No. 75PA13 TWENTY-A DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

DOCRX, INC.	)	
	)	From Stanly County
v	)	No. 11CVS000911
	)	No. COA12-783
EMI SERVICES OF NC, LLC	)	

****

MOTION FOR TEMPORARY STAY
(Filed 5 June 2013)
(Allowed 6 June 2013)
and
PETITION FOR WRIT OF SUPERSEDEAS
(Filed 15 February 2013)
(Allowed 27 August 2013)
and
NOTICE OF APPEAL
(Constitutional Question)
(Filed 15 February 2013)
and
PETITION FOR DISCRETIONARY REVIEW
UNDER G.S. 7A-31
(Filed 15 February 2013)
(Allowed 27 August 2013)
and
MOTION TO DISMISS APPEAL
(Filed 25 February 2013)
(Allowed 27 August 2013)

****

No. 75P13

SUPREME COURT OF NORTH CAROLINA

****

DOCRX, INC.,	)	
	)	
Plaintiff	)	
	)	FROM THE NORTH CAROLINA
v.	)	COURT OF APPEALS
	)	COA No. 12-783
EMI SERVICES OF NORTH CAROLINA, LLC	)	
	)	
	)	
Defendant.	)	

****

DEFENDANT-APPELLANT'S MOTION FOR TEMPORARY STAY

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Defendant, EMI Services of North Carolina, LLC, respectfully petitions this Court to temporarily stay the proceedings in Superior Court of Stanly County (11-CVS-911). Defendant filed its Petition for Writ of Supersedeas on February 15, 2013, to stay enforcement or any further action of the ruling of the North Carolina Court of Appeals (opinion issued January 15, 2013, mandate issued February 4, 2013), pending review by this Court of said ruling which would remand this matter to the trial court for further proceedings, which could lead to entry and execution of the fraudulent foreign judgment obtained against Defendant.

Wherefore, petitioner respectfully prays that this Court temporarily stay this matter and issue its writ of supersedeas to the Superior Court of Stanly County and the North Carolina Court of Appeals staying enforcement or any further proceedings upon the Court of Appeals decree above specified, pending issuance of the mandate to this Court following its review and determination of the appeal now pending; and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted, this the 5th day of June, 2013.

Electronically submitted
Avery S. Chapman, FLSB No. 517321
(Admitted *Pro Hac Vice*)
Chapman Law Group, PLC
12008 South Shore Blvd., Suite 107
Wellington, Florida 33414
Telephone: (561) 753-5996
Facsimile: (561) 753-9966
Email: ascesq1@cs.com

N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Electronically submitted
Sam McGee, NCSB No. 25343
Tin, Fulton, Walker & Owen, PLLC
Charlotte, North Carolina 28203
Telephone: (704) 338-1220
Facsimile: (704) 338-1312
Email: smcgee@tinfulton.com

Attorneys for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Defendant-Appellant's Motion for Temporary Stay was served on the date below upon counsel for Plaintiff-Appellee by facsimile and U.S. Mail, first class, postage prepaid addressed as follows:

Perry C. Henson
Karen Strom Talley
Henson & Talley, LLP
P.O. Box 3525
Greensboro, NC 27402
Facsimile: 336-273-2585

This the 5th day of June, 2013.

Electronically submitted
Sam McGee

Supreme Court of North Carolina

CHRISTIE SPEIR CAMERON ROEDER, Clerk

Fax: (919) 831-5720
Web: http://www.nccourts.org

Justice Building, 2 E. Morgan Street
Raleigh, NC 27601
(919) 831-5700

Mailing Address:
P. O Box 2170
Raleigh, NC 27602

From N.C. Court of Appeals
(12-783)
From Stanly
(11CVS911)

6 June 2013

Mr. Sam McGee
Attorney at Law
TIN, FULTON, WALKER & OWEN
301 E. Park Avenue
Charlotte, NC 28203

RE: Docrx, Inc. v EMI Services Of NC, LLC - 75P13-1

Dear Mr. McGee:

The following order has been entered on the motion filed on the 5th of June 2013 by Defendant for Temporary Stay:

"Motion Allowed by order of the Court in conference, this the 6th of June 2013."

s/ Newby, J.
For the Court

Christie Speir Cameron Roeder
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
North Carolina Court of Appeals
Mr. Perry C. Henson, Jr., Attorney at Law - (By Email)
Mr. Sam McGee, Attorney at Law, For EMI Services Of NC, LLC - (By Email)
Mr. Gary W. Jackson, Attorney at Law - (By Email)
Mr. Avery S. Chapman, Attorney at Law, For EMI Services Of NC, LLC - (By Email)
Ms. Karen Strom Tailey, Attorney at Law, For Docrx, Inc. - (By Email)
West Publishing - (By Email)
Lexis-Nexis - (By Email)

No. 75P13

SUPREME COURT OF NORTH CAROLINA

****

DOCRX, INC.,	)	
	)	
Plaintiff	)	
	)	FROM THE NORTH CAROLINA
v.	)	COURT OF APPEALS
	)	COA No. 12-783
EMI SERVICES OF NORTH CAROLINA, LLC	)	
	)	
	)	
Defendant.	)	

****

DEFENDANT-APPELLANT'S PETITION
FOR WRIT OF SUPERSEDEAS

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Defendant, EMI Services of North Carolina, LLC, respectfully petitions this Court to issue its writ of supersedeas to stay enforcement or any further action of the ruling of the North Carolina Court of Appeals (opinion issued January 15, 2013, mandate issued February 4, 2013), pending review by this Court of said ruling which would remand this matter to the trial court for further proceedings, which could lead to entry and execution of the fraudulent foreign judgment obtained against Defendant; and in support of this petition shows the following:

FACTS

Plaintiff obtained a judgment against Defendant in Alabama in the amount of $453,683.14. Defendant has alleged, and the trial court found, that this judgment was obtained fraudulently, in that Plaintiff knowingly presented false damages information to the Alabama court. Therefore, on or about August 25, 2011, (R. p. 12), Defendant timely filed its Motion for Relief from Foreign Judgment and Notice of Defenses, later amended, whereupon Defendant sought relief from the Alabama judgment because of the fraud, misrepresentation and misconduct of Plaintiff in obtaining the Alabama judgment, to wit:

1. Plaintiffs' Alabama Complaint sought as damages "25% of the difference between what Actavis charged for the products and the price for which EMI sold the products." (¶ 11 of Alabama Complaint, R. p. 52).

2. Nowhere in that Alabama Complaint did Plaintiff set forth "the price for which EMI sold the products."

3. Nevertheless, and without any documentation whatsoever, Brian Ward, in his *Supporting Affidavit for Entry of Default of Brian Ward,* stated in ¶ 7 that "EMI sold those units, individually, for $500 per unit, for a total profit of $ 475 per unit." (R. p. 101).

4. Plaintiff's Alabama counsel then further compounded the fraud against the Alabama Court by adopting this statement

and falsely representing to the Alabama Court, in ¶ 8 of Plaintiff's *Motion to Enter Default Judgment Amount* that "Following its receipt of Oxycodone from Actavis, EMI sold these units for $ 500 per unit, for a total sale price of $ 1,752,00, with total net profits of $1,664,400. (R. p. 92).

5. Those statements made by Plaintiff's principal Brian Ward (in ¶ 7 of his Affidavit) and his counsel (in ¶ 8 of their Motion for Default Judgment) were false, misleading and intended to induce the Court to rely upon those statements in rendering a default judgment against Defendant EMI.

6. Plaintiff and its Alabama counsel knew that the $500.00 statements were false because on both June 18 and July 12, 2010, Ward sent emails to Defendant EMI wherein he acknowledged that the selling price per unit to pharmacies and wholesalers was $ 45.00 per unit (not $ 500.00 per unit as alleged in the Complaint). (R. pp. 147-148). Plaintiff likewise knew the $500.00 statement was false because on June 18, 2012, Ward acknowledged via email to Defendant that the selling price in certain circumstances was $ 67.00 per unit. (R. p. 147).

After Defendant's introduction of those emails and a lack of any rebuttal whatsoever by Plaintiff, the trial court determined that Plaintiff had committed fraud in obtaining the Alabama judgment, holding:

This Court, having determined that the affidavits and

> exhibits of the defendant **support defendant's contention that there was fraud, misrepresentation and misconduct of the plaintiff** in obtaining the underlying Alabama judgment, and there being **no apparent basis** for the statement in paragraph 7 of the supporting affidavit for entry of default of Brian Ward filed in the Alabama proceeding on March 30, 2011 that "EMI sold these units, individually for $ 500 per unit, for a total profit of $ 475 per unit," **the convincing evidence before this Court** being that the defendant sold these units for far lesser sums." [emphasis added].

(R. p. 188).

The trial court thus concluded that "in accordance with NC R. Civ. P. 60(b)(3) the intrinsic fraud, misrepresentation and misconduct of the plaintiff in obtaining the underlying Alabama judgment precludes enforcement of the Alabama judgment as a judgment of this State." (R. p. 189).

Plaintiff appealed, and the Court of Appeals vacated the trial court's ruling, holding that the defenses available under N.C. Gen. Stat. §1A-1, Rule 60(b) are limited as to enforcement of foreign judgments by the Full Faith and Credit Clause of the Constitution of the United States and that that clause limits the fraud to defense to the type of fraud sometimes labeled "extrinsic." DocRx, Inc. v. EMI Services of NC, LLC, 2013 N.C. App. LEXIS 52, *9 (2012).

This Petition is being filed in this Court pursuant to N.C. R. App. P. 23(b). Simultaneously herewith, Defendant is filing a Notice of Appeal. It is Defendant's position that it is entitled

to appeal as of right pursuant to N.C. Gen. Stat. § 7A-30(1) because this case "directly involves a substantial question arising under the Constitution of the United States or of this State." In addition, out of an abundance of caution, Defendant is also simultaneously filing a Petition for Discretionary Review. Simultaneous filing of both a Notice of Appeal and a Petition for Discretionary Review is specifically contemplated by Rule 15(b) of the North Carolina Rules of Appellate Procedure ("Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a)."). N.C.R. App. P. 15(b).

REASONS WHY WRIT SHOULD ISSUE

Defendant was found by the trial court to have a meritorious defense to the foreign judgment in question. In fact, the trial court found that Plaintiff committed fraud in obtaining the Alabama judgment. In essence, the Court of Appeals has ruled that this fraudulent judgment will stand because the fraud in question was "intrinsic" rather than "extrinsic." Although Rule 60(b) of the North Carolina Rules of Civil Procedure allows a judgment to be set aside based upon fraud "whether heretofore denominated intrinsic or extrinsic," N.C. Gen. Stat. § 1A-1, Rule 60(b), the Court of Appeals has now held

that these remedies are limited by the Full Faith and Credit Clause of the Constitution of the United States, and that only extrinsic fraud is therefore a defense to a foreign judgment. Should further proceedings be allowed to occur while this matter is being reviewed by this Court, this substantial fraudulent judgment may be accepted for enforcement against Defendant in North Carolina. Such a result would work substantial unnecessary prejudice to Defendant, since the very issue to be decided by this Court is whether the judgment should stand.

Moreover, the Court of Appeals made clear in its decision that the limitation of Rule 60 by the Full Faith and Credit Clause is an issue of first impression. Consider the following:

> "The appellate courts of our State have not yet addressed the nature of the relationship between the Full Faith and Credit Clause and N.C. Gen. Stat. § 1A-1, Rule 60(b)."

DocRx, Inc., 2013 N.C. App. LEXIS 52, at *3.

> "[W]hile the trial court's analysis is thorough and reasoned, the trial court did not have the benefit of the determination herein that the application of Rule 60(b) to a foreign judgment is limited by traditional interpretations of the Full Faith and Credit Clause."

Id at *11.

Defendant should not be made to defend against further proceedings in the trial court, and prejudiced by potential entry of the foreign judgment in North Carolina, where the enforceability of the judgment is an issue of first impression

for North Carolina Courts.

Finally, this issue is also a substantial constitutional question. As summarized by the Court of Appeals, the trial court

> determined that N.C. Gen. Stat. § 1C-1703(c) entitled Defendant to raise against enforcement of the Alabama judgment " 'the same defenses as a judgment of this State,' " and "then stated that relief under N.C. Gen. Stat. § 1A-1, Rule 60(b) was available if the trial court determined that "there was 'fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.'"

DocRx, Inc. v. EMI Services of NC, LLC, 2013 N.C. App. LEXIS 52, *3 (2012). The Court of Appeals went on to say that "indeed, such an interpretation is warranted from the plain language of the statute. There remain, however, constitutional implications that must be determined." DocRx, Inc., 2013 N.C. App. LEXIS 52, at *6. Ultimately, these constitutional considerations determined the outcome, as the Court of Appeals held that the defenses of Rule 60 are limited by the Full Faith and Credit Clause of the United States Constitution. Id at *9.

The fact that this is a constitutional issue of first impression underscores the need to have the issue resolved by this Court without further action occurring which would unnecessarily and prematurely prejudice and damage Defendant.

CONCLUSION

Wherefore, petitioner respectfully prays that this Court issue its writ of supersedeas to the Superior Court of Stanly County and the North Carolina Court of Appeals staying enforcement or any further proceedings upon the Court of Appeals decree above specified, pending issuance of the mandate to this Court following its review and determination of the appeal now pending; and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted, this the 15th day of February, 2013.

Electronically submitted
Avery S. Chapman, FLSB No. 517321
(Admitted *Pro Hac Vice*)
Chapman Law Group, PLC
12008 South Shore Blvd., Suite 107
Wellington, Florida 33414
Telephone: (561) 753-5996
Facsimile: (561) 753-9966
Email: ascesq1@cs.com

N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Electronically submitted
Sam McGee, NCSB No. 25343
Gary W. Jackson, NCSB No. 13976
Jackson & McGee, LLP
225 East Worthington Avenue
Suite 200
Charlotte, North Carolina 28203
Telephone: (704) 377-6680
Facsimile: (704) 377-6690
Email: gjackson@ncadvocates.com
smcgee@ncadvocates.com

Attorneys for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Defendant-Appellant's Petition for Writ of Supersedeas was served on the date below upon counsel for Plaintiff-Appellee by U.S. Mail, first class, postage prepaid addressed as follows:

Perry C. Henson
Karen Strom Talley
Henson & Talley, LLP
P.O. Box 3525
Greensboro, NC 27402

This the 15th day of February, 2013.

Electronically submitted
Sam McGee

VERIFICATION

NOW COMES the undersigned, being first duly sworn, deposes and says that I have read the foregoing Petition for Writ of Supersedeas, and that the same is true and of my own personal knowledge, except for those matters and things therein stated to be alleged upon information and belief, and as to those matters and things, I believe them to be true.

This 15th day of February, 2013.

Sam McGee

STATE OF NORTH CAROLINA

COUNTY OF Mecklenburg

SWORN TO and subscribed before me this 15th day of February, 2013.

Notary Public

Kristy B. Lawton
Printed Name

My Commission Expires:

July 7, 2014

KRISTY B LAWTON
NOTARY PUBLIC
MECKLENBURG COUNTY, NC
My Commission Expires 7-7-2014

No. 75P13

SUPREME COURT OF NORTH CAROLINA

****

DOCRX, INC.,	)	
	)	
Plaintiff	)	
	)	FROM THE NORTH CAROLINA
v.	)	COURT OF APPEALS
	)	COA No. 12-783
EMI SERVICES OF NORTH CAROLINA, LLC	)	
	)	
	)	
Defendant.	)	

****

NOTICE OF APPEAL

****

Defendant hereby gives notice of appeal from the decision of the Court of Appeals in this matter filed January 15, 2013. This is a direct appeal as of right pursuant to N.C. Gen. Stat. § 7A-30(1) because this case "directly involves a substantial question arising under the Constitution of the United States or of this State." Specifically, the constitutional issue in question is whether the defenses provided by N.C. Gen. Stat. § 1A-1, Rule 60(b)are constrained and/or limited by the Full Faith and Credit Clause of the Constitution of the United States (Article IV, Section 1). The Court of Appeals has held that said defenses are so constrained, that only extrinsic fraud and not intrinsic fraud may be used to attack a foreign judgment, and that the trial court's use of Rule 60(b) to set aside the

foreign judgment for intrinsic fraud is therefore vacated. Defendant contends that the Court of Appeals erred in this constitutional determination, therefore potentially subjecting Defendant to the fraudulent judgment. The constitutional issue previously was raised in both the trial court (See, e.g. T. p. 8, 1.6-25 and T. p. 45, 1.2-46, 1.22), and the Court of Appeals.

In the event the Court finds this constitutional question to be substantial, petitioner intends to present the following issues in its brief for review:

1. Whether the remedies available under N.C. Gen. Stat. § 1A-1, Rule 60(b) are limited by the Full Faith and Credit Clause of the Constitution of the United States when a foreign judgment is at issue?
2. Whether all types of fraud are a valid defense to enforcement of a foreign judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) whether denominated intrinsic or extrinsic fraud?
3. Whether the Court of Appeals erred by vacating the trial court's denial of Plaintiff's Motion to Enforce Foreign Judgment?
4. Whether the trial court should have been affirmed even if intrinsic fraud is not a defense to enforcement of a foreign judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)?

In the event the Court does not find this constitutional issue to be substantial, Defendant requests that the Court grant its Petition for Discretionary Review, filed in the alternative simultaneously herewith.

This the 15th day of February, 2013.

Electronically submitted
Avery S. Chapman
Florida Bar No. 517321
(Admitted *Pro Hac Vice*)
Chapman Law Group, PLC
12008 South Shore Boulevard
Suite 107
Wellington, Florida 33414
Telephone: (561) 753-5996
Facsimile: (561) 753-9966
Email: ascesq1@cs.com

N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Electronically submitted
Sam McGee, NCSB No. 25343
Gary W. Jackson, NCSB No. 13976
Jackson & McGee, LLP
225 East Worthington Avenue
Suite 200
Charlotte, North Carolina 28203
Telephone: (704) 377-6680
Facsimile: (704) 377-6690
Email: gjackson@ncadvocates.com
smcgee@ncadvocates.com

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Defendant's Notice of Appeal was served on the date below upon counsel for Plaintiff by U.S. Mail, first class, postage prepaid addressed as follows:

Perry C. Henson
Karen Strom Talley
Henson & Talley, LLP
P.O. Box 3525
Greensboro, NC 27402

This the 15th day of February, 2013.

Electronically submitted
Sam McGee

No. 75P13 20A JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

DOCRX, INC.,	)	
	)	
Plaintiff	)	
	)	
v.	)	From Stanly County
	)	(No. 11 CvS 911)
EMI SERVICES OF NORTH CAROLINA, LLC	)	
	)	
	)	
Defendant.	)	

****

PLAINTIFF'S MOTION TO DISMISS APPEAL

****

INDEX

TABLE OF CASES AND AUTHORITIES

CASES:

CONSTITUTIONAL PROVISIONS:

STATUTES:

No. 75P13 20A JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

DocRx, Inc.,	)	
	)	
Plaintiff	)	
	)	
	)	
v.	)	From Stanly County
	)	(No. 11 CvS 911)
EMI Services of North Carolina, LLC,	)	
	)	
	)	
Defendant,	)	

PLAINTIFF'S MOTION TO DISMISS APPEAL

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

COMES NOW the Plaintiff DocRx, Inc. by and through its attorneys and pursuant to Rule 37 of the North Carolina Rules of Appellate Procedure, and hereby moves to dismiss the appeal of Defendant EMI Services of North Carolina, LLC, on the grounds that the constitutional question presented has already been the subject of conclusive judicial determination, and Defendant does not have an appeal of right under N.C. Gen. Stat. §7A-30. In support thereof, the Petitioner-Appellee shows unto the Court as follows:

STATEMENT OF THE FACTS

Plaintiff filed suit in Alabama against the Defendant for

breach of a pharmaceutical contract. The Plaintiff acted as an intermediary in the formation of a business relationship between the Defendant and another company. By signing the contract the Defendant agreed to make payments to the Plaintiff based on the profits made from this new business relationship. The Defendant failed to make payment to Plaintiff under the contract, which breach of contract precipitated the Alabama breach of contract action the Plaintiff filed on 6 August 2010. (R pp 164-181).

The Defendant failed to respond to the complaint and an entry of default was entered on 24 September 2010. (R p 110). On 1 April 2011, a default judgment in the amount of $453,683.14 was entered against the Defendant in the Circuit Court of Mobile County, Alabama. (R pp 10-11).

Pursuant to the provisions of North Carolina's Uniform Enforcement of Foreign Judgments Act, the Plaintiff sought to have this Alabama judgment entered as a judgment of the State of North Carolina. (R pp 25-118). The Defendant alleged that false testimony regarding the amount of damages was used in determining the amount of the default judgment. Since it was improper for the trial court in North Carolina to consider evidence of this alleged intrinsic fraud, counsel for Plaintiff objected to the trial court considering evidence of intrinsic fraud, and told the trial court he would not present contradictory evidence for fear of opening the door to the trial judge considering such evidence.

(T. pp 29). The trial judge did, however, consider over Plaintiff's objections the affidavits Defendant claims supports a finding of intrinsic fraud in the Alabama action, and denied the Plaintiff's Motion to Enforce the Alabama judgment on the grounds of that alleged intrinsic fraud. (R pp 187-188).

The Plaintiff appealed to the North Carolina Court of Appeals on the grounds that the North Carolina Court of Appeals, North Carolina Supreme Court, and United States Supreme Court have all held repeatedly that the use of intrinsic fraud to refuse to enforce a foreign judgment violates the Full Faith and Credit Clause of the United States Constitution. The Court of Appeals rightfully agreed, reversing the trial court. There was no dissent. Defendant claims the issue of whether Rule 60(b) of the North Carolina Rules of Civil Procedure would allow the Defendant to use intrinsic fraud as a defense to the enforcement of a foreign judgment despite provisions of the Full Faith and Credit Clause of the United States Constitution is a substantial constitutional question allowing an appeal of right from the decision of the North Carolina Court of Appeals.

ARGUMENT

Appeals of right from the Court of Appeals are governed by N.C. Gen. Stat. §7A-30. That statute lists only two grounds for an appeal of right: (1) when the decision directly involves a substantial question arising under the Constitution of the United

States or North Carolina, or (2) when the decision contains a dissent. N.C. Gen. Stat. §7A. The constitutional question must be real and substantial, and it must not have already been the subject of "conclusive judicial determination" or dismissal of the appeal is proper. Thompson v. Thompson, 288 N.C. 120, 215 S.E.2d 606 (1975). The federal purpose of the Full Faith and Credit Clause makes the United States Supreme Court "for both state and federal courts, the 'final arbiter when the question is raised as to what is a permissible limitation on the Full Faith and Credit Clause.'" Johnson v. Muelberger, 340 U.S. 581, 585, 71 S.Ct. 474, 476-77 (1951)(quoting Williams v. North Carolina, 317 U.S. 287, 302, 63 S.Ct. 207, 215 (1942)); see also Milwaukee County v. M.E. White Co., 296 U.S. 268, 273-74, 56 S.Ct. 229, 232 (1935). Therefore if the United States Supreme Court has already determined whether a state's rules can limit the application of the Full Faith and Credit Clause, then the Defendant's appeal should be dismissed.

The Defendant alleges Plaintiff presented perjured testimony regarding its damages amount to the Alabama Court, and that it is upon that allegedly incorrect damages amount that the judgment was entered. By 1878, it was "well settled" that "perjured evidence" or "any matter which was actually presented and considered in the judgment assailed" is intrinsic fraud. U.S. v. Throckmorton, 98 U.S. 61, 66, 25 L.Ed 93 (1878). The

constitutional issue presented in the case at bar is whether it is a violation of the Full Faith and Credit Clause of the United States Constitution to refuse to enforce a foreign judgment on the basis of intrinsic fraud. The North Carolina Supreme Court has already held that the Full Faith and Credit Clause of the United States Constitution requires that only extrinsic fraud, not intrinsic fraud can be used to defeat a foreign judgment. Crescent Hat Co., Inc. v. Chizik, 223 N.C. 371, 26 S.E.2d 871 (1943). Extrinsic fraud is also known as "fraud in the procurement" or a judgment "obtained by fraud." Florida Nat'l Bank v. Satterfield, 90 N.C.App. 105, 367 S.E.2d 358 (1988). Extrinsic fraud is something that has deprived the defendant of the ability to participate in the original litigation of the case, such as where the plaintiff fraudulently kept all knowledge of the suit away from the defendant. Throckmorton, 98 U.S. 61. Extrinsic fraud is called fraud in the procurement because it is fraud in procuring the judgment which keeps the opposing party from the opportunity of litigating his case. McCoy v. Justice, 199 N.C. 602, 155 S.E. 452 (1930). Intrinsic fraud, on the other hand, is something that was anterior to the entry of the initial judgment, and relates to the merits of the subject matter which was before the foreign court. Crescent Hat Co., 233 N.C. 371, 26 S.E.2d 871. Perjury is intrinsic fraud. McCoy, 199 N.C. 602, 155 S.E. 452.

As stated previously, although the North Carolina Supreme Court has already held that intrinsic fraud cannot be used to defeat the constitutional requirement that a North Carolina Court grant full faith and credit to a foreign judgment, the United States Supreme Court is the final arbiter on this issue. The United States Supreme Court has also held that the Full Faith and Credit Clause requires that a cause of action to enforce a money judgment from a foreign state can only be resisted on the grounds that the rendering court lacked jurisdiction, that the judgment has already been paid, that it was a cause of action for which the foreign state did not provide a court, or because the judgment was obtained through extrinsic fraud. Milwaukee County, 296 U.S. 268, 275-276, 56 S.Ct. 229, 233.

The Defendant contends that the Full Faith and Credit Clause of the United States Constitution cannot limit Rule 60(b) of the North Carolina Rules of Civil Procedure, which rule allows a movant to attack a judgment on grounds of intrinsic fraud. The Supremacy Clause of the United States Constitution, however, reads:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all the Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl.2. In the United States Supreme Court

case of Morris v. Jones, 329 U.S. 545, 67 S.Ct. 451 (1946), rehearing denied, 330 U.S. 854, 67 S.Ct. 858 (1947), the petitioner obtained a judgment in a Missouri court against an insolvent insurance company, and then filed an exemplified copy of his judgment in an Illinois proceeding where respondent was appointed as statutory liquidator for the insurance company against which the petitioner obtained the judgment. The Illinois Supreme Court sustained an order disallowing the claim, and the petitioner petitioned the United States Supreme Court for certiori, which was granted. The respondent contended that since the state had control over how to pay out claims against an insolvent insurance company, that the Illinois Court did not have to give full faith and credit to the Missouri judgment. The United States Supreme Court disagreed and reversed, holding that the Missouri judgment was entitled to Full Faith and Credit in the Illinois court, and that the nature and amount of the petitioner's claim could not be challenged or retried in the Illinois proceeding. The Court explained in regard to the respondent's position that the state's ability to adjudicate claims against insolvent insurance companies should override the Full Faith and Credit Clause of the Constitution was:

> [t]o argue that by reason of its police power, a State may determine the method and manner of proving claims against property which is in its jurisdiction and which is being administered by its Courts or administrative agencies. We have no doubt that it may do so except as such procedure

> collides with the Federal Constitution or an Act of Congress. But where there is such a collision, the action of a State under its police power must give away by virtue of the Supremacy Clause. Article IV, Clause 2. There is such a collision here. When we look to the general statute which Congress has enacted pursuant to the Full Faith and Credit Clause, we find no exception in case of liquidations of insolvent insurance companies. The command is to give full faith and credit to every judgment of a sister State. And where there is no jurisdictional infirmity, exceptions have rarely, if ever, been read into the constitutional provision or the Act of Congress in cases involving money judgments rendered in civil suits.

Morris, 329 U.S. 545, 553, 67 S.Ct. 451, 457. Thus, the United States Supreme Court has already held that although, in general, a state may determine the method and manner of proving claims against property in its jurisdiction, that power must "give way" to the Constitution. The argument the Defendant is making in the case at bar is identical to the one made by the respondent in Morris: namely, that the State of North Carolina through its Rules of Civil Procedure can curtail the Full Faith and Credit Clause of the United States Constitution. The final arbiter of that question, the United States Supreme Court, has already said that the constitutional provision must take precedence, and so the Defendant's appeal should be dismissed pursuant to N.C. Gen. Stat. § 7A-29.

WHEREFORE, having moved to dismiss this appeal pursuant to Rule 37 of the North Carolina Rules of Appellate Procedure on the grounds that it is now moot, the Petitioner-Appellee prays for

the following relief:

1. That this appeal be dismissed.

2. That the Court grant unto the Plaintiff such other and further relief as to the Court may seem just and proper.

Respectfully submitted this the 25th day of February, 2013.

HENSON & TALLEY, LLP

Electronically submitted
Karen Strom Talley
N.C. Bar No. 28820
Telephone: (336) 275-0587
ktalley@hensonlawyers.com
Post Office Box 3525
Greensboro, N.C. 27402

N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Electronically submitted
Perry C. Henson, Jr.
N.C. Bar No. 7787
Telephone: (336) 275-0587
phenson@hensonlawyers.com
Post Office Box 3525
Greensboro, N.C. 27402

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a copy of the foregoing motion on counsel for the Defendant by depositing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

Sam McGee
Gary Jackson
Jackson & McGee, LLP
225 E. Worthington Ave, Suite 200
Charlotte, North Carolina 28203
Telephone: (704)377-6680
Facsimile: (704)377-6690
Email: smcgee@ncadvocates.com
Email: gjackson@ncadvocates.com

Avery S. Chapman
Chapman Law Group, PLC
The Chancellor Building
12008 South Shore Boulevard, Suite 107
Wellington, Florida 33414
Telephone: (561)753-5996
Facsimile: (561)753-9966
Email: ascesq1@cs.com

This the 25th day of February, 2013.

Electronically Submitted
Karen Strom Talley
Attorney for Plaintiff

No. 75P13 20A JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

DOCRX, INC.,	)	
	)	
Plaintiff	)	
	)	FROM THE NORTH CAROLINA
v.	)	COURT OF APPEALS
	)	COA No. 12-783
EMI SERVICES OF NORTH CAROLINA, LLC	)	
	)	
	)	
Defendant.	)	

****

DEFENDANT-APPELLANT'S RESPONSE TO PLAINTIFF'S MOTION TO DISMISS APPEAL

****

INDEX

TABLE OF CASES AND AUTHORITIES

Cases:

Statutes and Rules:

Other:

No. 75P13 20A JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

DOCRX, INC., Plaintiff	)	
v.	)	FROM THE NORTH CAROLINA COURT OF APPEALS COA No. 12-783
EMI SERVICES OF NORTH CAROLINA, LLC Defendant.	)	

****

DEFENDANT-APPELLANT'S RESPONSE TO PLAINTIFF'S MOTION TO DISMISS APPEAL

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COMES the Defendant, pursuant to Rule 37 of the North Carolina Rules of Appellate Procedure, and responds to Plaintiff's Motion to Dismiss Appeal as follows.

ARGUMENT

A. This Case Presents a Constitutional Issue of First Impression

Defendant is entitled to appeal as of right pursuant to N.C. Gen. Stat. § 7A-30(1) because this case "directly involves a substantial question arising under the Constitution of the United States or of this State." As set forth in the Notice of Appeal, the constitutional issue is whether the defenses

provided by N.C. Gen. Stat. § 1A-1, Rule 60(b)are constrained and/or limited by the Full Faith and Credit Clause of the Constitution of the United States (Article IV, Section 1). It is clear from the opinion of the Court of Appeals that its decision was upon constitutional grounds. As summarized by the Court of Appeals, the trial court

> determined that N.C. Gen. Stat. § 1C-1703(c) entitled Defendant to raise against enforcement of the Alabama judgment " 'the same defenses as a judgment of this State,' " and "then stated that relief under N.C. Gen. Stat. § 1A-1, Rule 60(b) was available if the trial court determined that "there was 'fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.'"

DocRx, Inc. v. EMI Services of NC, LLC, 2013 N.C. App. LEXIS 52, *3 (2012). The Court of Appeals went on to say that "indeed, such an interpretation is warranted from the plain language of the statute. There remain, however, constitutional implications that must be determined." DocRx, Inc., 2013 N.C. App. LEXIS 52, at *6. Ultimately, these constitutional considerations determined the outcome, as the Court of Appeals held that the defenses of Rule 60 are limited by the Full Faith and Credit Clause of the United States Constitution, limiting the trial court to consider only extrinsic fraud, not intrinsic fraud. Id at 9.

Plaintiff contends that the appeal should be dismissed

because there has been conclusive judicial determination of this issue. The Court of Appeals disagrees, and made clear in its decision that the limitation of Rule 60 by the Full Faith and Credit Clause is an issue of first impression. Consider the following:

> "The appellate courts of our State have not yet addressed the nature of the relationship between the Full Faith and Credit Clause and N.C. Gen. Stat. § 1A-1, Rule 60(b)."

DocRx, Inc., 2013 N.C. App. LEXIS 52, at *3.

> "[W]hile the trial court's analysis is thorough and reasoned, the trial court did not have the benefit of the determination herein that the application of Rule 60(b) to a foreign judgment is limited by traditional interpretations of the Full Faith and Credit Clause."

Id at 11.

Although Defendant takes issue with the ultimate decision of the Court of Appeals, Defendant agrees with the Court of Appeals that this is a constitutional issue of first impression. If that is correct, there has been no conclusive judicial determination of this issue.

B. The Cases Cited By Plaintiff Have Not Determined the Issue

Plaintiff cites three cases that supposedly have decided this issue. They are Crescent Hat Co., Inc. v. Chizik, 223 N.C. 371, 26 S.E.2d 871 (1943), Milwaukee County v. M.E. White Co.,

296 U.S. 268, 56 S. Ct. 229 (1935), and Morris v. Jones, 329 U.S. 545, 67 S. Ct. 451 (1946) rehearing denied, 330 U.S. 854, 67 S. Ct. 858 (1947).

There are two fundamental problems with Plaintiff's argument: (1) It is not possible for these cases to have determined the effect of the Full Faith and Credit Clause on N.C. Gen. Stat. §1A-1, Rule 60(b) because they all pre-date Rule 60(b); and (2) None of the cases cited have conclusively decided the issue in any event.

The key question is whether a judgment may be attacked based upon intrinsic fraud. Rule 60(b) specifically contemplates this, stating that fraud is a ground to set aside judgment "whether heretofore denominated intrinsic or extrinsic." Id. This question is not and cannot be answered by the cases relied upon by Plaintiff.

1. The Cases on Which Plaintiff Relies Pre-Date Rule 60

The North Carolina Rules of Civil Procedure became effective on January 1, 1970. Session Laws 1967, ch. 954 and Session Laws 1969, ch. 803. Plaintiffs cite no case after 1946. It is simply impossible, therefore, that any of these cases decided the effect of the Full Faith and Credit Clause on a rule that did not yet exist. Similarly, the federal Rule 60 was

amended December 27, 1946 to allow fraud as a ground for attacking judgments, and was not effective until March 19, 1948. Fed. R. Civ. P. 60. Like the North Carolina Rule, the federal rule includes the specific statement that fraud may be considered "whether heretofore denominated intrinsic or extrinsic." Id. Again, it is impossible for the cases cited by Plaintiff to address this language, because they all pre-date the effective date of the Rule. Thus, the effect of the Full Faith and Credit Clause on this language has not been conclusively determined.

2. The Cases on Which Plaintiff Relies Are Inapposite

Even barring this fatal flaw in Plaintiff's argument, the cases Plaintiff cites simply do not stand for the proposition that the Full Faith and Credit Clause necessarily limits attacks on fraud to extrinsic fraud only.

The question in Milwaukee County v. M.E. White Co., 296 U.S. 268, 56 S. Ct. 229 (1935) was whether a judgment obtained in one state for failure to pay taxes, could be enforced in another state. Defendant's argument was that there was an exception to full faith and credit for taxes. The instant case, of course, has nothing to do with any such exception. Plaintiff has cited this case as holding that "a money judgment from a

foreign state can only be resisted … because the judgment was obtained through extrinsic fraud." Motion to Dismiss, at. p. 6.[1] (emphasis added). The words "extrinsic" and "intrinsic" appear nowhere in the opinion. The concepts of extrinsic and intrinsic fraud are not discussed in the opinion by other names. In fact, the word "fraud" appears only once in the opinion. The Court lists various grounds for attacking a foreign judgment and includes amongst them "possibly because procured by fraud." Milwaukee County, 296 U.S. at 276, 56 S. Ct. at 233. The case does not remotely stand for the proposition for which it is cited, and is actually about something else entirely; namely, whether there is an exception to full faith and credit for taxes. A decision on that issue cannot reasonably be said to be a conclusive judicial determination of the issue in this case.

Similarly, Morris v. Jones, 329 U.S. 545, 67 S. Ct. 451 (1946), involved a question of a potential exception to full faith and credit wholly unrelated to this case. In Morris, it was whether there was an exception for liquidations of insolvent insurance companies. Morris is not a case about fraud. The word "fraud" appears only once, when the Court observes that a

---

1 "Extrinsic fraud" was listed by plaintiff as one of a laundry list of defenses to foreign judgment allegedly stated by the Supreme Court of the United States. There is indeed such a list, but it says nothing of "extrinsic" fraud. Milwaukee County, 296 U.S. at 276, 56 S. Ct. at 233.

judgment of a court with proper jurisdiction is binding "in the absence of fraud or collusion." Id. at 551, 67 S. Ct. at 455 (internal citations omitted). The words "intrinsic" and "extrinsic" do not appear at all. In fact, the Court references the existence of "exceptions not relevant here," and proceeds to discuss whether there is any exception for liquidation of insolvent insurance companies. Id. Thus, the Court specifically did not address various exceptions to full faith and credit, including fraud.

Crescent Hat Co., Inc. v. Chizik, 223 N.C. 371, 26 S.E.2d 871 (1943) is the only case cited by plaintiff which actually includes any discussion of the different types of fraud at issue. There are several reasons this case does not constitute a conclusive judicial determination of the issue at hand. First of all, as observed by Plaintiff in its Motion, it is the Supreme Court of the United States that is the ultimate arbiter as to the Full Faith and Credit Clause. Plaintiff's Motion to Dismiss, at p. 4. Second, the problem of pre-dating Rule 60 is of particular weight when it comes to this case. Although this Court discussed what might be considered to be extrinsic fraud (though never by that name), it pre-dates the legislative modification of any common law preference for extrinsic fraud by way of the passage of Rule 60(b), with its clarification that both intrinsic and extrinsic fraud are relevant. It is the

effect of the Full Faith and Credit Clause on this language that the Court of Appeals observed has not been previously decided. Finally, it is also important that Crescent Hat pre-dates the Uniform Enforcement of Foreign Judgments Act, which was passed in 1989. N.C. Gen. Stat. § 1C-1701. The goal of the Act is that a foreign judgment will have "the same effect and [be] subject to the same defenses as a judgment of this State and shall be enforced or satisfied in like manner." N.C. Gen. Stat. § 1C-1703(c). A North Carolina judgment is subject to Rule 60(b) and can be attacked based upon intrinsic fraud. Equal treatment under the Act would warrant that Rule 60(b) apply to foreign judgments as well. It is not possible that this Court conclusively determined in 1943 the interplay of the Full Faith and Credit Clause with a 1970 Rule and a 1989 statute.

CONCLUSION

Certainly, one can understand why Plaintiff would cite cases that contain good language about the importance of full faith and credit. However, the question on Plaintiff's Motion is not one that can be answered by attempts to analogize vaguely similar cases or expand the scope of judicial language. The question is whether the constitutional issue in question here has been conclusively determined. As observed by the Court of Appeals, the trial court's order was well reasoned and justified

by the language of Rule 60(b) and the Uniform Enforcement of Foreign Judgment Act, but there is a novel question to be answered about whether this language is limited by the Full Faith and Credit Clause. Under N.C. Gen. Stat. § 7A-30(1), that is an issue that should be decided by this Court.

For the foregoing reasons, the Supreme Court should deny Plaintiff's Motion to Dismiss Appeal.

This the 7th day of March, 2013.

Electronically submitted
Avery S. Chapman
Florida Bar No. 517321
(Admitted *Pro Hac Vice*)
Chapman Law Group, PLC
12008 South Shore Boulevard
Suite 107
Wellington, Florida 33414
Telephone: (561) 753-5996
Facsimile: (561) 753-9966
Email: ascesq1@cs.com

N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Electronically submitted
Sam McGee, NCSB No. 25343
Gary W. Jackson, NCSB No. 13976
Jackson & McGee, LLP
225 East Worthington Avenue
Suite 200
Charlotte, North Carolina 28203
Telephone: (704) 377-6680
Facsimile: (704) 377-6690
Email: gjackson@ncadvocates.com
smcgee@ncadvocates.com

IDENTIFICATION OF COUNSEL

The following persons are identified as counsel:

For Appellant:

Gary W. Jackson, NCSB No. 13976
Sam McGee, NCSB No. 25343
Jackson & McGee, LLP
225 East Worthington Avenue, Suite 200
Charlotte, North Carolina 28203
Telephone: (704) 377-6680
Facsimile: (704) 377-6690
Email: gjackson@ncadvocates.com
smcgee@ncadvocates.com

Avery S. Chapman
Florida Bar No. 517321
(Admitted *Pro Hac Vice*)
Chapman Law Group, PLC
12008 South Shore Boulevard, Suite 107
Wellington, Florida 33414
Telephone: (561) 753-5996
Facsimile: (561) 753-9966
Email: ascesq1@cs.com

For Appellee:

Perry C. Henson
Karen Strom Talley
Henson & Talley, LLP
P.O. Box 3525
Greensboro, NC 27402
Telephone: (336) 542-2133
Emails: phenson@hensonlawyers.com

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Defendant-Appellant's Response to Plaintiff's Motion to Dismiss Appeal was served on the date below upon counsel for Plaintiff-Appellee by U.S. Mail, first class, postage prepaid addressed as follows:

Perry C. Henson
Karen Strom Talley
Henson & Talley, LLP
P.O. Box 3525
Greensboro, NC 27402

This the 7th day of March, 2013.

Electronically submitted
Sam McGee

No. 75P13

SUPREME COURT OF NORTH CAROLINA

****

DOCRX, INC.,	)	
	)	
Plaintiff	)	
	)	FROM THE NORTH CAROLINA
v.	)	COURT OF APPEALS
	)	COA No. 12-783
EMI SERVICES OF NORTH CAROLINA, LLC	)	
	)	
	)	
Defendant.	)	

****

DEFENDANT-APPELLANT'S PETITION
FOR DISCRETIONARY REVIEW
UNDER N.C. GEN. STAT. § 7A-31

****

INDEX

TABLE OF CASES AND AUTHORITIES

SUPREME COURT OF NORTH CAROLINA

****

DOCRX, INC.,	)	
	)	
Plaintiff	)	
	)	FROM THE NORTH CAROLINA
v.	)	COURT OF APPEALS
	)	COA No. 12-783
EMI SERVICES OF NORTH CAROLINA, LLC	)	
	)	
	)	
Defendant.	)	

****

DEFENDANT-APPELLANT'S PETITION
FOR DISCRETIONARY REVIEW
UNDER N.C. GEN. STAT. § 7A-31

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to Rule 15 of the North Carolina Rules of Appellate Procedure and N.C. Gen Stat. § 7A-31, Defendant-Appellant respectfully petitions the Supreme Court of North Carolina to certify for discretionary review a decision of the North Carolina Court of Appeals filed on January 15, 2013.

Simultaneously herewith, Defendant has filed a Notice of Appeal as of right pursuant to N.C. Gen. Stat §7A-30 based upon a substantial constitutional question. This Petition is filed in the alternative to said Notice of Appeal in the event this Court determines that there is no appeal as of right.

STATEMENT OF ESSENTIAL FACTS

In 2012, the parties entered into a contract for commissions to be paid Plaintiff arising out of certain pharmaceutical sales by Defendant. Thereafter, a dispute arose between the parties concerning the amount of commission, if any, due Plaintiff. As a result of that dispute, Plaintiff intentionally interferend with Defendant's relationship with the supplier, causing the supplier of the pharmaceuticals to cease supplying Defendant. Thereafter, Plaintiff, an Alabama company, sued Defendant in Alabama state court for alleged damages. Defendant did not defend the Alabama action, both due to financial reasons and because it believed the Alabama court lacked jurisdiction Therefore, in that case, on April 1, 2011, a default judgment was entered in Alabama against Defendant EMI in the amount of $453,683.14. (R. p. 11).

During the litigation of the judgment domestication proceedings in North Carolina, it became clear that in the default proceedings in Alabama, the owner of the Plaintiff corporation, Brian Ward, filed a false affidavit claiming lost commissions based upon a wholly fictitious account of Defendant selling the pharmaceuticals at $500.00 per unit. (Brian Ward Affidavit at paragraph 7, R. p. 101). During the proceedings below, Defendant established by clear and convincing evidence - Plaintiff's own emails, admitted into evidence - that the per

unit sales price of the pharmaceuticals was *known by Defendant* to be *no more than $67.00 a unit.* When questioned by the Court, Plaintiff's counsel was unable to present any evidence to support the $500.00 a unit figure and could not rebut Defendant's evidence that such a figure had been fabricated and presented to the Alabama court in the course of obtaining the default judgment there.

Notwithstanding that knowledge, Plaintiff represented to the Alabama court that the damage figure should be based on the fictitious $500.00 a unit measure. Despite there being no basis whatsoever for that claim, Plaintiff's Alabama counsel nevertheless adopted that ficticious measure of damages, which was then utilized by the Alabama court in calculating the amount of the Alabama default judgment.

The crux of Defendant's defense to the North Carolina enforcement action was therefore that the Alabama judgment was procured through fraud, whether denominated intrinsic or extrinsic, and further that North Carolina had a public interest in prohibiting the enforcement of foreign judgments procured by fraud, no matter how fraud is delineated.

Therefore, on or about August 25, 2011, (R. p. 12) Defendant timely filed its Motion for Relief from Foreign Judgment and Notice of Defenses, later amended, whereupon Defendant sought relief from the Alabama judgment because of the

fraud, misrepresentation and misconduct of Plaintiff in obtaining the Alabama judgment, to wit:

1. Plaintiffs' Alabama Complaint sought as damages "25% of the difference between what Actavis charged for the products and the price for which EMI sold the products." (¶ 11 of Alabama Complaint, R. p. 52).

2. Nowhere in that Alabama Complaint did Plaintiff set forth "the price for which EMI sold the products."

3. Nevertheless, and without any documentation whatsoever, Brian Ward, in his *Supporting Affidavit for Entry of Default of Brian Ward,* stated in ¶ 7 that "EMI sold those units, individually, for $500 per unit, for a total profit of $475 per unit." (R. p. 101).

4. Plaintiff's Alabama counsel then further compounded the fraud against the Alabama Court by adopting this statement and falsely representing to the Alabama Court, in ¶ 8 of Plaintiff's *Motion to Enter Default Judgment Amount* that "Following its receipt of Oxycodone from Actavis, EMI sold these units for $500 per unit, for a total sale price of $1,752,00, with total net profits of $1,664,400. (R. p. 92).

5. Those statements made by Plaintiff's principal Brian Ward (in ¶ 7 of his Affidavit) and his counsel (in ¶ 8 of their Motion for Default Judgment) were false, misleading and intended to induce the Court to rely upon those statements in rendering a

default judgment against Defendant EMI.

6. Plaintiff and its Alabama counsel knew that the $500.00 statements were false because on both June 18 and July 12, 2010, Ward sent emails to Defendant EMI wherein he acknowledged that the selling price per unit to pharmacies and wholesalers was $45.00 per unit (not $500.00 per unit as alleged in the Complaint). (R. pp. 147-148). Plaintiff likewise knew the $500.00 statement was false because on June 18, 2012, Ward acknowledged via email to Defendant that the selling price in certain circumstances was $67.00 per unit. (R. p. 147).

After Defendant's introduction of those emails and a lack of any rebuttal whatsoever by Plaintiff, the trial court determined that Plaintiff had committed fraud in obtaining the Alabama judgment, holding:

> This Court, having determined that the affidavits and exhibits of the defendant **support defendant's contention that there was fraud, misrepresentation and misconduct of the plaintiff** in obtaining the underlying Alabama judgment, and there being **no apparent basis** for the statement in paragraph 7 of the supporting affidavit for entry of default of Brian Ward filed in the Alabama proceeding on March 30, 2011 that "EMI sold these units, individually for $500 per unit, for a total profit of $475 per unit," **the convincing evidence before this Court** being that the defendant sold these units for far lesser sums." [emphasis added].

(R. p. 188).

The trial court thus concluded that "in accordance with NC R. Civ. P. 60(b)(3) the intrinsic fraud, misrepresentation and

misconduct of the plaintiff in obtaining the underlying Alabama judgment precludes enforcement of the Alabama judgment as a judgment of this State." (R. p. 189).

Plaintiff appealed, and the Court of Appeals vacated the trial court's ruling, holding that the defenses available under N.C. Gen. Stat. §1A-1, Rule 60(b) are limited as to enforcement of foreign judgments by the Full Faith and Credit Clause of the Constitution of the United States (Article IV, Section 1) and that that clause limits the fraud defense to the type of fraud sometimes labled "extrinsic." For the reasons set forth to the Court of Appeals, and as set forth herein, Defendant respectfully submits that the defenses available under Rule 60(b) include all fraud, and that the distinction as to types of fraud is a misnomer and not consistent with the public policy of North Carolina in preventing the defrauding of its citizens

REASONS WHY CERTIFICATION SHOULD ISSUE

A. The Case Involves Legal Principles of Major Significance to the Jurisprudence of the State

1. A Substantial Constitutional Question is Presented

Simultaneously herewith, Defendant is filing a Notice of Appeal. It is Defendant's position that it is entitled to appeal as of right pursuant to N.C. Gen. Stat. § 7A-30(1) because this

case "directly involves a substantial question arising under the Constitution of the United States or of this State." It is clear from the opinion of the Court of Appeals that its decision was upon constitutional grounds. As summarized by the Court of Appeals, the trial court

> determined that N.C. Gen. Stat. § 1C-1703(c) entitled Defendant to raise against enforcement of the Alabama judgment " 'the same defenses as a judgment of this State,' " and "then stated that relief under N.C. Gen. Stat. § 1A-1, Rule 60(b) was available if the trial court determined that "there was 'fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.'"

DocRx, Inc. v. EMI Services of NC, LLC, 2013 N.C. App. LEXIS 52, *3 (2012). The Court of Appeals went on to say that "indeed, such an interpretation is warranted from the plain language of the statute. There remain, however, constitutional implications that must be determined." DocRx, Inc., 2013 N.C. App. LEXIS 52, at *6. Ultimately, these constitutional considerations determined the outcome, as the Court of Appeals held that the defenses of Rule 60 are limited by the Full Faith and Credit Clause of the United States Constitution. Id at 9.

Based on the foregoing, it is clear that the Court of Appeals' opinion turned upon a substantial constitutional issue. Nevertheless, out of an abundance of caution, Defendant files this Petition for Discretionary Review. Simultaneous filing of

both a Notice of Appeal and a Petition for Discretionary Review is specifically contemplated by Rule 15(b) of the North Carolina Rules of Appellate Procedure ("Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a)."). N.C.R. App. P. 15(b).

In the event this Court determines that there is no appeal of right based upon a constitutional issue, it should grant discretionary review pursuant to N.C. Gen. Stat. § 7A-31(c)(1) and (c)(2).

2. An Important Issue of First Impression is Presented

The Court of Appeals made clear in its decision that the limitation of Rule 60 by the Full Faith and Credit Clause is an issue of first impression. Consider the following:

> "The appellate courts of our State have not yet addressed the nature of the relationship between the Full Faith and Credit Clause and N.C. Gen. Stat. § 1A-1, Rule 60(b)."

DocRx, Inc., 2013 N.C. App. LEXIS 52, at *3.

> "[W]hile the trial court's analysis is thorough and reasoned, the trial court did not have the benefit of the determination herein that the application of Rule 60(b) to a foreign judgment is limited by traditional interpretations of the Full Faith and Credit Clause."

Id at 11.

Issues of first impression are appropriate for discretionary review, particularly where important legal issues are involved. See, e.g., Kiser v. Kiser, 325 N.C. 502, 504, 385 S.E.2d 487, 487-488 (1989). Not only does this case present an issue of first impression, it proposes to answer crucial questions of great importance to North Carolina people or businesses against whom judgments may be enforced: What defenses to the enforcement of a judgment are available to North Carolina defendants, and are those defenses the same whether the judgment is foreign or domestic? Moreover, as discussed above, a substantial constitutional issue is involved, since the question to be answered has been answered by the Court of Appeals based upon the Full Faith and Credit Clause. Clarity of the relationship between North Carolina law and the Constitution is of obvious jurisprudential importance.

Therefore, to summarize, the issues involved in this case are of significant jurisprudential significance because (1) there is a substantial constitutional issue, (2) there is an issue of first impression, and (3) there is a fundamentally important question of the rights of North Carolina judgment debtors. In addition to the above, the importance of the issue is clear from the "significant public interest" involved, which is discussed below.

B. The Subject Matter of the Appeal Has Significant Public Interest

First of all, there is a public interest in having important issues finally determined. Given that this is an issue of first impression about a constitutional question potentially affecting a large number of North Carolina litigants, the public's interest in the issue is clear. In addition, however, there is a significant public interest in addressing unintended prejudicial consequences to North Carolina litigants as a result of the Court of Appeals' decision.

These prejudicial consequences are as follows: Rule 60(b) allows a judgment to be set aside for fraud "whether heretofore denominated intrinsic or extrinsic." N.C. Gen. Stat. §1A-1, Rule 60(b). Thus, a North Carolina defendant may raise a defense of intrinsic fraud to attack a judgment obtained in North Carolina. However, if the Court of Appeals' ruling stands, the same North Carolina defendant cannot levy the same attack against a judgment obtained in another state. Thus, a North Carolina defendant has fewer defenses available to it against a foreign plaintiff than it does against a North Carolina plaintiff. This is prejudicial to North Carolina litigants in two ways: (1) North Carolina defendants have fewer defenses against foreign plaintiffs, and (2) North Carolina plaintiffs

are subject to more defenses than foreign plaintiffs are. Thus, both North Carolina plaintiffs and North Carolina defendants are prejudiced.

The goal of the Uniform Enforcement of Foreign Judgments Act is that a foreign judgment will have "the same effect and [be] subject to the same defenses as a judgment of this State and shall be enforced or satisfied in like manner." N.C. Gen. Stat. § 1C-1703(c). Under the Court of Appeals' decision, this goal is not met. Its ruling does not place foreign judgments on equal footing with North Carolina judgments, it places them above North Carolina judgments.

There is also a significant public interest in not having fraudulent judgments enforced against North Carolina people and businesses. In this case, the trial court found that the Plaintiff misrepresented its damages to the court in Alabama. (R. pp. 188-189). Thus, the judgment obtained in Alabama was based upon grossly inflated damages figures. The Court of Appeals' ruling would allow such a fraudulent judgment to be enforced against a North Carolina defendant with no opportunity in North Carolina to raise the defense that the judgment was obtained through fraud. North Carolina people and businesses should not be subject to such fraud without the opportunity to defend against it in a North Carolina court. This is particularly the case where such North Carolina defendants would

have had the right to raise such a defense had the original judgment been obtained in North Carolina.

Should the Court find that this is not an appeal as of right, it should grant discretionary review.

ISSUES TO BE BRIEFED

1. Whether the remedies available under N.C. Gen. Stat. § 1A-1, Rule 60(b) are limited by the Full Faith and Credit Clause of the Constitution of the United States when a foreign judgment is at issue?

2. Whether all types of fraud are a defense to enforcement of a foreign judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b), whether denominated intrinsic or extrinsic fraud?

3. Whether the Court of Appeals erred by vacating the trial court's denial of Plaintiff's Motion to Enforce Foreign Judgment?

4. Whether the trial court should have been affirmed even if intrinsic fraud is not a defense to enforcement of a foreign judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)?

CONCLUSION

For the foregoing reasons, the Supreme Court should certify this case for discretionary review.

This the 15th day of February, 2013.

Electronically submitted
Avery S. Chapman, FLSB No. 517321
(Admitted *Pro Hac Vice*)
Chapman Law Group, PLC
12008 South Shore Blvd., Suite 107
Wellington, Florida 33414
Telephone: (561) 753-5996
Facsimile: (561) 753-9966
Email: ascesq1@cs.com

N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Electronically submitted
Sam McGee, NCSB No. 25343
Gary W. Jackson, NCSB No. 13976
Jackson & McGee, LLP
225 East Worthington Avenue
Suite 200
Charlotte, North Carolina 28203
Telephone: (704) 377-6680
Facsimile: (704) 377-6690
Email: gjackson@ncadvocates.com
smcgee@ncadvocates.com

Attorneys for Defendant-Appellant

IDENTIFICATION OF COUNSEL

The following persons are identified as counsel:

For Appellant:

Gary W. Jackson, NCSB No. 13976
Sam McGee, NCSB No. 25343
Jackson & McGee, LLP
225 East Worthington Avenue, Suite 200
Charlotte, North Carolina 28203
Telephone: (704) 377-6680
Facsimile: (704) 377-6690
Email: gjackson@ncadvocates.com
smcgee@ncadvocates.com

Avery S. Chapman
Florida Bar No. 517321
(Admitted *Pro Hac Vice*)
Chapman Law Group, PLC
12008 South Shore Boulevard, Suite 107
Wellington, Florida 33414
Telephone: (561) 753-5996
Facsimile: (561) 753-9966
Email: ascesq1@cs.com

For Appellee:

Perry C. Henson
Karen Strom Talley
Henson & Talley, LLP
P.O. Box 3525
Greensboro, NC 27402
Telephone: (336) 542-2133
Emails: phenson@hensonlawyers.com

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Defendant-Appellant's Petition for Discretionary Review Under N.C. Gen. Stat. §7A-31 was served on the date below upon counsel for Plaintiff-Appellee by U.S. Mail, first class, postage prepaid addressed as follows:

Perry C. Henson
Karen Strom Talley
Henson & Talley, LLP
P.O. Box 3525
Greensboro, NC 27402

This the 15th day of February, 2013.

Electronically submitted
Sam McGee

No. 75P13 20A JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

DOCRX, INC.,	)	
	)	
Plaintiff	)	
	)	
v.	)	From Stanly County
	)	(No. 11 CvS 911)
EMI SERVICES OF NORTH CAROLINA, LLC	)	
	)	
	)	
Defendant.	)	

****

RESPONSE OF PLAINTIFF DOCRX, INC. TO DEFENDANT'S PETITION FOR DISCRETIONARY REVIEW

****

INDEX

TABLE OF CASES AND AUTHORITIES

CASES:

No. 75P13 20A JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

DocRx, Inc.,	)	
	)	
Plaintiff	)	
	)	
	)	
v.	)	From Stanly County
	)	(No. 11 CvS 911)
EMI Services of North Carolina, LLC,	)	
	)	
	)	
Defendant,	)	

****

RESPONSE OF PLAINTIFF DOCRX, INC. TO DEFENDANT'S PETITION FOR DISCRETIONARY REVIEW

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

COMES NOW the Plaintiff DocRx, Inc. by and through its attorneys and pursuant to Rule 15 of the North Carolina Rules of Appellate Procedure, and hereby responds to the DEFENDANT-APPELLANT'S PETITION FOR DISCRETIONARY REVIEW UNDER N.C. GEN. STAT. § 7A-31 as follows:

STATEMENT OF THE FACTS

Plaintiff filed suit in Alabama against the Defendant for breach of a pharmaceutical contract. The Plaintiff acted as an intermediary in the formation of a business relationship between the Defendant and another company. By signing the contract the Defendant agreed to make payments to the Plaintiff based on the

profits made from this new business relationship. The Defendant failed to make payment to Plaintiff under the contract, which breach of contract precipitated the Alabama breach of contract action the Plaintiff filed on 6 August 2010. (R pp 164-181).

The Defendant failed to respond to the complaint and an entry of default was entered on 24 September 2010. (R p 110). In its petition, the Defendant claims it did not defend the Alabama action due to "financial reasons" and because it believed the Alabama Court lacked jurisdiction. That information is not contained anywhere in the Record on Appeal, and is not appropriate for consideration in ruling on the Defendant's petition. For whatever reason, the Defendant made a bad choice not to defend the Alabama action, and on 1 April 2011, a default judgment in the amount of $453,683.14 was entered against the Defendant in the Circuit Court of Mobile County, Alabama. (R pp 10-11).

Pursuant to the provisions of North Carolina's Uniform Enforcement of Foreign Judgments Act, the Plaintiff sought to have this Alabama judgment entered as a judgment of the State of North Carolina. (R pp 25-118). The Defendant claims in its petition that "it became clear" that the owner of plaintiff filed a false affidavit regarding the amount of Plaintiff's damages, and that Plaintiff's counsel was "questioned" by the trial court and "was unable" to present any evidence to support the damages

amount. That is a patently untrue statement. As shown in the transcript, since it was improper for the trial court in North Carolina to consider evidence of this alleged intrinsic fraud, counsel for Plaintiff objected to the trial court considering evidence of intrinsic fraud, and told the trial court he would not present contradictory evidence for fear of opening the door to the trial judge considering such evidence. (T pp 29). The trial judge never questioned Plaintiff's counsel, and it is also untrue that Plaintiff's counsel was "unable" to present any evidence of damages. (T pp 29). The trial judge did, however, consider over Plaintiff's objections the affidavits Defendant claims supports a finding of intrinsic fraud in the Alabama action, and denied the Plaintiff's Motion to Enforce the Alabama judgment on the grounds of that alleged intrinsic fraud. (R pp 187-188).

The Plaintiff appealed to the North Carolina Court of Appeals on the grounds that the North Carolina Court of Appeals, North Carolina Supreme Court, and United States Supreme Court have all held repeatedly that the use of intrinsic fraud to refuse to enforce a foreign judgment violates the Full Faith and Credit Clause of the United States Constitution. The Court of Appeals rightfully agreed, reversing the trial court, and it is from this decision of the North Carolina Court of Appeals that the Defendant petitions for review.

REASONS WHY DISCRETIONARY REVIEW SHOULD NOT ISSUE

The Defendant requests the Court grant discretionary review, contending this case involves legal principles of major significance because a substantial constitutional question is presented, that an issue of first impression is presented, and that there is a public interest in the subject matter of the appeal.

The Plaintiff objects to Defendant's petition for discretionary review on the following grounds:

I. THE CASE DOES NOT INVOLVE LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THIS STATE.

(A) The Constitutional Question Presented has Already Been the Subject of Conclusive Judicial Determination

The Defendant alleges Plaintiff presented perjured testimony regarding its damages amount to the Alabama Court, and that it is upon that allegedly incorrect damages amount that the judgment was entered. By 1878, it was "well settled" that "perjured evidence" or "any matter which was actually presented and considered in the judgment assailed" is intrinsic fraud. U.S. v. Throckmorton, 98 U.S. 61, 66, 25 L.Ed 93 (1878). The constitutional issue presented in the case at bar is whether it is a violation of the Full Faith and Credit Clause of the United States Constitution to refuse to enforce a foreign judgment on the basis of intrinsic fraud. The North Carolina Supreme Court has already held that the Full Faith and Credit Clause of the

United States Constitution requires that only extrinsic fraud, not intrinsic fraud can be used to defeat a foreign judgment. Crescent Hat Co., Inc. v. Chizik, 223 N.C. 371, 26 S.E.2d 871 (1943). Extrinsic fraud is also known as "fraud in the procurement" or a judgment "obtained by fraud." Florida Nat'l Bank v. Satterfield, 90 N.C.App. 105, 367 S.E.2d 358 (1988). It is something that has deprived the defendant of the ability to participate in the original litigation of the case, such as where the plaintiff fraudulently kept all knowledge of the suit away from the defendant. Throckmorton, 98 U.S. 61. Extrinsic fraud is called fraud in the procurement because it is fraud in procuring the judgment which keeps the opposing party from the opportunity of litigating his case. McCoy v. Justice, 199 N.C. 602, 155 S.E. 452 (1930). Intrinsic fraud, on the other hand, is something that was anterior to the entry of the initial judgment, and relates to the merits of the subject matter which was before the foreign court. Crescent Hat Co., 233 N.C. 371, 26 S.E.2d 871. Perjury is intrinsic fraud. McCoy, 199 N.C. 602, 155 S.E. 452.

As stated previously, the North Carolina Supreme Court has already held that intrinsic fraud, and specifically alleged perjured testimony regarding the amount of damages, is intrinsic fraud cannot be used to defeat the constitutional requirement that a North Carolina Court grant full faith and credit to a foreign judgment. Crescent Hat Co., 223 N.C. 371, 26 S.E.2d 871.

In addition to this, the federal purpose of the Full Faith and Credit Clause makes the United States Supreme Court "for both state and federal courts, the 'final arbiter when the question is raised as to what is a permissible limitation on the Full Faith and Credit Clause.'" Johnson v. Muelberger, 340 U.S. 581, 585, 71 S.Ct. 474, 476-77 (1951)(quoting Williams v. North Carolina, 317 U.S. 287, 302, 63 S.Ct. 207, 215 (1942)); see also Milwaukee County v. M.E. White Co., 296 U.S. 268, 273-74, 56 S.Ct. 229, 232 (1935). The United States Supreme Court has held that the Full Faith and Credit Clause requires that a cause of action to enforce a money judgment from a foreign state can only be resisted on the grounds that the rendering court lacked jurisdiction, that the judgment has already been paid, that it was a cause of action for which the foreign state did not provide a court, or because the judgment was obtained through extrinsic fraud. Milwaukee County, 296 U.S. 268, 275-276, 56 S.Ct. 229, 233. The final arbiter of this constitutional issue, the United States Supreme Court, has already held that only extrinsic fraud can be used as grounds to refuse to grant full faith and credit to the foreign judgment, and so there is no substantial constitutional question presented in the present case.

(B) This is Not an Issue of First Impression

The Defendant next contends that the Court should certify this case for review because it presents an important issue of

first impression. This is not an issue of first impression, however. The Appellate Courts of North Carolina have repeatedly held that only extrinsic fraud, not intrinsic fraud, can be used for North Carolina to refuse to enforce a foreign judgment under the Full Faith and Credit Clause of the United States Constitution. See, e.g., Crescent Hat Co., 223 N.C. 371, 26 S.E.2d 871; Florida Nat'l Bank, 90 N.C.App. 105, 367 S.E.2d 358; Hewett v. Zegarzewski, 90 N.C.App. 443, 368 S.E.2d 877 (1988).

The Defendant contends that what makes this case an issue of first impression is the question whether Rule 60 of the North Carolina Rules of Civil Procedure can override the constitutional requirements of the Full Faith and Credit Clause and allow intrinsic fraud to be used to defeat a foreign judgment. The Supremacy Clause of the United States Constitution, however, reads:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all the Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl.2. In the United States Supreme Court case of Morris v. Jones, 329 U.S. 545, 67 S.Ct. 451 (1946), rehearing denied, 330 U.S. 854, 67 S.Ct. 858 (1947), the petitioner obtained a judgment in a Missouri Court against an insolvent insurance company, and then filed an exemplified copy

of his judgment in an Illinois proceeding where respondent was appointed as statutory liquidator for the insurance company against which the petitioner obtained the judgment. The Illinois Supreme Court sustained an order disallowing the claim, and the petitioner petitioned the United States Supreme Court for certiori, which was granted. The respondent contended that since the state had control over how to pay out claims against an insolvent insurance company, that the Illinois Court did not have to give full faith and credit to the Missouri judgment. The United States Supreme Court disagreed and reversed, holding that the Missouri judgment was entitled to Full Faith and Credit in the Illinois court, and that the nature and amount of the petitioner's claim could not be challenged or retried in the Illinois proceeding. The Court explained in regards to the respondent's position that the state's ability to adjudicate claims against insolvent insurance companies should override the Full Faith and Credit Clause of the Constitution was:

> [t]o argue that by reason of its police power, a State may determine the method and manner of proving claims against property which is in its jurisdiction and which is being administered by its Courts or administrative agencies. We have no doubt that it may do so except as such procedure collides with the Federal Constitution or an Act of Congress. But where there is such a collision, the action of a State under its police power must give away by virtue of the Supremacy Clause. Article IV, Clause 2. There is such a collision here. When we look to the general statute which Congress has enacted pursuant to the Full Faith and Credit Clause, we find no exception in case of

> liquidations of insolvent insurance companies. The command is to give full faith and credit to every judgment of a sister State. And where there is no jurisdictional infirmity, exceptions have rarely, if ever, been read into the constitutional provision or the Act of Congress in cases involving money judgment rendered in civil suits.

Morris, 329 U.S. 545, 553, 67 S.Ct. 451, 457. Thus, the United States Supreme Court has already held that although, in general, a state may determine the method and manner of proving claims against property in its jurisdiction, that power must "give way" to the Constitution. The argument the Defendant is making in the case at bar is identical to the one made by the respondent in Morris: namely, that the State of North Carolina through its Rules of Civil Procedure can curtail the Full Faith and Credit Clause of the United States Constitution. The final arbiter of that question, the United States Supreme Court, has already said that the constitutional provision must take precedence, and so this is not an issue of first impression that is appropriate for discretionary review.

II. THE SUBJECT MATTER APPEALED DOES NOT HAVE SIGNIFICANT PUBLIC INTEREST

Defendant contends there is a significant public interest in the outcome of this case because Defendant claims the ruling gives North Carolina defendants fewer defenses against a foreign plaintiff than it does against a North Carolina plaintiff (which is untrue), and that there is a "significant public interest in not having fraudulent judgments enforced against North Carolina

people and businesses."

Defendant's first position is that since rule 60(b) of the North Carolina Rules of Civil Procedure allows for an attack on a North Carolina judgment based on intrinsic fraud, that by not allowing a defendant in an action to enforce a foreign judgment to use intrinsic fraud as a defense, we are giving a North Carolina defendant fewer defenses to a foreign judgment than to a local judgment. That is not correct. The Defendant, and any defendant in an action to enforce a foreign judgment, always had the opportunity to file a Rule 60 motion in Alabama, or in whichever state the initial judgment was entered in. Hewett v. Zegarzewski, 90 N.C.App. 443, 447, 368 S.E.2d 877, 879 (1988) ("The questions which plaintiff now raises, issues alleging intrinsic fraud, should be properly addressed to the Florida Courts rather than to the North Carolina Courts."); Carr v. Bett, 970 P.2d 1017 (Mont. 1998); Data Management Systems, Inc. v. EDP Corp., 709 P.2d 377 (Utah 1985). The Defendant opted not to pursue a Rule 60 motion in Alabama in front of the Alabama Courts, but that was Defendant's own decision. It is not the fault of the North Carolina Appellate Courts that the Defendant did not choose to pursue other remedies available to it.

The Defendant's final argument is that there is a significant public interest in not having fraudulent judgments enforced against North Carolina people and businesses. The North

Carolina Court of Appeals, North Carolina Supreme Court, and United States Supreme Court have all held that issues of intrinsic fraud are to be decided by the foreign trial court, and cannot be relitigated when the plaintiff attempts to enforce it. The North Carolina Supreme Court has held:

> "a cause of action on a judgment is different from that upon which the judgment was entered. In a suit upon a money judgment for a civil cause of action, the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis. . .. recovery upon it can be resisted only the grounds that the court which rendered it was without jurisdiction. . .. or possibly because procured by fraud.

Milwaukee County, 296 U.S. at 275-276, 56 S.Ct. at 233. Regardless of any public interest in not wanting a judgment allegedly based on intrinsic fraud enforced in North Carolina, that decision has already been made by the final arbiter of the Full Faith and Credit Clause, the United States Supreme Court, and no "public interest" claimed by the Defendant can reverse that decision.

CONCLUSION

Defendant petitions the Court to review the decision of the Court of Appeals vacating the judgment of the trial court, contending that the Court of Appeals' decision raises a constitutional question and that the subject matter has a significant public interest. The issues in front of the Court of Appeals have already been decided by the United States Supreme

Court, the final arbiter on constitutional matters, and the Court of Appeals correctly applied those United States Supreme Court decisions.

WHEREFORE, having objected to the Defendant-Appellant's Petition for Discretionary Review, the Plaintiff DocRx, Inc., prays for the following relief:

1. That the petition of the defendant be denied.

2. That the Court grant unto the Plaintiff DoxRx, Inc., such other and further relief as the Court may seem just and proper.

Respectfully submitted this the 25th day of February, 2013.

HENSON & TALLEY, LLP

Electronically submitted
Karen Strom Talley
N.C. Bar No. 28820
Telephone: (336) 275-0587
ktalley@hensonlawyers.com
Post Office Box 3525
Greensboro, N.C. 27402

N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Electronically submitted
Perry C. Henson, Jr.
N.C. Bar No. 7787
Telephone: (336) 275-0587
phenson@hensonlawyers.com
Post Office Box 3525
Greensboro, N.C. 27402

Attorneys for Plaintiff-Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a copy of the foregoing response on counsel for the Defendant by depositing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

Sam McGee
Gary Jackson
Jackson & McGee, LLP
225 E. Worthington Ave, Suite 200
Charlotte, North Carolina 28203
Telephone: (704)377-6680
Facsimile: (704)377-6690
Email: smcgee@ncadvocates.com
Email: gjackson@ncadvocates.com

Avery S. Chapman
Chapman Law Group, PLC
The Chancellor Building
12008 South Shore Boulevard, Suite 107
Wellington, Florida 33414
Telephone: (561)753-5996
Facsimile: (561)753-9966
Email: ascesq1@cs.com

This the 25th day of February, 2013.

Electronically Submitted
Karen Strom Talley
Attorney for Plaintiff-Respondent

NO. COA12-783

NORTH CAROLINA COURT OF APPEALS

Filed: 15 January 2013

DOCRX, INC.,
Plaintiff-Appellant,

v.

Stanly County
No. 11 CVS 000911

EMI SERVICES OF NC, LLC,
Defendant-Appellee.

Appeal by Plaintiff from order entered 6 February 2012 by Judge W. David Lee in Superior Court, Stanly County. Heard in the Court of Appeals 27 November 2012.

Henson & Talley, LLP, by Karen Strom Talley and Perry C. Henson, Jr., for Plaintiff-Appellant.

Chapman Law Group, PLC, by Avery S. Chapman; and Jackson & McGee, LLP, by Sam McGee and Gary W. Jackson, for Defendant-Appellee.

McGEE, Judge.

DOCRX, Inc. (Plaintiff) appeals from an order denying its motion to enforce a foreign judgment pursuant to the Uniform Enforcement of Foreign Judgments Act, N.C. Gen. Stat. §§ 1C-1701 to -1708. For the reasons below, we vacate the order and remand for further proceedings.

The undisputed facts are that Plaintiff filed a Request To File Foreign Judgment in Superior Court in Stanly County on 2

August 2011. Plaintiff presented a certified copy of a default judgment order (the Alabama judgment) entered against EMI Services of North Carolina, LLC (Defendant) in the amount of $453,683.14, on 1 April 2011 in the Circuit Court of Mobile County, Alabama. Defendant filed a Motion For Relief From And Notice Of Defense To Foreign Judgment on 25 August 2011. Defendant argued, *inter alia*, that the Alabama judgment was obtained by extrinsic fraud. Plaintiff filed a motion to dismiss Defendant's defense of extrinsic fraud pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Plaintiff also filed a Motion To Enforce Foreign Judgment As A North Carolina Judgment on 2 December 2011. Defendant filed an Amended Motion For Relief From And Notice Of Defense To Foreign Judgment on 17 January 2012, and altered its motion by adding a request for relief from the judgment based on fraud, pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b). The trial court heard the matter on 30 January 2012, and entered an order on 6 February 2012 denying Plaintiff's motion to enforce the Alabama judgment as a judgment of the State of North Carolina. Plaintiff appeals.

On appeal, Plaintiff raises the issue of whether the trial court erred in denying Plaintiff's motion to enforce the Alabama judgment as a judgment of North Carolina. In its order, the trial court first determined that the affidavits and exhibits

submitted by Defendant supported Defendant's argument that Plaintiff obtained the Alabama judgment as a result of fraud. The trial court then determined that N.C. Gen. Stat. § 1C-1703(c) entitled Defendant to raise against enforcement of the Alabama judgment "'the same defenses as a judgment of this State[.]'" The trial court then stated that relief under N.C. Gen. Stat. § 1A-1, Rule 60(b) was available if the trial court determined that "there was "fraud (whether heretofore denominated *intrinsic* or *extrinsic*), misrepresentation, or other misconduct of an adverse party." Finally the trial court concluded that:

> This [c]ourt concludes that in accordance with NCRCP 60(b)(3) the intrinsic fraud, misrepresentation and misconduct of . . . [P]laintiff in obtaining the underlying Alabama judgment precludes enforcement of the Alabama judgment as a judgment of this State.

The appellate courts of our State have not yet addressed the nature of the relationship between the Full Faith and Credit Clause and N.C. Gen. Stat. § 1A-1, Rule 60(b). Traditionally, foreign judgments have been subject to attacks on limited grounds:

> North Carolina may set aside another state's judgment, *but only where it is shown that the court lacked jurisdiction, or that the judgment was procured through fraud. Thomas v. Frosty Morn Meats, Inc.*, 266 N.C. 523, 146 S.E.2d 397 (1966). The type of fraud

> which must be alleged in order to attack a foreign judgment is *extrinsic fraud*. *Horn v. Edwards*, 215 N.C. 622, 3 S.E.2d 1 (1939). The general rule is that
>
> > [e]quity will not interfere in an independent action to relieve against a judgment on the ground of fraud unless the fraud complained of is extrinsic and collateral to the proceeding, *and not intrinsic merely—that is, arising within the proceeding itself and concerning some matter necessarily under the consideration of the court upon the merits.*
>
> *Id.* at 624, 3 S.E.2d at 2. (Citations omitted). (Emphasis added).

Hewett v. Zegarzewski, 90 N.C. App. 443, 446, 368 S.E.2d 877, 878 (1988) (emphasis added). Our Courts have continued to recite this general concept. *See First-Citizens Bank & Tr. Co. v. Four Oaks Bank & Tr. Co.*, 156 N.C. App. 378, 380, 576 S.E.2d 722, 724 (2003) ("However, to make a successful attack upon a foreign judgment on the basis of fraud, it is necessary that extrinsic fraud be alleged." (citations and quotation marks omitted)). In *Florida National Bank v. Satterfield*, 90 N.C. App. 105, 107, 367 S.E.2d 358, 360 (1988), this Court observed that "[t]he Full Faith and Credit Clause of the United States Constitution requires North Carolina to enforce a judgment rendered in another state, if the judgment is valid under the laws of that state." *Id.* We further stated in *Florida National Bank* that: "A foreign judgment may be collaterally attacked only

on the grounds that it was obtained without jurisdiction; that fraud was involved in the judgment's procurement; or that its enforcement would be against public policy." *Id.* We also stated that "[a]lthough extrinsic fraud is a defense to an action to recover on a foreign judgment, intrinsic fraud is not." *Id.*

However, our General Assembly enacted the Uniform Enforcement of Foreign Judgments Act (UEFJA) in 1989. *See* N.C. Gen. Stat. § 1C-1701 et seq. Under UEFJA, foreign judgment debtors

> may file a motion for relief from, or notice of defense to, the foreign judgment on the grounds that the foreign judgment has been appealed from, or enforcement has been stayed by, the court which rendered it, or on any other ground for which relief from a judgment of this State would be allowed.

N.C. Gen. Stat. § 1C-1705(a) (2011). Likewise, N.C. Gen. Stat. § 1C-1703(c) (2011) states that "[a] judgment so filed has the same effect and is subject to the same defenses as a judgment of this State and shall be enforced or satisfied in like manner[.]" Defendant contends this statute entitles a foreign judgment defendant to utilize any defense applicable to an in-state judgment. As discussed above, in the present case, the trial court agreed and it utilized Rule 60(b) to set aside the Alabama judgment; indeed, such an interpretation is warranted from the

plain language of the statute. There remain, however, constitutional implications that must be determined.

As stated above, our Courts have not yet addressed the interplay between N.C.G.S. § 1C-1705, N.C.G.S. § 1A-1, Rule 60(b), and the United States Constitution. However, case law from other jurisdictions has addressed this issue involving similar statutes. For example, the appellate courts of Utah have concluded that "the remedies available under Rule 59 and 60 are limited by the Full Faith and Credit Clause of the United States Constitution when a foreign judgment is at issue." *Bankler v. Bankler*, 963 P.2d 797, 799-800 (Utah App. 1998). In *Bankler*, the Utah Court of Appeals noted that:

> "[n]either Rule 60(b) nor our Utah Foreign Judgment Act allows our Utah courts to reopen, reexamine, or alter a foreign judgment duly filed in this state, *absent a showing of fraud or the lack of jurisdiction or due process in the rendering state. Only these defenses may be raised to destroy the full faith and credit owed to the foreign judgment* sought to be enforced under the Foreign Judgments [sic] Act."

Id. at 799 (citation omitted).

Likewise, the Supreme Court of Montana addressed this issue in *Carr v. Bett*, 970 P.2d 1017 (Mont. 1998), holding that: "We disagree with [the proposition that] . . . . a foreign judgment duly filed in Montana can be subjected to the same defenses and proceedings for reopening or vacating as a domestic judgment,

and remain consistent with full faith and credit." *Id.* at 1024. The Montana court held that "the only defenses that may be raised to destroy the full faith and credit obligation owed to a final judgment are those defenses directed at the validity of the foreign judgment." *Id.* Finally, the Montana court determined that:

> certain defenses such as lack of personal or subject matter jurisdiction of the rendering court, fraud in the procurement of the judgment, lack of due process, satisfaction, or other grounds that make the judgment invalid or unenforceable may be raised by a party seeking to reopen or vacate a foreign judgment filed in Montana. These defenses have been recognized by other states that have held that the language similar to that found in § 25-9-503, MCA, does not allow the merits of a foreign judgment to be reopened or reexamined by the state where it is recorded.

Id. at 1024-25. The Colorado Court of Appeals has held similarly. *See Craven v. Southern Farm Bureau Cas. Ins.*, 117 P.3d 11, 14 (Colo.App. 2004) ("Postjudgment relief available from foreign judgments under C.R.C.P. 60(b) is limited to the following grounds: (1) the judgment is based upon extrinsic fraud; (2) the judgment is void; or (3) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.").

In opposition, Defendant cites two Third Circuit Court of Appeals cases in his discussion of Federal Rule of Civil Procedure 60(b), and argues that any distinction between intrinsic and extrinsic fraud is "meaningless." In *Averbach v. Rival Mfg. Co.*, 809 F.2d 1016 (3rd Cir. 1987), the Third Circuit Court of Appeals discussed, but did not rule on, the "'most unfortunate'" distinction between extrinsic and intrinsic fraud when considering relief from a judgment. Defendant also cites *Publicker v. Shallcross*, 106 F.2d 949 (3rd Cir. 1939), and argues that "the distinction between types of fraud under Rule 60(b) is chimerical and not easily ascertainable." However, we first note that decisions of the Court of Appeals for the Third Circuit are not binding on our Court when interpreting the laws of our State. Further, the cases on which Defendant relies appear to criticize the distinction between intrinsic and extrinsic fraud in similar circumstances, but they do not abolish such distinction.

We find the reasoning of the Utah, Montana and Colorado appellate courts persuasive, and hold that in North Carolina, "the remedies available under Rule . . . 60 are limited by the Full Faith and Credit Clause of the United States Constitution when a foreign judgment is at issue." *Bankler*, 963 P.2d at 799-800. We hold that postjudgment relief from foreign judgments

under N.C.G.S. § 1A-1, Rule 60(b) is limited to the following grounds: "(1) the judgment is based upon extrinsic fraud; (2) the judgment is void; or (3) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." *Craven*, 117 P.3d at 14.

In the past, this Court has, without addressing this framework explicitly, held in accordance with these principles. In *Moss v. Improved B.P.O.E.*, 139 N.C. App. 172, 177, 532 S.E.2d 825, 829 (2000), this Court observed:

> For a foreign judgment to be accorded full faith and credit in North Carolina, and thereby survive a Rule 60(b) motion, "the rendering court must . . . have respected the demands of due process. That is, the rendering court must . . . have afforded the parties adequate notice and opportunity to be heard before full faith and credit will be accorded the judgment. . . . . [I]t follows that when a party against whom a default was entered subsequently challenges the validity of the original proceeding on grounds that he did not receive adequate notice, the reviewing court ordinarily must examine the underlying facts in the record to determine if they support the conclusion that the notice given of the original proceeding was adequate."

Id. at 177, 532 S.E.2d at 829. Further, in *Walden v. Vaughn*, 157 N.C. App. 507, 579 S.E.2d 475 (2003), this Court ruled that:

> The 'Uniform Enforcement of Foreign

> Judgments Act' (Act) provides that a judgment from another state, filed in accordance with the procedures set out in the Act, has the same effect and is subject to the same defenses as a judgment issued by a North Carolina court and shall be enforced or satisfied in a like manner.

Id. at 510, 579 S.E.2d at 477 (citation omitted). We then observed that "[i]n North Carolina, accord and satisfaction is a valid defense against a claim to enforce a judgment." *Id.* Finally, we concluded that "the trial court did not err in considering defendants' defense of accord and satisfaction." *Id.*

For the foregoing reasons, we hold in the present case that, while the trial court's analysis is thorough and reasoned, the trial court did not have the benefit of the determination herein that the application of Rule 60(b) to a foreign judgment is limited by traditional interpretations of the Full Faith and Credit Clause. Plaintiff's motion to enforce the Alabama judgment should have been denied only if "(1) the judgment [was] based upon extrinsic fraud; (2) the judgment [was] void; or (3) the judgment [had] been satisfied, released, or discharged, or a prior judgment upon which it [was] based [had] been reversed or otherwise vacated, or it [was] no longer equitable that the judgment should have prospective application." *Craven*, 117 P.3d at 14. In the present case, the trial court denied Plaintiff's

motion to enforce the Alabama judgment on the grounds of "intrinsic fraud, misrepresentation and misconduct." As we have held, these grounds are not sufficient under the Full Faith and Credit Clause to warrant the trial court's denial of Plaintiff's motion to enforce the Alabama judgment. We therefore vacate the trial court's order and remand for further proceedings.

Vacated and remanded.

Judges HUNTER, Robert C. and ELMORE concur.

Supreme Court of North Carolina

DOCRX, INC.

v

EMI SERVICES OF NC, LLC

From N.C. Court of Appeals
(12-783)
From Stanly
(11CVS911)

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Defendant on the 15th of February 2013 in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the Plaintiff, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is

"Allowed by order of the Court in conference, this the 27th of August 2013."

s/ Beasley, J.
For the Court

Upon consideration of the petition filed by Defendant on the 15th of February 2013 for Writ of Supersedeas of the judgment of the Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Allowed by order of the Court in conference, this the 27th of August 2013."

s/ Beasley, J.
For the Court

Upon consideration of the petition filed on the 15th of February 2013 by Defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Allowed by order of the Court in conference, this the 27th of August 2013."

s/ Beasley, J.
For the Court

Therefore the case is docketed as of the date of this order's certification. Briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 15 (g)(2).

WITNESS my hand and official seal of the Supreme Court of North Carolina, this the 28th of August 2013.

Christie Speir Cameron Roeder
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
North Carolina Court of Appeals
Mr. Perry C. Henson, Jr., Attorney at Law - (By Email)
Mr. Sam McGee, Attorney at Law, For EMI Services Of NC, LLC - (By Email)
Mr. Gary W. Jackson, Attorney at Law - (By Email)
Mr. Avery S. Chapman, Attorney at Law, For EMI Services Of NC, LLC - (By Email)
Ms. Karen Strom Talley, Attorney at Law, For Docrx, Inc. - (By Email)
West Publishing - (By Email)
Lexis-Nexis - (By Email)