 25, 2018.

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