

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

MAY 07 2018

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

SC Court of Appeals

Edwin M. Smith, Jr., Petitioner,

v.

David Fedor, Respondent.

**REPLY TO RETURN TO AMENDED
PETITION FOR WRIT OF CERTIORARI**

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ATTORNEYS FOR PETITIONER

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In support of his Amended Petition for Writ of Certiorari, Petitioner Edwin M. Smith, Jr. (“Petitioner”) respectfully submits this Reply to Return to Amended Petition for Writ of Certiorari.

I. ALL ISSUES RAISED IN PETITIONER’S AMENDED PETITION FOR WRIT OF CERTIORARI ARE PROPERLY PRESERVED FOR REVIEW BY THIS COURT.

Respondent claims that various arguments in Petitioner’s Amended Petition are not preserved for review by this Court. To the contrary, all issues in Petitioner’s Amended Petition before this Court have been raised and ruled upon by the lower courts as set forth below.

A. Confidential Settlement Agreement is properly before this Court.

Respondent claims the Confidential Settlement Agreement was not properly presented to the lower courts and therefore cannot be considered by this Court. See Return to Amended Petition (“Return”), pp. 2 and 19-20. The Confidential Settlement Agreement, however, was proffered to the trial court on multiple occasions and was included by the Court of Appeals in the Record on Appeal. App. pp. 58-61; *cf.* App. pp. 53, 76 and 97 for pages omitted from Record on Appeal per order of the Court of Appeals.

Prior to the August 26, 2013 hearing on the Motion to Vacate Judgment, Petitioner’s trial counsel submitted the Confidential Settlement Agreement to the trial court and to Respondent’s counsel by attaching it as Exhibit A to Petitioner’s Memorandum in Opposition to Defendant’s Motion to Vacate Judgment of July 3, 2013. App. pp. 54-61.

At the hearing, Petitioner’s counsel submitted the Confidential Settlement Agreement in person to the trial judge as follows:

[PETITIONER’S
COUNSEL]:

We have the confidential settlement
if you’d like to see it, Your Honor.

THE COURT: Yes.
(Complies.)

App. p. 34, lns. 13-16.

Subsequently, Petitioner's trial counsel offered in open court to file the Confidential Settlement Agreement under seal and emphasized "it is imperative that the Court see this confidential settlement agreement." App. pp. 37, ln. 8 and 44, lns. 4-8. Thereafter, Petitioner's counsel, on the record, described to the trial court the essential terms of the Confidential Settlement Agreement as follows:

[PETITIONER'S
COUNSEL]:

. . . a confidential settlement [] agreement. . . was reached through the mediation of a retired Chief Justice of the Supreme Court.

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

(App. p. 32, lns. 8-15.)

Petitioner's counsel further described the Confidential Settlement Agreement for the trial court as a:

[PETITIONER'S
COUNSEL]:

. . . 4-page document, which is entitled Confidential Settlement Agreement, because of the term *confidential* at the top of the handwritten document.

It bears the signature of Mr. Fedor, his attorney, the Plaintiff, and the Plaintiff's attorney. And it is dated [September] 17th, 2002.¹

(App. p. 36, lns. 10-16).

¹ Petitioner's counsel initially misstated the date of the Confidential Settlement Agreement as December 17, 2002 but subsequently corrected the date to September 17, 2002. (App. p. 41, lns. 20-21).

More than a month before the trial court hearing, Petitioner also provided the circuit court and Respondent a similar written description of the Confidential Settlement Agreement, in addition to the agreement itself, in his Memorandum in Opposition to Defendant's Motion to Vacate Judgment. (App. pp. 54-55, ¶¶ 1,7 and 9).

To preserve a ruling on an evidentiary issue for appeal, South Carolina Rule of Evidence 103 provides as follows:

(a) **Effect of Erroneous Ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . .

(2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context.

SCRE 103(a).

In this case a substantial right of the Petitioner was being adversely affected by the exclusion of the Confidential Settlement Agreement which was specifically mentioned three times in the Confession of Judgment as the basis for the liability secured by the Confession of Judgment. App. pp. 19-20, ¶¶ 5, 9 and 10.

As described in the trial court colloquy above, Petitioner provided an offer of proof of the Confidential Settlement Agreement, pursuant to Rule 103(a)(2), SCRE, though the trial court refused to allow the document into the record. Since Petitioner's counsel provided a description of the essential terms of the Confidential Settlement Agreement, an appellate court may consider any error claimed in the exclusion of this evidence by the trial court. See Jamison v. Ford Motor Co., 373 S.C. 248, 260, 644 S.E.2d 755, 761 (Ct. App. 2007) (stating appellate court may consider errors in exclusion of evidence where record on appeal shows fairly what the rejected evidence would have been); see also State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402-03 (1986) (allowing

review of excluded testimony where the lower court record reveals what the excluded testimony was intended to show).

The Court of Appeals therefore properly allowed the Confidential Settlement Agreement into the Record on Appeal, and likewise it should be considered by this Court.

Respondent mistakenly asserts the Confidential Settlement Agreement was not authenticated and should not be given any credence. Return, pp. 2 and 19. Petitioner's undersigned counsel James R. Gilreath was a signatory to the Confidential Settlement Agreement. The authenticity of the copy of the Confidential Settlement Agreement was verified under oath in the Affidavit of James R. Gilreath presented to the trial court. (App. pp. 65-67, ¶¶ 3 and 11). Though the Respondent objects that the Affidavit of James R. Gilreath was not in the clerk of court record, the trial transcript clearly shows that the trial court and Respondent had received the Gilreath affidavit more than a month before the August 26, 2013 hearing. App. p. 34, lns. 8-11 and pp. 35, ln. 23 – 36, ln. 7. With the Gilreath affidavit dated July 1, 2013 offered in conjunction with Petitioner's Memorandum in Opposition to Defendant's Motion to Vacate Judgment dated July 3, 2013, the trial court had ample opportunity to review, and Respondent had ample time to respond to, the Confidential Settlement Agreement and Gilreath affidavit prior to the trial court hearing and its subsequent order on October 31, 2013. Respondent offered no affidavit or other evidence challenging the authenticity of the Confidential Settlement Agreement or his signature thereon.

Respondent also objects that there are conflicting statements from the attorneys at the August 26, 2013 hearing as to who was the scrivener of the Confidential Settlement Agreement, but neither counsel at the hearing was present at the execution of the Confidential Settlement Agreement. The Gilreath affidavit is the only statement from an actual eyewitness and signatory to the agreement addressing the drafting of the Confidential Settlement Agreement. Respondent, who

is also a signatory, could have contested the statement of the authenticity of the Confidential Settlement Agreement in the Gilreath affidavit, but he did not. Respondent submitted an affidavit on August 19, 2013, more than six weeks after the Gilreath affidavit and Petitioner's July 3, 2013 Memorandum, but did not challenge the statements in the Gilreath affidavit. The fact that he had the opportunity to submit opposing statements contradicting the Gilreath affidavit but did not do so establishes that the facts set forth in the Gilreath affidavit are true and correct. *Cf.* Gilreath Affidavit, App. pp. 65-67 and Fedor Affidavit, App. p. 70. Respondent had from July 3, 2013 through October 30, 2013 to contradict the statements in the Gilreath affidavit but did not do so. There is no "competing evidence" concerning the terms of the Confidential Settlement Agreement. Respondent's only defenses to the Confidential Settlement Agreement are to exclude it or ignore it.

B. Petitioner has properly challenged the rulings of the lower courts on the weight of the evidence.

Respondent contends that Petitioner has not preserved his challenge to the Court of Appeals' determination that there was conflicting evidence that supported the trial judge's ruling. Petitioner in his Petition for Rehearing before the Court of Appeals explained that the evidence was indisputable and showed that the Respondent had not paid the sum of \$400,000 to Petitioner which is the amount the Respondent properly owes to Petitioner. App. p. 218. The issue was therefore before the Court of Appeals in the Petition for Rehearing as well as in the trial court and appellate briefs.

An abuse of discretion occurs when a court ruling is controlled by an error of law or based on factual conclusions that are without evidentiary support. Ware v. Ware, 404 S.C. 1, 10, 743 S.E.2nd 817, 822 (2013).

In this case the rulings of the trial court and Court of Appeals were both affected by an error of law, namely that the 2013 version of Rule 43(k), SCRPC, amended in 2009, did not

apply to the hearing before the trial court in 2013. This legal error thereby precluded proper consideration of the Confidential Settlement Agreement. The trial court and the Court of Appeals did not analyze the terms of the Confidential Settlement Agreement and the Confession of Judgment together to determine the Respondent's payment obligations to Petitioner. The Court of Appeals in its Opinion stated that: "While there was competing evidence, we cannot say the trial court abused its discretion in granting [Respondent's] motion for relief from judgment in this case." App. p. 2010. However, the trial court never considered the terms of the Confidential Settlement Agreement due to its erroneous determination that the 2002 version of Rule 43(k) applied to a hearing held in 2013 regarding a breach of the agreement that occurred in 2012 and for which proceedings were filed in 2013, well after the 2009 amendment of Rule 43(k).

Respondent in his Return never addressed the substantive terms of the Confidential Settlement Agreement. Once the terms of the Confidential Settlement Agreement are given consideration, as they should be, there is only one conclusion that could be made – that being Respondent owes an additional \$15,000 to Petitioner under the Confession of Judgment.

C. Parol evidence rule does not bar review of the Confidential Settlement Agreement.

Respondent mischaracterizes Petitioner's argument on the relevance of the parol evidence rule to this case by stating Petitioner invoked the parol evidence rule in the courts below. Return, p. 11. Actually, the parol evidence rule generally bars the admission of extrinsic evidence to interpretations of contracts. See McGill v. Moore, 381 S.C. 179, 188, 672 S.E.2d 571, 576 (2009). Petitioner's argument has been that the parol evidence rule does not apply to this case because the instrument being considered is a confession of judgment and therefore its bar is simply inapplicable. Even if the rule somehow did apply to a confession of judgment, the

various exceptions would permit consideration of the Confidential Settlement Agreement. Since the parol evidence rule is inapplicable to confessions of judgment, the determination of whether the Confidential Settlement Agreement should have been considered by the lower courts under Rule 43(k) is therefore determinative of this matter. (*e.g.*, App. pp. 198-99).

Respondent states that the parol evidence rule is not a principle applicable to the construction of judgments. Return, p. 10. Petitioner agrees and has cited the case of Weinges v. Cash, 15 S.C. 44 (1881) in support. In that case, this Court explained that the concisely stated facts in a confession of judgment are not meant to be the only facts a third party reading the confession of judgment can accept about the debtor's debt. It is the obligation of the third party reading the confession of judgment to further investigate the circumstances behind the debt.

This Court expounded on that point by stating:

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

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

Respondent argues that the case of Weinges v. Cash is not applicable because it deals with the relationship between a third party creditor and the confession of judgment, whereas this case involves the two parties to the confession of judgment. App. pp. 18-19. The relevance of the confession of judgment to third parties is exactly the point in this case. A confession of judgment is a document designed to provide some specified amount of notice to a third party. It is not designed to be the exclusive document between the two parties in the creditor-debtor relationship. That is why the more detailed Confidential Settlement Agreement is relevant to this action.

D. Petitioner's arguments under Rule 43(k) and parole evidence rule were sufficiently raised in the courts below.

Respondent contends that Petitioner's Rule 43(k) and parole evidence rule arguments were not properly raised below and should not be considered by this Court under Rule 59(g), SCRCPP. Return, pp. 5, 21-24. Though Petitioner's trial counsel did not mail directly to the trial judge a copy of his Motion for Reconsideration at the same time he served Respondent's counsel and filed the same with the clerk of court, the issues of Rule 43(k) and the parole evidence rule should have been considered by the lower courts.

The Court of Appeals did not address the substance of the parole evidence rule arguments but instead ruled that they were not properly preserved below because Petitioner's Motion for Reconsideration did not comply with Rule 59(g), SCRCPP. App. p. 209. Petitioner subsequently filed his Petition for Rehearing which raised his objections to the Court of Appeals' determination that the Petitioner's Motion for Reconsideration was fatally deficient under Rule 59(g). App. p. 217-218. Petitioner previously had raised the parole evidence rule prior to the trial court's order (App. pp. 77-79), in his Motion for Reconsideration (App. pp. 88-93), in his opening brief in the Court of Appeals (App. pp. 139-148), and in his reply brief before the Court of Appeals (App. pp. 198-99). Since Petitioner raised in his Petition for Rehearing the only basis on which the Court of Appeals addressed the parole evidence rule – *i.e.*, under Rule 59(g), SCRCPP – the issue is preserved and is not the law of the case.

Prior to the August 26, 2013 hearing, no party raised the issue of Rule 43(k) in relation to the Confidential Settlement Agreement. Respondent filed his Rule 60(b) motion without mentioning Rule 43(k). App. p. 24. During the oral arguments before the trial court, neither party uttered a word about Rule 43(k) and most importantly, neither did the trial court. App. pp. 26-52. In the parties' memoranda submitted after the hearing, Rule 43(k) was never raised. App.

pp. 54-56 and 73-75. The first mention of the issue came in the trial court's order granting Respondent's motion. App. pp. 12-13. The first chance Petitioner had available to address the issue was in his Motion for Reconsideration which he promptly filed with the Court and served on Respondent's counsel. The trial court never addressed Petitioner's arguments regarding the retroactivity of Rule 43(k) in determining the validity of the Confidential Settlement Agreement in 2012. Petitioner submits that the trial court erred in refusing to entertain any arguments by Petitioner on the issue of Rule 43(k) by her denial of an issue of first impression before that Court under the mailing technicalities of Rule 59(g).

Respondent also cites to the unpublished Court of Appeals case of Price v. Investors Title Ins. Co., Op. No. 2011-UP-359 (June 30, 2011). The facts of that case however are inapplicable to this case. In Price, the mediated settlement agreement was revoked by the plaintiff in 2008 before the amendment of Rule 43(k) effective April 29, 2009. The defendant in that case then filed a motion for specific performance and to enforce the mediation agreement in December 2008, also before the 2009 amendment of Rule 43(k). In contrast in this case, the Respondent's repudiation of the settlement agreement occurred in 2012, more than three years after the amendment of Rule 43(k) to its present form in 2009. Moreover, the filing of the Confession of Judgment and the motion to set it aside were initiated in February and April of 2013. The action before the trial court in this case concerned events that occurred three years after the amendment of Rule 43(k) which provided for enforcement of settlement agreements signed by their parties and their counsel. The Price case is therefore of no guidance to this matter.

E. Petitioner has properly raised the retroactivity of Rule 43(k) before the lower courts.

Respondent claims that Petitioner has raised a new argument regarding the retroactivity of Rule 43(k) as a remedial rule in his Amended Petition and that it is not preserved. Return,

pp. 15-16. Petitioner however has repeatedly raised this issue before the trial court and Court of Appeals. Petitioner has pointed out that the amendment of Rule 43(k) is given retroactive effect since it addresses changes in remedies and procedures. Petitioner had repeatedly emphasized through underlined text in his briefs and in section headings that “Rule 43(k) is a rule of procedure affecting a remedy and is not a rule of substantive contract law and therefore should be applied retroactively.” App. pp. 216-217 (Motion for Rehearing); see also App. p. 86 (Motion for Reconsideration); App. p. 137 (Petitioner’s Initial Brief); App. p. 199 (Petitioner’s Reply Brief). The principle that a trial court should apply changes in procedural rules and remedies retroactively so that the trial court employs the rules in effect at the time of its ruling should have been followed in this case as well. See Allen v. South Carolina Public Employee Ben. Auth., 411 S.C. 611, 622, 769 S.E.2d 666, 672 (2015) (holding amendment related to court procedure is fully applicable to any further proceedings before lower court, including any remand by appellate court).

II. PETITIONER’S COUNSEL DID NOT CONCEDE THAT THE CONFESSION OF JUDGMENT WAS SATISFIED AT ORAL ARGUMENT.

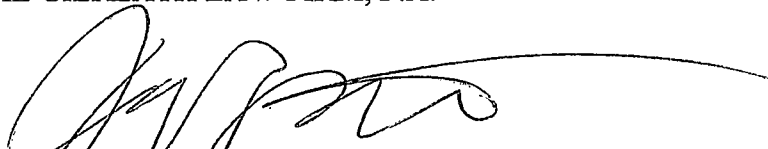
Respondent contends that Petitioner’s counsel conceded that the Confession of Judgment was satisfied by taking one sentence in oral argument out of context. Return, pp. 3 and 10. The full context of Petitioner’s trial court counsel shows that his statement that “the confession of judgment should be deemed satisfied” was talking about a hypothetical situation if there were no confidential settlement agreement between the parties. The very next sentence and the arguments that follow plainly speak to the point that the terms of the Confidential Settlement Agreement have to be considered and that “[t]his case was settled for \$400,000. And so [Respondent] still owes \$15,000.” App. p. 33, lns. 21-22.

CONCLUSION

After both parties for nine years adhered to the terms of the Confidential Settlement Agreement negotiated by a former chief justice of this Court, Respondent chose to repudiate it by failing to complete his final payment required thereunder and secured by the Confession of Judgment. For the reasons set forth above and the additional reasons stated in Petitioner's filings in the Court of Appeals, App. pp. 120-154, 188-201 and 211-219 incorporated herein by reference, this Court should grant Petitioner's Amended Petition for Writ of Certiorari to review the trial court's order vacating the Confession of Judgment.

Respectfully submitted,

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Attorneys for Petitioner Edwin M. Smith, Jr.

May 4, 2018
Greenville, South Carolina.

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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 **Reply to Return to 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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May 4, 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

RECEIVED
MAY 07 2018
SC Court of Appeals

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

Dear Mr. Shearouse:

Please find enclosed for filing the original and seven (7) copies of the Reply to Return to Petitioner's Amended Petition for a Writ of Certiorari regarding the above-captioned Supreme Court appellate case and two copies of the Proof of Service.

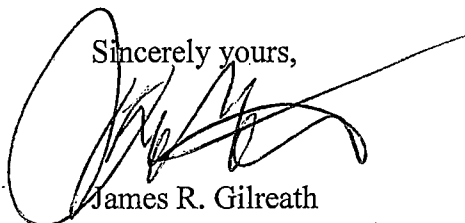
I am sending a copy of the Reply to Return to Petitioner's Amended Petition for a Writ of Certiorari and Proof of Service to the South Carolina Court of Appeals for filing. By copy of this letter to opposing counsel, I am serving her with the same.

Please return a file stamped copy of the Reply to Return to Petitioner's Amended Petition for a Writ of Certiorari 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, please call on my cell. My cell number is (864) 270-1102. If you cannot reach me by cell on Monday, please contact Bill Hogan on his cell at (864) 201-8382.

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)

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May 4, 2018

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

RECEIVED
MAY 07 2018
SC Court of Appeals

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

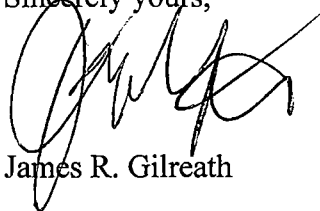
Dear Ms. Kitchings:

Enclosed please find two copies of the Appellant's Reply to Return to 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,

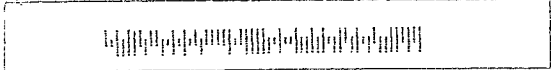


James R. Gilreath

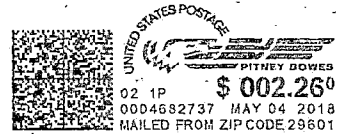
JRG/kmk

Enclosures

cc: Katherine Goode, Esquire (w/enclosures)



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MAY 07 2018
SC Court of Appeals

FIRST CLASS MAIL

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