THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Honorable Robin B. Stilwell, Circuit Court Judge



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Case No.: 2014-CP-23-05031

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Oldcastle APG South, Inc.,
d/b/a/ Adams Products Company,
and Oldcastle APG Northeast, Inc.,
d/b/a Foster-Southeastern, ..... Respondents,

v.

Daniel B. Albert, ..... Appellant.

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# INITIAL BRIEF OF RESPONDENTS

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## STATEMENT OF THE CASE

This case was initiated by Respondents Oldcastle APG South, Inc., d/b/a/ Adams Products Company and Oldcastle APG Northeast, Inc., d/b/a Foster-Southeastern (collectively "Oldcastle") by filing a Complaint in Greenville County Court of Common Pleas on September 11, 2014 asserting claims for breach of contract, unjust enrichment, breach of guarantee, and quantum meruit against Appellant Daniel B. Albert, individually and as owner of Madawaska Hardscape Products, Inc. Oldcastle asserted that it had extended approximately $127,212.13 in credit to Albert that he had failed to pay.[1] Attached to the Complaint were contracts between Albert and Oldcastle and personal guarantees of payment signed by Albert. (Summons & Complaint, filed Sept. 11, 2014, with attachments). Albert acknowledged that he and/or his company owed the money to Oldcastle. (Tr. p. 7, lines 24-25).

Albert filed an answer as well as a counterclaim against Oldcastle, seeking damages for lost profits and loss of goodwill. (Defendant's Answer, Affirmative Defenses and Counterclaim, dated Dec. 29, 2014). Oldcastle filed a timely reply to Albert's counterclaim. (Reply to Defendant's Counterclaim, filed Jan. 30, 2015).

Trial initially was set for May 23, 2016. Oldcastle proposed to Albert that the parties dismiss the case without prejudice pursuant to Rule 40(j), SCRCP, and sent him a proposed "Consent Order Striking Case from Docket per Rule 40(J)." (Exh. A to Plaintiff's Memorandum in Opposition to Defendant's Motion for Relief and Reinstatement to Trial Roster, filed June 14, 2017) ("Memorandum in Opposition").

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[1] Oldcastle is in the business of supplying hardscape and building materials to various retailers and subcontractors such as Madawaska. (Complaint).

After reviewing the proposed Consent Order, Albert suggested instead that the parties enter into a Confession of Judgment for $100,000 in order to end the litigation. In a May 16, 2016 email to Oldcastle's counsel, Albert stated, "[i]f [Oldcastle] can agree to this, we can be finished with this litigation immediately. If Oldcastle is willing to put the litigation behind us and resume a business relationship, I am confident that the mutual benefit derived from future business will dwarf any perceived loss that Oldcastle has coming out of this litigation. As you have made clear, there would be no commitment to doing business on the part of Oldcastle if we agree to a confession of judgment." (Exh. B to Memorandum in Opposition) (Tr. p. 6, lines 17-20).

As requested, Oldcastle prepared a Confession of Judgment in the amount of $100,000.00. The Confession of Judgment recited that Albert or one of his companies had obtained a judgment in federal district court[2] in the amount of $928,915.00.[3] Albert agreed that, "upon his or his company's receipt of funds that are paid either as a judgment or as a settlement of the Federal Court Case, [Albert] agrees to pay [Oldcastle] the amount of one Hundred Thousand and 00/100 ($100,000.00) Dollars within ten days of receipt of the payment of the judgment in the Federal Court Case." The agreement provided that Oldcastle would hold the Confession of Judgment, which would remain unrecorded unless Albert failed to pay the agreed amount ($100,000.00) within 10 days of receiving payment in the federal case. In a cover email, Oldcastle's counsel explained

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[2] The caption in the referenced federal court case listed the plaintiff as "Keystone Northeast, Inc., f/k/a Pavers Plus GSP, Inc., assignee of Madawaska Brick and Block Corp." (Exh. K to Memorandum in Opposition).

[3] At the time the parties entered into the Confession of Judgment, this award was on appeal to the Fourth Circuit Court of Appeals. (Exh. 4 to Defendant's Motion For Releif [sic] of Judgment and for Reinstatement to Trial Roster, filed May 15, 2017, 0022) ("Motion for Relief") (Exh. K to Memorandum in Opposition).

that, once Albert signed and had the Confession of Judgment notarized, she would "advise the court of the dismissal of the case." She also reminded Albert that, as they had "discussed at length last week, my client is not willing to agree to anything beyond this Confession of Judgment." Albert executed the Confession of Judgment on May 16, 2016. (Exhs. C & D to Memorandum in Opposition).

Two days after signing the Confession of Judgment, however, Albert sent Oldcastle's counsel an email suggesting that the parties should enter into a settlement agreement spelling out certain additional terms and conditions. He explained that, after he had emailed the executed Confession of Judgment, he had had additional questions and concerns regarding its terms. Albert spelled out, in four numbered paragraphs, his "intent in entering into this agreement," none of which involved an immediate end to the litigation. When Oldcastle's counsel objected to the additional terms proposed by Albert, Albert advised that, if the parties could not agree to his proposed settlement agreement, "we must appear in court next week and argue over whether we have a legally binding agreement or not and in all likelihood proceed with trial. I am attaching sixty-four pages of documents that I intend to use at trial." (Exh. E to Memorandum in Opposition) (Exh. 4 to Motion For Relief, DEF 0019 – DEF 0022). As a result, Oldcastle advised the Circuit Court that the matter had not settled as previously believed, and that it should be placed back on the docket. (Exh. F to Memorandum in Opposition). Albert separately emailed the Circuit Court indicating that he did not believe the matter had settled. (Exh. 9 to Motion for Relief, DEF 0036).

In an attempt to resolve the matter, Oldcastle agreed to enter into a Settlement Agreement signed by both parties. The Settlement Agreement recited the outstanding

debt personally guaranteed by Albert and provided that Albert agreed to pay $100,000.00 "when and only if he or one of his companies receives money from the Federal Court Case," and that Albert was "only obligated to pay the Settlement Amount [$100,000.00] solely from the money he receives from the Federal Court Case." The Settlement Agreement further provided that, if the Settlement Amount is paid, "the payment shall act as a release of all claims with prejudice," and that if "this Agreement is followed, it shall act as a full and final release of all Claims." The parties further agreed "to enter into a Stipulation of Dismissal which will dismiss all claims and counterclaims in the Litigation." (Exhs. G & H to Memorandum in Opposition).

On May 21, 2016, Albert wrote to Oldcastle's counsel, "I assume that you will collect the signatures and send the executed copies to me, and I execute and send mine to you, and that we will then inform the court that the case has been settled." (Exh. G to Memorandum in Opposition). On May 23, 2016, at 3:59 p.m., Albert agreed that the parties "have settled the matter, and that you may inform the court of that fact." (Exh. 7 to Motion for Relief, DEF 0050). Later on May 23, 2016, counsel for Oldcastle advised the Circuit Court that the matter had settled and that a stipulation of dismissal would be submitted "shortly." The case was removed from the trial roster but remained an active case. (Exh. I to Memorandum in Opposition).

On January 31, 2017, Albert or one of his companies was awarded a total of $361,559.00 (damages and interest) in his federal court case upon resolution of the appeal to the Fourth Circuit. (Exh. K to Memorandum in Opposition).

In February 2017, after the case was scheduled for a status conference, Oldcastle proposed the parties enter into a Consent Order striking the case pursuant to Rule 40(j),

SCRCP, explaining that it would reinstate the case only in the event the Confession of Judgment had to be entered. However, Albert disagreed and insisted that the case be dismissed with prejudice. Oldcastle agreed to raise the issue at the upcoming status conference and asked to be advised when Albert received payment of the federal court award. (Exh. J to Memorandum in Opposition).

In a letter dated March 9, 2017, Oldcastle demanded payment pursuant to the terms of the Confession of Judgment within 10 days of Albert's receipt of the proceeds from the federal court judgment or, if Albert had already received the proceeds, within 10 days of his receipt of the letter. Otherwise, Oldcastle advised that it would be forced to file the Confession of Judgment. (Exh. K to Memorandum in Opposition).

Albert responded, in a letter dated March 13, 2017, by questioning the validity of both the Confession of Judgment and the Settlement Agreement. Alert accused Oldcastle of, among other things, failing to file a Stipulation of Dismissal which he believed was Oldcastle's obligation to draft and submit. He acknowledged that, in a June 2, 2016 email, he had asked whether a stipulation of dismissal would be forthcoming but had received no response. Arguing that both the Confession of Judgment and the Settlement Agreement were now invalid, Albert proposed "a solution" that he believed "would be appropriate and reasonable if [the parties] agree that I will make a payment of $75,000 to completely satisfy all claims by [Oldcastle] against my companies and me personally. I think that a $25,000 haircut for what I refer to as shenanigans is appropriate and reasonable, especially when considering what I am offering to throw in as an added incentive for Oldcastle to give me the green light to resume doing business with them. If we resume doing business, I will make payments on my schedule and my terms as I'm

able for the balance of the $143,000 that I show that Madawaska Hardscape Products, Inc. owes [Oldcastle] on my books." Payment of the remaining $68,000 was to be "strictly voluntary and subject to [Albert's] ability to do so and based upon the volume of business that I do with Oldcastle in the future." Albert suggested the parties could "effectuate such an agreement by simply declaring the Confession of Judgment and Settlement Agreement null and void upon payment of $75,000 ..." Albert copied Oldcastle's Assistant General Counsel, Sarah T. Brooks, on his March 13, 2017 letter, questioning the nature of counsel's "presentations of the facts of our dealings to your client, and the potential damage to my prospects of resuming business with Oldcastle." (Exh. M to Memorandum in Opposition) (*see also* Exh. 7 to Motion for Relief, at DEF 0065). Albert continued to call and write to Ms. Brooks, proposing various new agreements, offering to pay either $75,000 or $100,000 with various conditions and stipulations, all of which were rejected. (Exh. 12 to Motion for Relief).

Oldcastle filed the Confession of Judgment on May 5, 2017. (Confession of Judgment, filed May 5, 2017). It was entered on May 8, 2017. (Docket in Case No.: 2014-CP-23-05031).

On May 15, 2017, Albert filed a Motion for Releif [sic] of Judgment and for Reinstatement to Trial Roster, pursuant to Rule 60, SCRCP. (Motion for Relief). In his Motion for Relief, Albert argued that, "[w]hether through negligence, breach of contract, fraud, misrepresentation or other misconduct of Plaintiff, Defendant has been denied the benefit of his bargain." As a result, Albert argued the Confession of Judgment was "null and void, and without any continuing effect." Oldcastle responded by filing Plaintiff's Memorandum in Opposition to Defendant's Motion for Relief and Reinstatement to Trial

Roster. (Memorandum in Opposition).

The parties were heard by the Honorable Robin B. Stilwell on June 15, 2017. At that hearing, Albert admitted that he had received proceeds from the Federal Court Case but had not paid any monies to Oldcastle. (Tr. p. 15, line 21 – p. 16, line 1). Albert acknowledged that, although he sought to have the judgment vacated, his hope was "that if we level the playing field and take the invalid Confession of Judgment out of their hands as a weapon, I believe, Your Honor, that we could settle this case without having to have it come to fruition." (Tr. p. 15, lines 11-20). Albert explained that the basis for his request that the judgment be overturned is that the Confession of Judgment was "part and parcel" of the Settlement Agreement, which he alleged Oldcastle had breached by not filing an immediate Stipulation of Dismissal. (Tr. p. 20, line 20 – p. 21, line 9; p. 24, lines 13-15; p. 30, lines 17-21). He also alleged "what amounts to, misrepresentation and fraud, and misconduct and not responding," against Oldcastle and its counsel. (Tr. p. 24, lines 9-12). However, he clarified that he was not asserting that any alleged failure to dismiss the pending case "was intentional." (Tr. p. 31, line 5). Albert agreed he could point to no language in the Settlement Agreement that placed responsibility for filing a stipulation of dismissal on Oldcastle, and acknowledged that he could "only point to outside the four corners where the evidence shows clearly that [Oldcastle's counsel] was taking that responsibility." (Tr. p. 33, line 15 – p. 34, line 15; p. 36, lines 1-9 (arguing evidence "outside the four corners" demonstrated the Settlement Agreement was ambiguous)).

After hearing argument from both Albert and Oldcastle, Judge Stilwell ruled from the bench that the Confession of Judgment "was clearly agreed to and signed and entered

into the public record," and that Albert's "arguments regarding the filing of a Stipulation of Dismissal are entirely pretextual and are calculated to effect an end different than the Settlement Agreement that was entered into between the parties." Judge Stilwell also explained that no evidence had been presented that suggested the Confession of Judgment should be overturned. (Tr. p. 39, line 18 – p. 40, line 9; p. 42, lines 1-3). In addition, Judge Stilwell found the terms of the Settlement Agreement to be clear and unambiguous. (Tr. p. 41, lines 12-25).

On July 10, 2017, the Circuit Court issued an Order Denying Defendant's Motion for Relief. In its Order, the Circuit Court held that the Settlement Agreement was clear and unambiguous and did not obligate Oldcastle to file a stipulation of dismissal. Albert failed to present sufficient evidence that Oldcastle had breached the Settlement Agreement, or that Oldcastle had engaged in negligence, fraud, misrepresentation or other misconduct that would relieve Albert from his obligations under the Settlement Agreement and Confession of Judgment. The Circuit Court found the Confession of Judgment to be valid, and struck the case from the docket. (Form 4 Judgment in a Civil Case, filed July 10, 2017) (Order Denying Defendant's Motion for Relief of Judgment and Reinstatement to Trial Roster, filed July 10, 2017).

Within 10 days, Albert moved for reconsideration, (Motion to Reconsider Ruling on Defendant's Motion for Releif [sic] of Judgment and for Reinstatement to Trial Roster, filed July 20, 2017) ("Motion to Reconsider"), which the Circuit Court denied on July 27, 2017. (Order Denying Defendant's Motion to Reconsider, filed July 27, 2017).

Appellant filed his notice of appeal on October 18, 2017, alleging he had not

received written notice of entry of the July27, 2017 Order until September 18, 2017.[4]

## ARGUMENTS

Although not always entirely clear, Albert appears to argue, alternatively, that he is entitled to relief from judgment pursuant to Rule 60, SCRCP, that there was fraud or misrepresentation or other misconduct in the negotiation of the Confession of Judgment and Settlement Agreement, and/or that Oldcastle is in breach of the Settlement Agreement because it did not immediately dismiss the pending litigation. Oldcastle addresses each of these arguments, none of which has any merit.

As a preliminary argument, however, Albert's Brief contains no table of contents or table of authorities as required by Rule 208, SCACR. In fact, Albert's Brief cites to no legal authority at all. "An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." Bryson v. Bryson, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008). Albert's failure to comply with the appellate rules of this Court and/or to cite any statute or case law in his Brief provide independent grounds to disregard his arguments, affirm the Circuit Court and dismiss this appeal.

[4] Albert's Statement of the Case includes contested matters in violation of Rule 208, SCACR. In particular, Albert asserts that the parties disagreed "about the failure of Respondent to file a stipulation of dismissal, and the materiality of that failure to file a stipulation of dismissal *as required by the Settlement Agreement* ..." (App. Br. p. 2) (emphasis added). Whether the Settlement Agreement required Oldcastle unilaterally to file a dismissal of the action before Albert satisfied the signed Confession of Judgment was one of the major issues decided against Albert by the Circuit Court. (July 10 Order). Albert's assertion regarding what the Settlement Agreement required should be stricken from his Statement of the Case.

## I. Albert failed to show he is entitled to relief from the Judgment entered against him.

A. Standard of Review.

"Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge." BB&T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 502 (2006); McClurg v. Deaton, 380 S.C. 563, 571, 671 S.E.2d 87, 91-92 (Ct. App. 2008) (trial court has discretion to determine whether relief from final judgment is warranted). On appeal, the reviewing court "is limited to determining whether there was an abuse of discretion," which occurs "where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." Stearns Bank N.A. v. Glenwood Falls, LP, 373 S.C. 331, 336, 644 S.E.2d 793, 795 (2007).

B. Albert is not entitled to relief from the Judgment entered against him due to alleged fraud, misrepresentation or other misconduct on the part of Oldcastle.

Albert alleged that he was entitled to relief under Rule 60, SCRCP, because, "[w]hether through negligence, breach of contract, fraud, misrepresentation or other misconduct of [Oldcastle], [Albert] has been denied the benefit of his bargain." (Motion for Relief, pp. 1, 4) (App. Br. pp. 7, 8). Rule 60(b)(3) provides discretionary relief for "fraud, misrepresentation, or other misconduct of an adverse party." Rule 60(b)(3), SCRCP. In order to prove he was entitled to relief from judgment under Rule 60(b)(3), however, Albert had to prove by clear and convincing evidence that a fraud had been committed upon the court. *See, e.g.*, Chewning v. Ford Motor Co., 354 S.C. 72, 86, 579 S.E.2d 605, 612 (2003); Shanklin v. Seals, 461 Fed. Appx. 313, 315 (4th Cir. 2012)[5]

[5] Rule 60 is "drawn from the Federal Rule." Rule 60, SCRCP, *notes*.

("the requisite showing for relief under Rule 60(b)(3)" is proof of misconduct "by clear and convincing evidence" which "demonstrate[s] that such misconduct prevented [appellant] from fully and fairly presenting his claims").

"In South Carolina, extrinsic fraud is the only type of fraud for which relief may be granted under Rule 60(b)(3), SCRCP." Gainey v. Gainey, 382 S.C. 414, 425, 675 S.E.2d 792, 798 (Ct. App. 2009). Extrinsic fraud is "collateral to the issues tried in a case and effectively deprives the litigant of a fair hearing or the opportunity to present its case." Jamison v. Ford Motor Co., 373 S.C. 248, 273, 644 S.E.2d 755, 768 (Ct. App. 2007). Relief is granted where extrinsic fraud has been proven by clear and convincing evidence because the litigant has been prevented from fully presenting his or her case and, as a result, "there has never been a real contest before the court on the subject matter of the action." Chewning, 354 S.C. at 81, 579 S.E.2d at 610.

"On the other hand, intrinsic fraud is fraud which was presented and considered at trial." Gainey, 382 S.C. at 426, 675 S.E.2d at 798. Intrinsic fraud is not a ground for relief under Rule 60(b)(3), as any intrinsic "deceptions should be discovered during the litigation itself, and to permit such relief would undermine the stability of all judgments." Raby Constr., LLP v. Orr, 358 S.C. 10, 20, 594 S.E.2d 478, 483 (2004). Furthermore, any alleged "lack of fairness is not a ground for relief under Rule 60(b), SCRCP." Gainey, 382 S.C. at 431, 675 S.E.2d at 801.

The only argument Albert makes on appeal with regard to fraud on the court is that Oldcastle's counsel "misled the court by saying that no attorney would file a stipulation of dismissal before payment was received," even though he asserts counsel had represented to him that that is what would happen. (Motion to Reconsider ¶ 5) (App.

Br. p. 3). Regardless of the merits of his argument, which Respondents deny, at best, Albert has alleged intrinsic fraud, which cannot serve as a ground for relief from judgment under Rule 60(b)(3). *Cf.* Rycroft v. Tanguay, 279 S.C. 76, 79, 302 S.E.2d 327, 329 (1983) (a "charge of perjury or false swearing on the part of a party or his witnesses is a species of intrinsic, not extrinsic, fraud, and affords no ground for equitable interference with a judgment").

Furthermore, even if any misrepresentation was made to the Circuit Court, which is denied, "a party may not prevail on a Rule 60(b)(3) motion on the basis of fraud where he ... has knowledge of inaccuracies in an opponent's representations at the time of the alleged misconduct." Raby Constr., 358 S.C. at 21, 594 S.E.2d at 484. Here, Albert was present when counsel's statement was made to the Court and had ample opportunity to respond. (Tr. p. 31, lines 13-21 (Albert arguing about alleged misrepresentations made to Judge Gravely and with regard to the Fourth Circuit appeal)) (Tr. p. 33, lines 21-25 (Albert arguing that the evidence shows Oldcastle "took responsibility for filing the stipulation of dismissal, that she would file it"); p. 34, lines 13-25 (same)).

This Court should hold that Albert has failed to prove any extrinsic fraud upon the court that would entitle him to relief under Rule 60(b)(3).

C. Albert is not entitled to relief from the Judgment entered against him due to alleged fraud or misrepresentation in the inducement.

In fact, the fraud of which Albert appears to complain is "fraud or misrepresentation in negotiating the settlement agreement." (App. Br. pp. 3-4, 6). This is not extrinsic fraud and, therefore, cannot serve as the basis for granting him relief from judgment pursuant to Rule 60(b)(3), SCRCP. Gainey, 382 S.C. at 425, 675 S.E.2d at 798 ("extrinsic fraud is the only type of fraud for which relief may be granted under Rule

60(b)(3), SCRCP").

Furthermore, in order to prove fraud or misrepresentation in the inducement, Albert must prove, "by clear and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon and (9) the hearer's consequent and proximate injury." Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). The failure to establish any one of these elements is fatal to Albert's claim. First Union Mortg. Corp. v. Thomas, 317 S.C. 63, 71, 451 S.E.2d 907, 912 (Ct. App. 1994). Here, Albert cannot prove a number of the required elements, including that Oldcastle made a representation to him that was false, let alone all of them.

Albert's allegation of fraud and misrepresentation centers around his assertion that Oldcastle induced him into signing the Confession of Judgment and/or the Settlement Agreement by promising it would dismiss the pending litigation immediately and with prejudice. In addition to the fact that the evidence does not prove any such thing, *see* Section II.C. below, such a promise relates to a future action and not to a preexisting fact. Ordinarily, in order to be actionable, the alleged false statement must "relate to a present or preexisting fact, and cannot be predicated on unfulfilled promises or statements as to future events." Turner, 392 S.C. at 123, 708 S.E.2d at 770; Emerson v. Powell, 283 S.C. 293, 296, 321 S.E.2d 629, 631 (Ct. App. 1984) ("[a]s a general rule ... the fraudulent representation must relate to a present or preexisting fact and it cannot ordinarily be based on unfulfilled promises or statements as to future events").[6]

[6] The exception to this general rule is where a party has made promises, never intending

Albert has presented no evidence that Oldcastle engaged in fraud or misrepresentation or misconduct in negotiating either the Confession of Judgment or the Settlement Agreement with him. As is discussed in more detail below, his entire argument hinges on his mistaken assertion that Oldcastle misrepresented to him that "upon entering into the Settlement Agreement, the litigation would be brought to an immediate, complete and final end." (App. Br. p. 6). Albert can point to no such language in either the Confession of Judgment or the Settlement Agreement, nor is any such promise contained in correspondence between Albert and Oldcastle's counsel, regardless of what Albert believed he was bargaining for.[7] Even if such a promise was made and broken, which Oldcastle denies, "a mere breach of contract," where one is proven, "does not constitute fraud." Dailey Co. v. American Inst. of Mktg. Sys., Inc., 256 S.C. 550, 553, 183 S.E.2d 444, 446 (1971).

South Carolina courts "consistently follow[] the rule that ordinarily one cannot complain of fraud in the misrepresentation of the contents of a written instrument signed by him when the truth could have been ascertained by reading the instrument, and that one entering into a written contract should read it and avail himself of every reasonable opportunity to understand its content and meaning." Evans v. State Farm Mut. Auto. Ins.

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to fulfill them. *See* Turner, 392 S.C. at 124, 708 S.E.2d at 770. Albert has not made any such allegation and cannot do so now. *See* Simmons v. SC Strong, 402 S.C. 166, 173 n.2, 739 S.E.2d 631, 634 n.2 (Ct. App. 2013) (argument not preserved for appellate review where it was raised for the first time in a reply brief). Furthermore, Albert stated that he was not saying that the fact that he did not get what he thought he had bargained for "was intentional" on Oldcastle's part. (Tr. p. 31, line 5).

[7] Albert asserts that he "testified" to various facts at the June 15, 2017 hearing. (App. Br. pp. 5, 6). However, he was not under oath or testifying as a fact witness but, instead, was appearing on his own behalf *pro se* to present legal argument. *E.g.*, Sessions v. Withers, 327 S.C. 409, 414, 488 S.E.2d 888, 891 (Ct. App. 1997) (argument and statements of counsel do not constitute evidence).

Co., 269 S.C. 584, 587, 239 S.E.2d 76, 77 (1977) (citation omitted); Parks v. Morris Homes Corp., 245 S.C. 461, 467, 141 S.E.2d 129, 132 (1965) (the duty of a party alleging fraud in the inducement "to exercise reasonable care to protect himself requires that he read the contract which he signs and, if he cannot read, that he get some one to read it for him"); Shumpert v. Service Life & Health Ins. Co., 220 S.C. 401, 412-413, 68 S.E.2d 340, 345 (1951) ("if a person is able to read and understand an instrument before signing it, he is bound, as a matter of ordinary care, to read the instrument" before signing). As was the case with the plaintiffs in Evans, Albert clearly is a "mature and intelligent" individual, 269 S.C. at 587, 239 S.E.2d at 77, fully capable of reading and understanding the agreements he signed. "[W]hen a person signs a document, he is responsible for exercising reasonable care to protect himself by reading the document and making sure of its contents." Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 332, 755 S.E.2d 437, 443 (2014).

This Court should hold that Albert failed to prove that he is entitled to relief from judgment under Rule 60, SCRCP based on any alleged fraud or misrepresentation in the inducement.

## II. Albert is not entitled to relief from the Judgment entered against him due to breach of contract.

Much of Albert's brief centers on his argument that Oldcastle breached a material term of the Settlement Agreement and, as a result, the Confession of Judgment is unenforceable. Even if Albert could prove Oldcastle breached the Settlement Agreement, which he cannot, such breach would not provide grounds for setting aside the Confession of Judgment, which is valid and enforceable independent of the Settlement Agreement.

Albert's breach of contract arguments revolve around two central concepts. First,

he argues that the Settlement Agreement is ambiguous and, therefore, parole evidence may be employed to show he did not get the benefit for which he bargained. As a subset of this argument, he argues that parole evidence should be allowed to prove that the Settlement Agreement is ambiguous. Second, Albert argues that Oldcastle assumed a unilateral and unqualified obligation to dismiss the case pending against him with prejudice merely upon his signing the Settlement Agreement, which it later breached. Oldcastle addresses these arguments in turn, neither of which has any merit.

A. Standard of Review.

"The interpretation of a contract is an action at law." Silver v. Aabstract Pools & Spas, Inc., 376 S.C. 585, 590, 658 S.E.2d 539, 542 (Ct. App. 2008). "In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them." Williams v. GEICO, 409 S.C. 586, 593, 762 S.E.2d 705, 709 (2014). "However, an appellate court may make its own determination on questions of law and need not defer to the trial court's rulings in this regard." Id.

B. The Settlement Agreement is not ambiguous on its face.

The provision in the Settlement Agreement that Albert argues is ambiguous is Paragraph 5, which provides that, "[t]he parties agree to enter into a Stipulation of Dismissal which will dismiss all claims and counterclaims in the Litigation." (Exh. H to Memorandum in Opposition) (Exh. 8 to Motion for Relief). The Circuit Court correctly found that neither that provision nor any other provision in the Settlement Agreement is ambiguous. (Order, pp. 4-5) (*see also* Tr. p. 39, line 11 – p. 40, line 9; p. 41, line 12 – p. 42, line 12). Furthermore, the Circuit Court properly found that both the Settlement

Agreement and the Confession of Judgment are valid.

It is axiomatic that the goal of contract interpretation is "to ascertain and give effect to the intention of the parties." Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007). Such intent "is to be determined first from the language. Language which is perfectly clear determines the full force and effect of the document. Extrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible." Gilstrap v. Culpepper, 283 S.C. 83, 85-86, 320 S.E.2d 445, 447 (1984). Furthermore, "[w]hether an ambiguity exists in an agreement must be ascertained from the language of the instrument." Nicholson v. Nicholson, 378 S.C. 523, 533, 663 S.E.2d 74, 79 (Ct. App. 2008). In other words, a party "cannot create ambiguity when it does not exist within the four corners:

> In construing and determining the effect of a written contract, the intention of the parties and the meaning are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument, and when such contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed."

Silver, 376 S.C. at 591, 658 S.E.2d at 542; *quoting* McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945). Indeed, "[p]arties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." Ecclesiastes Prod., 374 S.C. at 498, 649 S.E.2d at 502.

Albert argues nonsensically that the Settlement Agreement is ambiguous because it does not "state that it was *not* the responsibility of [Oldcastle] to file a Stipulation of

Dismissal." (App. Br. p. 4). First, Paragraph 5 states that "[t]he parties," in the plural, "agree to enter into a Stipulation of Dismissal ..." Other places in the Settlement Agreement refer to Albert and Oldcastle individually where an obligation is placed on one or the other, (*see* ¶¶ 1, 2 (Albert's obligations) and ¶ 3 (Oldcastle's obligations)), and jointly as "parties" where an obligation is placed on *both* Albert and Oldcastle (*see* ¶ 5 (the parties jointly agreeing to enter into a stipulation of dismissal); *see also* ¶ 4 (the parties agree that if the Agreement is followed, "it shall act as a full and final release of all Claims")). (Exh. H to Memorandum in Opposition) (Exh. 8 to Motion for Relief). Therefore, the only fair and logical reading of Paragraph 5 is that the obligation to enter into a Stipulation of Dismissal is placed on both parties, not just Oldcastle.

Where, as is the case here, "a contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and its language determines the instrument's force and effect." Ecclesiastes Prod., 374 S.C. at 499, 649 S.E.2d at 502. Just because the Settlement Agreement, an agreement that Albert reviewed and signed, does not contain a provision that he later wants or believes would be prudent to include, however, does not make it ambiguous. (*See* Tr. p. 39, line 11 – p. 40, line 9; p. 41, line 12 – p. 42, line 12). Wachovia Bank, 407 S.C. at 332, 755 S.E.2d at 443 ("when a person signs a document, he is responsible for exercising reasonable care to protect himself by reading the document and making sure of its contents").

As noted above, Albert has conceded that there is nothing in the Settlement Agreement that obligates Oldcastle unilaterally to file a Stipulation of Dismissal. Instead, he pointed to parole evidence in order to create such a "duty":

THE COURT: All of the stuff that you've given me is interesting and it gives me a lot of background into the back and forth between the parties, but

ultimately what you're asking me to do is to overturn a stipulation agreement and vacate a Confession of Judgment. So you're gonna have to tell me exactly where they failed to meet an obligation under the terms of the agreement.

MR. ALBERT: Your Honor, I can only point to outside the four corners where the evidence shows clearly that she was taking that responsibility.

(Tr. p. 34, lines 5-15) (App. Br. pp. 4, 5).[8]

In addition, Albert argued that the Court should look outside the four corners of the agreement in order to determine whether it is ambiguous or not. (Tr. p. 35, line 23 – p. 36, line 9). However, as noted above, whether any ambiguity exists is determined from the four corners of the Settlement Agreement. *See* Nicholson, 378 S.C. at 533, 663 S.E.2d at 79 ("[w]hether an ambiguity exists in an agreement must be ascertained from the language of the instrument"); Silver, 376 S.C. at 591, 658 S.E.2d at 542 (a party "cannot create ambiguity when it does not exist within the four corners"). Albert has conceded that the only way to determine that the Settlement Agreement is ambiguous is by looking at parole evidence. (Tr. p. 35, line 4 – p. 36, line 9 (Albert arguing that "[t]here's a lot of information there outside the four corners that shows some of the nature of the terms of the agreement that weren't represented in the four corners that you can look at and see where there's ambiguity in the four corners")). In other words, he essentially has agreed that the Settlement Agreement on its face is unambiguous.

At best, Albert mistakenly assumed the existence of certain provisions and/or

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[8] Albert also appears to argue that he should prevail because he "is a *pro se* litigant." (App. Br. p. 4). A *pro se* litigant "who knowingly elects to represent himself assumes full responsibility for complying with substantive and procedural requirements of the law." State v. Burton, 356 S.C. 259, 265 n.5, 589 S.E.2d 6, 9 n.5 (2003); Goodson v. American Bankers Ins. Co. of Fla., 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1998) (*pro se* litigants held to the same standard as attorneys).

obligations that were not included in the Confession of Judgment and/or Settlement Agreement, both of which he reviewed and signed. He is now bound to those terms. Ecclesiastes Prod., 374 S.C. at 500, 649 S.E.2d at 503 (a "court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully"). At worst, Albert is attempting to use the judicial process to renege on a Settlement Agreement and Confession of Judgment that he reviewed and knowingly signed in order to negotiate yet a "better deal" for himself.

This Court should hold that neither the Confession of Judgment nor the Settlement Agreement are ambiguous.

C. Oldcastle did not assume a unilateral and unqualified obligation to dismiss the case and, therefore, did not breach the Settlement Agreement.

Albert argues that Oldcastle breached the Settlement Agreement when it failed to file a Stipulation of Dismissal immediately upon his signing that agreement. However, as explained above, there is no ambiguity in the Confession of Judgment or Settlement Agreement, neither of which obligates Oldcastle to file an immediate Stipulation of Dismissal.

Even if this Court were to look outside the four corners of the Settlement Agreement, which Oldcastle maintains would be improper, Gilstrap, 283 S.C. at 85-86, 320 S.E.2d at 447 ("extrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible"), there is no evidence that Albert was ever promised an immediate dismissal with prejudice in return for signing either the Settlement Agreement or, for that matter, the Confession of Judgment. Although Oldcastle was prepared to remove the matter from the active docket in exchange for

Albert signing the Confession of Judgment, and had taken steps to do so, Albert's about-face and insistence on renegotiating the terms of the document he had just signed placed the parties in a very different posture.

Albert references a May 16, 2016 email from Oldcastle's counsel. (App. Br. pp. 3, 6). However, the correspondence makes it clear that Oldcastle is not promising anything more than is contained in the Confession of Judgment. Albert stated in a May 16, 2016 email to Oldcastle's counsel that, "[i]f [Oldcastle] can agree to [the Confession of Judgment], we can be finished with this litigation immediately. If Oldcastle is willing to put the litigation behind us and resume a business relationship, I am confident that the mutual benefit derived from future business will dwarf any perceived loss that Oldcastle has coming out of this litigation. As you have made clear, there would be no commitment to doing business on the part of Oldcastle if we agree to a confession of judgment." (Exh. B & D to Memorandum in Opposition) (Tr. p. 6, lines 17-20).

As requested, Oldcastle prepared a Confession of Judgment in the amount of $100,000.00. In a cover email, Oldcastle's counsel explained that, once Albert signed and had the Confession of Judgment notarized, she would "advise the court of the dismissal of the case." However, she also reminded Albert that, as they had "discussed at length last week, *my client is not willing to agree to anything beyond this Confession of Judgment.*" Albert executed the Confession of Judgment on May 16, 2016. (Exhs. C & D to Memorandum in Opposition) (emphasis added).

Oldcastle did not induce Albert into signing the Settlement Agreement by making promises; instead, two days after signing the Confession of Judgment, Albert demanded the parties enter into that agreement or else he was prepared to move forward with trial.

(Exhs. 4, DEF 0019-0021, & 9, DEF 0036, to Motion for Relief). Specifically, Albert began negotiating additional terms and threatening to move forward with trial, attaching 64 pages of documents he proposed to "use at trial" unless Oldcastle also agreed to enter into a Settlement Agreement. Albert spelled out, in four numbered paragraphs, his "intent in entering into this agreement," none of which involved an immediate end to the litigation.

In a later email, Albert listed six "statements" that he suggested "accurately reflect the intent of the contemplated agreement," including number six, that "[u]pon execution of a legally binding settlement agreement stipulating a confession of judgment on the above terms, the present litigation will be resolved, and Oldcastle will be relinquishing all claims against me personally and Madawaska Hardscape Products, Inc." Oldcastle responded that the six listed items were generally accurate except that Oldcastle would not "stipulate to any more narrow language than is provided in the Confession of Judgment; and (2) we disagree with your item #6. I will be glad to send you a settlement agreement that states that we are relinquishing all claims against you personally and Madawaska Hardscape Products, Inc. due to your signing of that Confession of Judgment." (Exh. E to Memorandum in Opposition) (Exhs. 4 DEF 0019 – DEF 0022, & 9 to Motion for Relief).

In fact, Paragraph 3 of the Settlement Agreement provides that if the Settlement Amount is paid, "the payment shall act as a release of all claims with prejudice," and that the parties "waive and forever relinquish any and all claims they may have against each other prior to the execution of this Agreement, regardless of their nature and extent." Paragraph 4 provides for a mutual release of claims but stipulates that the "[o]bligations

created by this Agreement, including the obligations set forth in the Confession of Judgment, are exempt from the coverage of this release." (Exh. 8 to Motion for Relief) (Exh. H to Memorandum in Opposition). Presumably, Albert read the Settlement Agreement prior to signing it. Wachovia Bank, 407 S.C. at 332, 755 S.E.2d at 443 ("when a person signs a document, he is responsible for exercising reasonable care to protect himself by reading the document and making sure of its contents"); Evans, 269 S.C. at 587, 239 S.E.2d at 77 ("one entering into a written contract should read it and avail himself of every reasonable opportunity to understand its content and meaning").

The fact that Oldcastle's counsel advised the court clerk that the parties had reached a Settlement Agreement and that a stipulation of dismissal would be filed "shortly" simply does not serve as a promise to Albert that anything would be filed on his behalf. In fact, that email was sent after Albert had agreed to and signed the Settlement Agreement, (Exh. G to Memorandum in Opposition (May 21, 2016 email from D. Albert to B. McMillan approving the Settlement Agreement and indicating he would "execute and send mine to you, and that we will then inform the court that the case has been settled")) (Exh. 7 to Motion for Relief, DEF 0050 (email from D. Albert to B. McMillan on May 23, 2016, at 3:59 p.m., agreeing that the parties "have settled the matter, and that you may inform the court of that fact")) (Exh. I to Memorandum in Opposition (email from B. McMillan to L. Coker on May 23, 2016 , at 4:30 p.m., advising that the parties had executed the settlement agreement and a stipulation of dismissal would be submitted "shortly")), so it is nonsensical to suggest that he relied on it in entering into the Settlement Agreement.

When Albert asked whether a stipulation of dismissal was forthcoming, he

received no answer. (Exh. 7 to Motion for Relief, DEF 0065). That he did not follow up or take any other step to protect his interests as he saw them is no one's fault but his own.

As the Court correctly found, the Settlement Agreement is unambiguous on its face and did not require Oldcastle to immediately dismiss the pending action. Even looking at the parole evidence, which Oldcastle does not concede would be proper, there simply is no unequivocal promise by Oldcastle to dismiss all pending claims immediately and with prejudice upon Albert's signing of the Settlement Agreement – an agreement he insisted the parties enter into. Because Oldcastle had no duty to dismiss the pending case, its failure to do so as Albert allegedly believed it would, does not constitute a breach.

Furthermore, as noted above, Albert's argument that the Confession of Judgment is dependent on the existence of the Settlement Agreement is baseless and legally incorrect. He signed the Confession of Judgment and had it notarized, which is all that was required in order to make it valid and effective. That Oldcastle agreed, at Albert's insistence, to enter into an additional Settlement Agreement in an attempt to resolve the dispute between the parties is not an admission that the Confession of Judgment required anything further and does not affect the enforceability of the agreed upon judgment signed by Albert and entered in this case. Indeed, "[p]arties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." Ecclesiastes Prod., 374 S.C. at 498, 649 S.E.2d at 502.

This Court should hold that the Settlement Agreement and Confession of Judgment are valid and Albert failed to present sufficient evidence to demonstrate that Oldcastle breached either agreement or engaged in fraud, misrepresentation or other

misconduct that would relieve Albert from his obligations under the agreements.

## CONCLUSION

For all of the reasons stated herein, this Court should affirm the Circuit Court's July 10, 2017 Order Denying Defendant's Motion for Relief of Judgment and Reinstatement to Trial Roster, the July 27, 2017 Order Denying Defendant's Motion to Reconsider, and dismiss this appeal with prejudice.

Respectfully submitted,

**McANGUS GOUDELOCK & COURIE LLC**

June 4, 2018

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*Attorneys for Respondents*

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Honorable Robin B. Stilwell, Circuit Court Judge

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Case No.: 2014-CP-23-05031

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Oldcastle APG South, Inc.,
d/b/a/ Adams Products Company,
and Oldcastle APG Northeast, Inc.,
d/b/a Foster-Southeastern, ..... Respondents,

v.

Daniel B. Albert, ..... Appellant.

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**PROOF OF SERVICE**

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I certify that on the 4th day of June 2018, I served the Respondents' **Initial Brief of Respondents** and **Designation of Matter** on *pro se* Appellant Daniel B. Albert by depositing a copy of it in the United States Mail, postage prepaid, addressed as follows:

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June 4, 2018

***Via U.S. Mail***
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

RE: Oldcastle APG South, Inc. d/b/a Adams Products Company and Oldcastle APG Northeast, Inc. d/b/a Foster-Southeastern v. Madawaska Hardscape Products, Inc. and Daniel B. Albert
Civil Action No.: 2014-CP-23-05031 (Greenville)
MGC File No.: 20799.14001
Appeal No.: 2017-002183

Dear Ms. Kitchings:

Enclosed for filing please find the following documents:

1. original and one copy of the Initial Brief of Respondents;
2. original and one copy of the Designation of Matter to be Included in the Record on Appeal; and
3. original and one copy of Respondents' Proof of Service concerning items one and two.

Please file these documents and return the clocked-in copies in the enclosed, self-addressed stamped envelope.

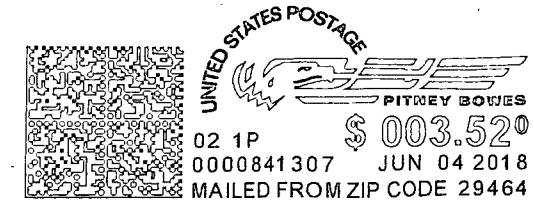
If you have any questions, please do not hesitate to contact me.

Yours truly,
McAngus Goudelock & Courie, LLC

Helen F. Hiser

Enclosures

cc: Daniel B. Albert, *pro se* (via U.S. Mail & Certified Mail)
Sarah T. Brooks, Oldcastle, Inc.

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