THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Kristi F. Curtis, Circuit Court Judge

Appellate Case Number 2025-000403

Lauren Chambers Tracy,

Respondent,

v.

Elijah Osama Mustafa,

Appellant.

AMENDED INITIAL BRIEF OF APPELLANT

June 30, 2025

By: s/Hannah D. Stetson

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court erroneously deny Appellant's Motion for Entry of Satisfaction of Judgment Based On Agreement Dated January 31, 2018 despite the clear and unambiguous language of the Agreement requiring prompt satisfaction?

2. Did the trial court erroneously deny Appellant's Motion for Relief from Judgment Pursuant to Rule 60 of the South Carolina Rules of Civil Procedure, depriving Appellant of his due process rights and in contravention to applicable legal standards?

STATEMENT OF THE CASE AND FACTS

This appeal arises from a $4,198,672.14 judgment ("Judgment") against Appellant Elijah Osama Mustafa ("Mustafa" or "Appellant"), arising out of a motor-vehicle accident involving Appellant and Respondent Lauren Chambers Tracy ("Respondent" or "Tracy"). The trial court denied entry of satisfaction of the judgment and further denied relief from judgment, even though the judgment deprived Mustafa of his due process rights and the failure to satisfy the judgment defied the plain language of an unambiguous agreement between the parties, which requires Tracy to promptly satisfy the judgment against Mustafa. This Court should reverse the trial court's erroneous Orders denying Mustafa's requested relief to remedy the same.

A. August 6, 2016 Motor Vehicle Accident.

This personal injury action arises from an August 6, 2016 motor vehicle accident between Tracy and Mustafa. Mustafa operated a motor vehicle which made contact with the rear of a motor vehicle in which Tracy was a passenger. Mustafa's vehicle was originally stopped behind the vehicle in which Tracy was a passenger. (Affidavit of Mustafa, Exhibit 1). After the traffic light turned green, both vehicles accelerated and then slowed for traffic, leading Mustafa's vehicle to make contact with Tracy's vehicle. (Affidavit of Mustafa, Exhibit 1).

At the time of the accident, Travelers' Property Casualty Insurance Company ("Travelers") was the primary insurance carrier for Appellant Mustafa. Travelers had issued an automobile liability insurance policy to Osama Mustafa[1] and Appellant Mustafa. The Travelers policy had coverage limits in the amount of $250,000.00 per person and $500,000.00 per accident.

B. Pre-Suit Settlement Agreement.

Prior to the filing of any lawsuit relating to the subject motor-vehicle accident, Respondent

[1] Osama Mustafa is the father of Appellant. Both are Insureds under the Travelers policy.

Tracy—through her legal counsel—negotiated an agreement with Travelers, the primary insurance carrier for Appellant Mustafa. These negotiations culminated in a written agreement, titled "Covenant Not to Execute" ("2018 Agreement"). The 2018 Agreement was executed by Respondent Tracy, as well as Respondent Tracy's attorney. (2018 Agreement, p. 6).

The 2018 Agreement provided for a $175,000 payment to Respondent Tracy by Travelers, in exchange for, among other things, Appellant Mustafa's protection from liability for any future judgment. (January 31, 2018, Agreement, p.1). The 2018 Agreement specifically provides that Travelers made this payment "by and on behalf of its Insureds" (including Appellant) to "end all obligations to pay any further sums" and to "protect the Insureds from any excess judgment which may be rendered." (2018 Agreement, p.1).

The Agreement mandates, in plain and unambiguous language, that if any judgment for damages against the Insureds (including Appellant) arising out of a claim by Respondent is entered, Respondent will "***promptly satisfy*** the judgment with respect to the amount of the consideration being paid under this agreement, and will file a certification of such satisfaction with the Clerk of Court in whose office the judgment is enrolled to be entered on the face of the judgment." (2018 Agreement, p. 3-4, ¶ 6) (emphasis added). If a judgment is entered in excess of the $175,000 consideration paid under the 2018 Agreement, Respondent must "***promptly satisfy*** the judgment with respect to such excess and will file a certification of such satisfaction with the Clerk of Court in whose office the judgment is enrolled to be entered upon the face of the judgment." (2018, Agreement, p.3-4, ¶ 6) (emphasis added).

The 2018 Agreement preserved Respondent Tracy's right to proceed with a civil lawsuit against Appellant Mustafa, only "to effect settlement or verdict against the Insureds solely for the purpose of collecting excess liability insurance coverage and/or underinsured motorist coverage."

(2018 Agreement, p.3 ¶¶ 3, 5, 11). Moreover, the 2018 Agreement provided that "when and if" excess liability or underinsured motorist coverage is paid, Respondent Tracy will "execute proper Releases relinquishing and releasing all of their rights to proceed against the Insureds and Travelers." (2018 Agreement, p.5 ¶¶ 12).

C. The Ensuing Civil Lawsuit.

Several months after the 2018 Agreement was finalized and payment was tendered to Respondent, on May 11, 2018, Tracy sued Mustafa in the South Carolina Court of Common Pleas, asserting one claim for negligence arising from the August 6, 2016 motor vehicle accident. In response to the lawsuit, Travelers retained counsel to defend Mustafa. Mustafa, through counsel, timely answered the Complaint, denying any negligence and asserting affirmative defenses. (Answer).

Subsequently, two underinsured motorist ("UIM") carriers for Respondent—State Farm Mutual Automobile Insurance Company ("State Farm") and United Services Automobile Association ("USAA")—appeared in the action pursuant to South Carolina Code Section 38-77-160, which allows a UIM carrier to appear and defend in the name of the underinsured motorist in any action that may affect its liability. (Notices of Appearance). In light of the appearances of the legal counsel retained by the UIM carriers, the trial court entered a Consent Order for Substitution of Counsel on January 23, 2019, relieving the legal counsel retained by Travelers in the matter and substituting the UIM legal counsel. (Substitution Order).

On February 11, 2022, the trial court dismissed UIM carriers State Farm and USAA from the action, pursuant to a policy release between Tracy and the UIM carriers, and relieved UIM legal counsel. Thus, as of February 11, 2022, Mustafa proceeded in the action *pro se*, with no legal counsel. (Consent Order Dismissing UIM Carriers).

D. The trial court imposes a harsh sanction—striking Mustafa's Answer—for an unintentional discovery violation.

Believing that the 2018 Agreement fully resolved Respondent's claims against him, Mustafa—a college student during the relevant time period—failed to appear for at least two noticed depositions. (Affidavit of Mustafa). Based on Mustafa's failure to appear for depositions, on March 11, 2022, Respondent filed a Motion to Strike Appellant's Answer. (Motion to Strike Defendant's Answer). On June 1, 2022, the trial court issued a Form 4 Order Striking Mustafa's Answer. (Transcript of June 1, 2022 Hearing). The entirety of the language in the Form 4 Order Striking Defendant's Answer stated, "Plaintiff's Motion to Strike Defendant's Answer due to the defendant's failure to participate in discovery is GRANTED." **(**Form 4 Order on Motion to Strike).

E. Mustafa filed a Motion to Vacate the Order Striking Answer.

Just over nine months later, Travelers-retained defense counsel again appeared on behalf of Mustafa. Travelers-retained defense counsel moved to vacate the Order Striking Mustafa's Answer. (Motion to Vacate). The Motion to Vacate explained that Mustafa had a good faith belief that he had "no continuing obligation to participate in any lawsuit that may be filed" as a result of the 2018 Agreement. (Affidavit of Mustafa ¶ 6).

Per Mustafa, no attorney contacted him about the depositions, despite multiple counsel appearing on his behalf at various times throughout the lawsuit. (Affidavit of Mustafa ¶ 10). Upon receiving a notice of deposition in January 2022, Mustafa consulted an attorney and concluded he did not need to appear because of the 2018 Agreement. (Affidavit of Mustafa ¶ 11).

Moreover, Mustafa highlighted his conversations with Tracy at the scene of the accident, which did not lead him to observe that she was injured in any way. This is consistent with the relevant Police Report, in which no injury was reported and no EMS transport requested. (Affidavit of Mustafa ¶ 17, Exhibit 1). Mustafa denied that any negligence on his part was a

proximate cause of any of the damages claimed by Tracy. (Affidavit of Mustafa ¶ 17).

F. Damages Hearing and Judgment.

On June 2 and 29, 2023, without an explicit on-the-record ruling on Mustafa's Motion to Vacate the Order Striking his Answer,[2] the trial court held a damages-only hearing. (Transcript of June 2, 2023, and June 29, 2023 Hearings). Tracy submitted evidence, in the form of an Affidavit and supporting documents, of her alleged related medical expenses to date, lost wages, future medical expenses, pain and suffering, and future pain and suffering. (Amended Damages Hearing Exhibit Index and Exhibits). On June 20, 2023, Respondent also filed an Affidavit of Damages, requesting judgment be entered against Appellant in the total amount of $4,198,672.14 in damages. Tracy requested entry of judgment in that amount. (Affidavit of Damages).

Two months after the damages-only hearing, the trial court entered an Order of Judgment stating that it had orally denied Mustafa's Motion to Vacate at the damages-only hearing—even though the hearing transcript does not evidence a ruling as to the same.

The court then entered judgment for Tracy and against Mustafa in the requested amount: $4,198,672.14. Specifically, on August 9, 2023, at 9:47:27 a.m., the trial court entered an Order of Judgment denying Appellant's pending Motion to Vacate the June 1, 2022 Order Striking Appellant's Answer orally at the June 2, 2023 hearing and proceeded with the damages portion of the hearing. (Order of Judgment). Subsequently, on August 9, 2023, at 9:47:32 a.m., the trial court issued a Form 4 Order noting that "This action came to trial or hearing before the court. The issues have been tried or heard," and stating that a decision had been rendered and that a formal

[2] After argument on the Motion to Vacate, the trial court noted that it was "very reluctant to overturn something that another judge has already ordered . . . [h]e's heard this exact same argument once before so (inaudible) set aside." (June 2, 2023 Transcript p. 8). However, the transcript does explicitly evidence an order regarding the Motion to Vacate.

order would follow. (Form 4 Order of Judgment).

G. Post-Judgment Motions.

Pursuant to the plain terms of the 2018 Agreement, which provides that "Plaintiff agrees to promptly satisfy the judgment with respect to the amount of the consideration being paid under this agreement [$175,000]" and "Plaintiff will promptly satisfy the judgment with respect to such excess [over $175,000]," Tracy was responsible for satisfying the entire judgment. Based on these provisions of the 2018 Agreement, Mustafa moved for entry of an order reflecting his satisfaction of the $4,198,672.14 judgment, pursuant to South Carolina Code Sections 14-17-280 and 15-35-180 and/or Rules 60 and 69 of the South Carolina Rules of Civil Procedure. (Motion for Entry of Satisfaction of Judgment and Supporting Memorandum). In opposition, Tracy submitted extrinsic evidence, including emails from counsel for various insurance carriers and/or Mustafa and claim file entries purporting to show an ambiguity in the 2018 Agreement and/or demonstrate her unilateral belief that the contract's plain language meant something other than what it unambiguously stated. (Tracy's Memorandum in Opposition to Motion for Entry of Satisfaction and supporting Exhibits).

Mustafa also moved for relief from the judgment, requesting the trial court vacate the oral Order Denying his Motion to Vacate the Order Striking his Answer, vacate the Judgment, and/or provide relief from the Judgment, pursuant to Rules 60(a) and 60(b) of the South Carolina Rules of Civil Procedure.

After holding a hearing on Mustafa's post-judgment Motions, on January 27, 2025, the court denied all relief. (Transcript of January 27, 2025 Hearing). The court reasoned that although the 2018 Agreement stated that Tracy would promptly satisfy any judgment, the parties could not have meant what they stated:

> The Plaintiff entered into a Covenant Not to Execute with Travelers Insurance which references no fewer than seven times the fact that the Covenant is meant to preserve Plaintiff's right to recover excess liability and/or UIM coverage. (See paragraphs 4, 5, 9, and numbered paragraphs 3, 5, 11, and 12). Satisfaction in violation of the clear terms and intent of the Covenant would result in an unfair windfall to Defendant that neither Travelers, Plaintiff, or Defendant intended when entering into the Covenant Not to Execute.

(Form 4 Order Denying Motion for Entry of Satisfaction).

The court further held that there were no grounds for vacating the Order Striking Mustafa's Answer. The court reasoned that the ruling contained no mistakes or ambiguities, and suggested that Mustafa had delayed in seeking relief: "Defendant's motion to vacate was not filed until Mar. 17, 2023. Judge Price denied the motion on Aug. 9, 2023, and the instant motion was not filed until May 31, 2024." (Form 4 Order Denying Motion for Relief from Judgment).

Mustafa moved to reconsider the Orders denying his post-judgment Motions. (Motions to Reconsider). The trial court denied reconsideration, finding that Mustafa had not shown that the court "misunderstood, failed to fully consider, or failed to rule on an argument or issue before the Court." (Order Denying Defendant's Motion for Reconsideration as to its Motion for Relief; Order Denying Defendant's Motion for Reconsideration as to its Motion for Entry of Satisfaction). This appeal timely followed. (Notice of Appeal).

STANDARD OF REVIEW

The Order denying Mustafa's Motion for Satisfaction of Judgment, which turns on the proper construction of the 2018 Agreement, is reviewed *de novo*. *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) ("The construction of a clear and unambiguous contract is a question of law for the court."). This Court owes no deference to the trial court's resolution of a legal issue. *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 593, 748 S.E.2d 781, 785 (2013).

The Orders denying Mustafa's post-judgment Motions are reviewed for an abuse of discretion. *Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 17–18, 594 S.E.2d 478, 482 (2004). A trial court's legal error automatically constitutes an abuse of discretion. *Delta Apparel, Inc. v. Farina*, 406 S.C. 257, 265, 750 S.E.2d 615, 619 (Ct. App. 2013) ("An abuse of discretion in setting aside a default judgment occurs when the [trial court] issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support."); *see also Kemp v. United States*, 596 U.S. 528, 534 (2022) (holding that Federal Rule of Civil Procedure 60(b)(1), on which South Carolina's corresponding rule is based, includes "all mistakes of law made by a judge").

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING MUSTAFA'S MOTION FOR ENTRY OF SATISFACTION.

A. The 2018 Agreement's plain language unambiguously requires Tracy's "prompt satisfaction" of the judgment.

South Carolina law regarding construction and interpretations of contracts is "well settled." *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 183 (2013). "In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties." 405 S.C. at 46; 747 S.E.2d at 183. (quotations and citations omitted). If the contract language "is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect." *Id.* (quotations and citations omitted); *see also Ellie, Inc. v. Miccichi*, 358 S.C. 78, 94, 594 S.E.2d 485, 493 (Ct. App. 2004) ("To discover the intention of a contract, the court must first look to its language—if the language is perfectly plain and capable of legal construction, it alone determines the documents force and effect."). A covenant-not-to-execute is a contract and, as such, is subject to these precepts. *Progressive Max Ins. Co.*, 405 S.C. 35 at 46, 747 S.E.2d at

183 ("Covenants not to execute are treated as contracts and, as such, they are governed by general contract law.").

Here, the language of the 2018 Agreement is plain and unambiguous. The 2018 Agreement reflects the parties' mutual intent to protect Mustafa from any further liability. This mutual intent is evidenced in multiple provisions.

For example, the 2018 Agreement provides that Mustafa's primary automobile liability insurer (Travelers) would pay Tracy $175,000: "Travelers by and on behalf of its Insureds, desires to make payment of One Hundred Seventy-Five Thousand Dollars and 00/100 ($175,000.00) Dollars …." The contract goes on to state that this one-time payment would "thereby ***end all obligations to pay any further sums and protect the Insureds from any excess judgment which may be rendered***[.]" (2018 Agreement p. 2) (emphasis added). This is precisely the protection that South Carolina courts view as being afforded by a liability carrier's settlement payment on behalf of its insured. *E.g.*, *Green v. McGee*, 441 S.C. 157, 169, 892 S.E.2d 520, 526 (Ct. App. 2023) ("[W]hen a liability insurance carrier provides funds for a settlement, the funds are provided to benefit its insured"), *reh'g denied* (Oct. 11, 2023), *cert. granted* (Nov. 13, 2024).

The 2018 Agreement further reflects Tracy's agreement not to execute on any judgment against Mustafa, as consideration for the $175,000.00 payment. (2018 Agreement p. 3, ¶ 2). Paragraph 6 provides that, in the event a judgment is entered against Mustafa, "Plaintiff agrees to ***promptly*** satisfy the judgment with respect to the amount of the consideration being paid . . . and will file a certification of such satisfaction with the Clerk of Court in whose office the judgment is enrolled to be entered on the face of the judgment." (2018 Agreement p. 3-4, ¶ 6). Paragraph 6 also states that, in the event of a judgment in excess of the $175,000 payment, Tracy will "***promptly*** satisfy the judgment with respect to such excess and will file a certification of such satisfaction

…." (2018 Agreement p. 3-4, ¶ 6) (emphasis added).

Notably, the prompt satisfaction requirement of Paragraph 6 is not qualified by ***any*** contingencies—such as collection or payment from any excess liability carriers and/or underinsured carriers. Had the parties intended any such qualifications, they clearly knew how to impose them. For example, Paragraph 12 requires Tracy to execute a release relinquishing her rights to proceed against the Insureds and Travelers only "***when and if*** excess liability insurance coverage and/or underinsured motorist coverage is paid . . . ." (2018 Agreement, p.5, ¶ 12) (emphasis added). This stands in stark contrast to Paragraph 6, which omits any similar language. Accordingly, the intentional omission of any qualifying language must be given effect. *See C.A.N. Enterprises, Inc. v. S.C. Health & Hum. Servs. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). Tracy's insistence upon collecting the judgment from Mustafa is a blatant violation of the 2018 Agreement's unambiguous terms. In failing to promptly satisfy the judgment, Tracy failed and continues to fail to protect Mustafa from further liability. Mustafa has thereby been deprived of the benefit of the bargain.

The trial court erred as a matter of law in refusing to enforce the 2018 Agreement's unambiguous terms. The Order denying Mustafa's Motion for Entry of Satisfaction does not even mention Paragraph 6's prompt satisfaction requirements. The Order also fails to give effect to the additional sections discussed above addressing the protections afforded to an insured from a judgment. (Form 4 Order Denying Motion for Entry of Satisfaction). Ignoring these provisions, the trial court instead focused solely on provisions discussing pursuit and recovery of excess liability coverage. (Form 4 Order Denying Motion for Entry of Satisfaction).

By selectively enforcing the contractual terms that inure to Tracy's benefit, while at the same time disregarding the contractual terms that inure to Mustafa's benefit, the court violated the

cardinal rule of contract construction that all terms are to be given meaning and none rendered surplusage. *See Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 498, 649 S.E.2d 494, 502 (Ct. App. 2007) ("Documents will be interpreted so as to give effect to all of their provisions, if practical.").

The court also effectively rewrote the agreement by conferring on Tracy a better deal—and conferring on Mustafa a worse deal—than the one the parties negotiated for themselves. *C.A.N. Enterprises, Inc.*, 296 S.C. at 378, 373 S.E.2d at 587 ("[Courts are without authority to alter a contract by construction or to make new contracts for the parties"); *Nicholson v. Nicholson*, 378 S.C. 523, 532, 663 S.E.2d 74, 79 (Ct. App. 2008) ("In the enforcement of an agreement, the court does not have the authority to modify terms that are clear and unambiguous on their face.").

Contrary to the trial court's determination, there was no inconsistency that demanded that the agreement be only partially enforced. The terms reserving Tracy's right to pursue additional coverage are consistent with the terms providing that Tracy promptly satisfy any judgment against Mustafa. Tracy had a right to "proceed" against excess liability and/or UIM coverage and attempt to collect coverage. Tracy was in fact permitted to proceed, via the personal injury lawsuit she filed. And Mustafa never moved to dismiss or preclude the lawsuit on the basis of the 2018 Agreement. Therefore, the covenant-not-to-execute could have and should have been fully enforced to protect the bargained-for rights of *both* parties.

To the extent the court considered and was persuaded by Tracy's tendered extrinsic evidence, the court erred anew. The extrinsic evidence, purporting to show that counsel for various carriers recognized that payment was due to Respondent, was inadmissible for the simple reason that the contractual terms are unambiguous. *Charles v. B & B Theatres, Inc.*, 234 S.C. 15, 18, 106

S.E.2d 455, 456 (1959) (holding that extrinsic evidence is inadmissible to discern the parties' intent, "when the written contract is ambiguous in its terms").

The court compounded its error, when it concluded that holding Tracy to her contractual prompt satisfaction obligation would result in an unintended and unfair windfall to Mustafa. (Form 4 Order Denying Motion for Entry of Satisfaction). Because the plain language of Paragraph 6 expressly provides for unqualified prompt satisfaction of any judgment, that is *precisely* what the parties intended. It follows that enforcing the unambiguous terms as written does not result in a "windfall" to Tracy. *C.A.N. Enterprises*, 296 S.C. at 377, 373 S.E.2d at 586 (acknowledging that even when a contract interpretation will permit one party to "receive a windfall," the Court is constrained to apply the plain and unambiguous language of the contract and cannot "strain well established principles of contract law" to prevent a windfall). Rather, Tracy is simply being held to the obligations she contractually agreed to assume, in exchange for valuable consideration and with guidance of her legal counsel.

The court's retrospective reassessment of the wisdom or folly of the 2018 Agreement is utterly irrelevant. That is the deal the parties struck, and that is the deal to which they must now be held. Any other result confers an unwarranted windfall on Tracy. *Maybank v. BB&T Corp.*, 416 S.C. 541, 574, 787 S.E.2d 498, 515 (2016) ("[A] court's ultimate duty is confined to interpreting the contractual provisions agreed to by the parties—regardless of their wisdom or folly, apparent unreasonableness, or any failure of the parties to guard their interests carefully.").

For these reasons, the trial court erred as a matter of law in denying Mustafa's Motion for Entry of Satisfaction. This Court should reverse and enter judgment for Mustafa.

B. To the extent the trial court found the 2018 Agreement ambiguous, this finding is in error.

"A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear." *Ellie, Inc.*, 358 S.C. at 94, 594 S.E.2d at 493. " In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered." *Id.* "Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." *Id.* If the court decides the language is ambiguous . . . evidence may be admitted to show the intent of the parties, and the determination of the parties' intent becomes a question of fact for the fact-finder. *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 594, 762 S.E.2d 705, 710 (2014).

Here, it is unclear whether the trial court found the 2018 Agreement ambiguous in any material respect. The trial court's Order Denying Satisfaction does not specify whether the trial court found the 2018 Agreement to be clear and unambiguous. As detailed above, the language in the 2018 Agreement is clear and unambiguous, which renders improper any consideration of extrinsic evidence. However, in Respondent's Memorandum in Opposition to Appellant's Motion for Entry of Satisfaction, she attached extrinsic evidence. (Respondent's Memorandum in Opposition to Motion for Entry of Satisfaction). Similarly, at the January 27, 2025 hearing, Respondent relied on that extrinsic evidence in an attempt to show that the 2018 Agreement—the agreement that Respondent's own counsel drafted—was ambiguous. (Transcript of January 27, 2025 Hearing, p. 10-19).

To the extent the trial court found an ambiguity in the 2018 Agreement, such ambiguity simply provides further evidence of reversible error. It follows that the trial court erred as a matter of law in denying Mustafa's Motion for Entry of Satisfaction. For this separate and independent reason, this Court should reverse and enter Judgment for Mustafa.

II. THE TRIAL COURT COMMITTED A LEGAL ERROR IN DENYING MUSTAFA'S MOTION FOR RELIEF FROM JUDGMENT, CONSTITUTING AN ABUSE OF DISCRETION.

A. The judgment is void because the trial court denied Mustafa his due process rights by holding a damages-only hearing, without ever having defaulted Mustafa.

The South Carolina Rules of Civil Procedure offer various remedies for discovery violations. For example, under South Carolina Rule of Civil Procedure 37(2)(C), these remedies could include a court "striking out pleadings or parts thereof . . . **or** dismissing the action **or** proceeding or any part thereof, **or** rendering a judgment by default against the disobedient party") (emphasis added). The plain language of Rule 37 provides that striking a pleading is distinct from rendering judgment by default. This Court has acknowledged the same. *See Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999) ("If a party fails to obey an order to provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment.") (emphasis added).

Here, no default was ever entered against Mustafa. The court merely struck Mustafa's Answer. (Form 4 Order Striking Answer). The ruling did not also state that a default judgment was being entered against Mustafa, pursuant to Rule 37, Rule 55(a), or any other authority. Nor was any subsequent such Order entered. *Cf.* SCRCP 55(a) ("When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default upon the calendar (file book).").

What is more, the ruling striking Mustafa's Answer is not the functional equivalent of a default judgment. To be sure, the two events are separate and distinct. SCRCP 37(2)(C) (stating that a court may issue an order "striking out pleadings or parts thereof … **or** dismissing the action

or proceeding or any part thereof, **or** rendering a judgment by default against the disobedient party") (emphasis added).

Because Mustafa's Answer was stricken, the case should have been placed on the jury trial roster. Instead, despite the fact that no default had been entered against Mustafa, the court proceeded immediately to a damages-only hearing that culminated in the judgment.

But the judgment is void and unenforceable, in that Mustafa was deprived of his due process rights—including the right to challenge entry of a default judgment and to have the claim against him resolved by a jury. *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002) ("The definition of void under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction."); *Dymon, Inc. v. Hyman*, 305 S.C. 170, 172, 406 S.E.2d 388, 389 (Ct. App. 1991) ("[A] default judgment rendered without the required notice constitutes a deprivation of due process of law and is void.").

For this reason, the trial court should have granted Mustafa's Motion requesting relief from the void Judgment. SCRCP Rule 60(b)(4) (stating that a party may be relieved from a void judgment). The court's failure to have granted such relief was premised on its mistaken belief that the judgment was not void. This error is purely legal in nature, meaning that the court ***necessarily*** abused its discretion in denying relief from the void judgment. Thus, this Court should reverse the Order Denying Mustafa's Motion for Relief from the Judgment.

B. The trial court erred in finding the Motion for Relief untimely.

Rule 60(a) imposes no time limit on motions made thereunder. SCRCP 60(a) ("Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court *at any time* of its own initiative or on the motion of any

party ….") (emphasis added).

Motions under Rule 60(b)(1), Rule 60(b)(2), and Rule 60(b)(3) must be brought within one year of entry of the challenged judgment or order. *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 289, 457 S.E.2d 340, 342 n.2 (1995) (recognizing that motions made pursuant to Rule 60(b)(1), (2), and (3) may be filed within one year after the order was entered).

Motions under Rule 60(b)(4) and 60(b)(5) must be brought within an unspecified "reasonable time." *See Perry v. Heirs at L. of Gadsden*, 357 S.C. 42, 48, 590 S.E.2d 502, 505 (Ct. App. 2003) (recognizing that motions under 60(b)(5) are not subject to the requirement that they be filed within one year of the judgment and merely must be filed within "a reasonable time"); *Smith Companies of Greenville, Inc. v. Hayes*, 311 S.C. 358, 359, 428 S.E.2d 900, 902 (Ct. App. 1993) ("Under Rule 60(b)(4) and (5), the court may grant a party relief from judgment if the party makes a motion seeking relief within a reasonable time.").

Here, pursuant to Rule 60(a) and Rule 60(b) of the South Carolina Rules of Civil Procedure, Mustafa moved for relief from the Order refusing to vacate the Order striking his Answer and for relief from the Judgment. In denying Mustafa's post-trial Motions, the trial court appeared to believe that Mustafa's Motions were untimely. But the trial court's own timeline of critical events shows otherwise:

> Defendant's Answer was struck on June 1, 2022. Defendant's motion to vacate was not filed until March 17, 2023. Judge Price denied the motion on August 9, 2023, and the instant Motion was not filed until May 31, 2024.

(Form 4 Order Denying Motion for Relief, p.1).

According to this timeline, every one of Mustafa's post-judgment Motions were timely. Mustafa's Motion pursuant to Rule 60(a) was plainly subject to *no* deadline. SCRCP 60(a) (stating that motions seeking relief under this rule may be brought "at any time"). Mustafa's Motion

pursuant to Rule 60(b)(1), Rule 60(b)(2), and Rule 60(b)(3) had been brought within one year of the entry of the Order denying his Motion to Vacate the Order Striking his Answer—or by August 9, 2024.[3] The Motion was timely filed on May 31, 2024, well within the rule's stated deadline. Mustafa's Motion pursuant to Rule 60(b)(4) and 60(b)(5) was filed within the same timeframe, and the trial court made no finding that the timing of the latter Motion was unreasonable.

For these reasons, there is no merit to the trial court's apparent belief that Mustafa's post-trial Motions were untimely. To the extent this mistaken belief persuaded the court to deny relief, the trial court committed a legal error and thereby abused its discretion.

C. Mustafa properly preserved all errors.

By this appeal, Mustafa challenges the purported June 2, 2023 oral ruling refusing to vacate the Order striking his Answer and the August 9, 2023 Order reflecting the same, as well as the August 9, 2023 Judgment in the amount of $4,198,672.14. (August 9, 2023 Written Order; Form 4 Order of Judgment). Mustafa's post-trial Motions sought relief from *both* the June 2, 2022 ruling *and* the August 9, 2023 Judgment (both the Form 4 Order of Judgment and the written Order of Judgment). But the trial court only partially resolved Mustafa's post-trial Motions, denying solely that branch of the post-trial Motions directed at the June 2, 2023 purported oral ruling:

> Defendant has failed to meet his burden of showing grounds under Rules 60(a) or 60(b), SCRCP, sufficient to vacate the order denying Defendant's Motion to Vacate Judge Culberson's Order striking Defendant's Answer. The Order contains no clerical mistakes or ambiguities which would give rise to relief under Rule 60(a). Furthermore, Plaintiff[4] has failed to show sufficient grounds for relief under Rule 60(b).

(Form 4 Order Denying Appellant's Motion for Relief, p.1).

Because the court overlooked that branch of the post-trial Motions directed at the August

[3] Even assuming the court orally denied the Motion to Vacate on June 2, 2023, Appellant's Motion is still timely.

9, 2023 judgment, Mustafa repeated his request for a ruling on that issue, pursuant to South Carolina Rule of Civil Procedure 59(e). (Appellant's Motion to Reconsider, p.3) Without offering any reasoning, the trial court summarily denied the latter Motion. (Form 4 Order Denying Motion to Reconsider Appellant's Motion for Relief from Judgment).

Under these circumstances, Mustafa properly preserved his challenge to both the June 2, 2023 ruling and the August 9, 2023 judgment. *See Johnson v. Lloyd*, 407 S.C. 610, 612, 757 S.E.2d 705, 706 (2014) ("A party must file a Rule 59(e), SCRCP, motion to preserve an issue the trial court fails to rule on.").

D. <u>The trial court erred in failing to set aside the Judgment on the basis of mistake, inadvertence, surprise, and/or excusable neglect</u>.

In crafting a discovery sanction, a trial court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice. *Griffin Grading & Clearing, Inc.*, 334 S.C. at 199, 511 S.E.2d at 719. "The sanction should be aimed at the specific misconduct of the party sanctioned . . . . In other words, the sanction should be a rifle-shot, not a shotgun blast." *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct. App. 1990). In other words, the sanction imposed should be reasonable, and a court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case. *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 543, 489 S.E.2d 679, 682 (Ct. App. 1997).

In determining whether to grant relief under Rule 60(b)(1), a court must consider the following factors: (1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party. *Nelson v. Nelson*, 428 S.C. 152, 174, 833 S.E.2d 432, 443 (Ct. App. 2019).

Here, the striking of Mustafa's answer was an unduly harsh sanction, in comparison to the

conduct constituting the supposed discovery violation: Mustafa's inadvertent failure to respond to two deposition notices, where he reasonably—albeit mistakenly—believed that his appearance was unnecessary because the case had settled. (Affidavit of Mustafa). Mustafa had not repeatedly and contumaciously defied any discovery orders. In fact, Mustafa had not defied ***any*** Orders prior to the striking of the Answer. Nor had any lesser sanction been previously imposed, in a failed attempt to coerce Mustafa's deposition appearance. To the extent any sanction at all was warranted for two instances of inadvertent discovery violations, there was a full panoply of more narrowly tailored sanctions available—for example, an attorneys' fees award or an Order compelling Mustafa's deposition attendance.

Under these circumstances, the trial court abused its discretion in imposing an excessively harsh sanction. *Compare Balloon Plantation*, 303 S.C. at154 (recognizing the sanction of striking an Answer for a defendant's failure to comply with a single Order compelling discovery was unduly harsh), *with Griffin Grading & Clearing, Inc.*, 334 S.C. at 199, 511 S.E.2d at 719 (affirming the sanction of striking an answer where the Court had issued four prior orders, without meaningful compliance by defendant, and had imposed a prior lesser sanction of the assessment of attorney's fees that did not result in defendant's meaningful compliance).

Because the sanction was excessively harsh, Mustafa was entitled to relief from the sanction. All relevant factors militate in favor of this conclusion.

First, although nine months passed between entry of the Order Striking Mustafa's Answer and the filing of Mustafa's Rule 60(b) Motion seeking relief from that Order, there was good reason for the delay. As Mustafa's unchallenged Affidavit demonstrates, he made a good faith mistake. Mustafa, a college student at the time, failed to appear at his deposition because he understood that entering into the 2018 Agreement "fully resolved" the claims against him.

(Mustafa Affidavit ¶ 6). Mustafa also believed that he had "no continuing obligation to participate in any lawsuit that may be filed" as a result of this settlement agreement. (Mustafa Affidavit ¶ 6) This belief, albeit mistaken, is understandable, as the 2018 Agreement itself specifically provided that Tracy agreed to "promptly satisfy the judgment" in the event of any judgment against Mustafa. As soon as he understood that his belief was mistaken, Mustafa reengaged Travelers-retained legal counsel, who immediately moved to vacate the Order Striking the Answer. This undisputed evidence conclusively demonstrates Mustafa's good faith mistake. *Williams v. Watkins*, 384 S.C. 319, 324, 681 S.E.2d 914, 917 (Ct. App. 2009) ("In order to gain relief under Rule 60(b)(1), SCRCP, a party must first show a good faith mistake of fact has been made ….").

Second, Mustafa had meritorious defenses to Tracy's lawsuit—to wit, his conduct was not the proximate cause of Tracy's alleged injuries and, in any event, Tracy sustained no monetary damages. Mustafa was prepared to testify about conversations he had with Tracy at the accident site, which led him to believe she was not injured. (Mustafa Affidavit). What is more, Tracy did not report any injuries to the responding police officer and EMS was not called to the scene. (Mustafa Affidavit).

In light of this evidence, Mustafa should have been allowed to present his meritorious defenses to a jury for resolution. The fact that Mustafa might not have ultimately prevailed on those defenses is irrelevant to the inquiry. *Thompson v. Hammond*, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989) ("[A] meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence.").

Confirming that Mustafa's defenses were meritorious is the fact that Tracy never requested

a lesser sanction. The reason is because Tracy had hoped to prevail on a technicality, so as to dodge Mustafa's meritorious defenses. Wielding the discovery rules as a sword rather than a shield, Tracy engaged in gamesmanship, seizing on Mustafa's inadvertent discovery violation to bypass a trial on the merits.

Third, while Tracy will claim she would have been prejudiced by vacatur of the Order Striking Mustafa's Answer, the key point is that she would not have been *unduly* prejudiced. This is particularly true, considering that South Carolina public policy strongly favors "the trial of cases on their merits." *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 274 S.E.2d 290 (1981).

For these reasons, the trial court's sanction Order lacks reasonable factual support and unfairly prejudiced Mustafa's due process rights. It follows that the court abused its discretion. *Karppi.*, 327 S.C. at 542, 489 S.E.2d at 681 ("An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law.").

While the court's Order would normally be entitled to deference on appeal, that is not true here. This is because, in its written Order, the court failed to address ***any*** of the factors governing imposition of discovery sanctions—particularly a sanction as harsh as striking a party's pleadings. Therefore, there is no basis on which this Court could possibly defer to the trial court.

In sum, the sanction of striking Mustafa's Answer cannot stand. This Court should reverse the Order Denying Mustafa's Motion for Relief from the Judgment.

E. The trial court erred as a matter of law in failing to set aside the judgment on the basis of satisfaction.

Relief may be granted from a satisfied judgment. SCRCP 60(b)(5) (allowing relief from a final judgment, order, or proceeding, if "the judgment has been satisfied, released, or discharged, or … it is no longer equitable that the judgment should have prospective application").

Here, even assuming the judgment was otherwise valid and enforceable, the trial court still erred as a matter of law by refusing to grant an offset. The trial court entered judgment in the exact amount Tracy requested in her Affidavit, presented at the damages-only hearing. The judgment did not account for the fact that it has already been satisfied—either fully, by operation of the 2018 Agreement's "prompt satisfaction" language, or partially, by virtue of Travelers' prior payment to Tracy of $175,000 for the identical damages. (2018 Agreement). Without offsetting at least Travelers' prior payment, Tracy has received a double recovery to the extent of $175,000—an unwarranted windfall. *See Truesdale v. S.C. Highway Dep't*, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975) ("[I]t is almost universally held that there can be only one satisfaction for an injury or wrong."), *overruled on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985).

For these reasons, Mustafa was entitled to either a full or partial offset against the judgment. Consequently, the trial court should have granted Mustafa's Rule 60(b)(5) Motion for relief from the Judgment.

F. <u>The trial court erred in failing to grant relief under Rule 60(a)(1)</u>.

At any time, a court may correct clerical mistakes in judgments, orders, or other parts of the record. SCRCP 60(a). The "mistake" must be one where "there is an inconsistency between the text of an order or judgment and the ... court's intent when it entered the order or judgment," which "includes an unintended ambiguity that obfuscates the court's original intent." *Landry v. Landry*, 430 S.C. 153, 161, 843 S.E.2d 491, 495 (2020) (quoting *Sartin v. McNair Law Firm*, 756 F.3d 259, 265 (4th Cir. 2014)).

Here, the trial court erred in failing to acknowledge ambiguities and/or errors in the Order of Judgment and the Form 4 Order of Judgment. These omissions and/or errors, including the trial

court's failure to issue a written Order following the Form 4 Order of Judgment as indicated and the Order of Judgment. Indeed, while the Form 4 Order of Judgment indicated, that a formal Order would follow, there is no Order attached to the Form 4 Order of Judgment, and the Court did not file an Order subsequent to the Form 4 Order of Judgment.[5]

Additionally, the Form 4 Order of Judgment's failure to account for Travelers' undisputed $175,000.00 prior payment, create an ambiguity in the text of the Orders that obfuscates the court's original intent and/or constitutes a mistake. Based on the foregoing, this Court should reverse the trial court's denial of Mustafa's Motion for Relief from the Judgment.

CONCLUSION

For the reasons stated above, Mustafa respectfully requests that this Court: (1) vacate the August 9, 2023 judgment for Tracy and instead enter judgment for Mustafa; (2) alternatively, vacate the June 2, 2023 purported oral ruling refusing to vacate the Order Striking Mustafa's Answer and remand for additional proceedings consistent with that ruling; and (3) grant such further and additional relief as this Court deems just.

TURNER PADGET GRAHAM & LANEY, PA

June 20, 2025

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[5] Notably, the document entitled "Order of Judgment" was filed *before* the Form 4 Order of Judgment, meaning that it cannot constitute the forthcoming order referenced in the Form 4 Order of Judgment.