THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge
Deadra L. Jefferson, Circuit Court Judge

Case No. 2011-CP-08011
Appellate Case No. 2018-000460

Assistive Technology Medical Services, LLC,
Respondent,

v.

Hood & Selander, CPAS, LLC; Donna C. Cash, as Personal Representative of the Estate of Dorothy A. Connelly; W.E. Applegate, III, as Personal Representative of the Estate of James B. Connelly; Kimberly Cuce; and Phillip DeClemente,
Defendants,

Of whom Phillip DeClemente is the Appellant.

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Appellant, Phillip DeClemente, respectfully petitions this Court for rehearing pursuant to Rule 221, SCACR. In light of the important issues in this case, Appellant suggests that the Court rehear this matter *en banc* pursuant to Rule 219, SCACR.

Summary of Grounds for Rehearing and Consideration *en banc*

Appellant's first ground for rehearing is based upon this Court's erroneous affirmation of the lower court's order denying Appellant relief from entry of default. This Court's Opinion cites one decision as guidance – *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009). Appellant agrees that *Sundown* provides proper guidance for granting relief from entry of default under Rule 55(c), SCRCP. Appellant submits that the Court overlooked and failed to consider the evidence establishing the factors *Sundown* requires for relief from default entry. The fact that the Court overlooked all of Appellant's evidence establishing Rule 55(c) and Rule 60(b) factors is partially demonstrated in the Court's erroneous statement that, "Appellant failed to show any of the necessary elements under Rule 60(b)." This Court failed to acknowledge and rule upon the sufficiency of Appellant's "reasons why vacation of default entry would serve the interests of justice." This Court's Opinion incorrectly states, "Appellant did not put forth a satisfactory explanation for the default. This finding is well supported by the record, and not controlled by an error of law." It is axiomatic that the Court cannot rule upon the sufficiency of an explanation without first acknowledging its existence, which this Court failed to do. Proper interpretation and application of the Supreme Court's *Sundown* decision poses a "question of exceptional importance," and Appellant suggests this matter is reheard *en banc*. Rule 219(a), SCACR.

Appellant's second ground for rehearing is based upon this Court's failure to address and rule upon Appellant's argument that the Full and Final Release (hereinafter, "Release") requires that the damages judgment be entered in the clerk of court's record as "satisfied." This Court's Opinion states, "further, we disagree with Appellant's contention that the lower court should have considered the "full and final release" executed by the parties when determining damages."

This statement establishes that the Court misapprehended Appellant's argument concerning the Release. Appellant has never argued that the lower court should have considered the Release "when determining damages." Rather, Appellant has always argued that once the amount of damages was ordered in the damages judgment, *then* the lower court was required to examine the Release and rule whether or not the damages satisfaction provision requires Respondent to satisfy the damages judgment. The lower court erroneously failed to make this ruling, and this Court has also overlooked this issue and failed to rule.

Appellant's third and final ground for rehearing is that this Court overlooked and failed to rule upon the third issue presented in his Final Brief. The third issue, as written in Appellant's Statement of Issues on Appeal, reads as follows: "Did the trial court commit error by ordering DeClemente to pay damages?" (Appellant's Final Brief, p. 1). This issue was divided and argued in three separate sub-parts:

A. Did the trial court commit error by failing to allow DeClemente's presence at important stages of the damages hearing?

B. Did the trial court commit error by failing to order the judgment satisfied, as required by the Full and Final Release?

C. Did the trial court commit error by allowing ATMES's CPA to testify as an expert witness against his former client, DeClemente?

(Appellant's Final Brief, p. 1).

"In order to prevail on a petition for rehearing, appellants must demonstrate the court overlooked or misapprehended their argument." *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001) (citing Rule 221(a), SCACR). In rendering its opinion,

this Court overlooked every material fact contained in the record and misapplied controlling authority. For these reasons, detailed *infra*, Appellant respectfully requests rehearing.

ARGUMENT

I. *SUNDOWN* PROVIDES THAT A SHOWING OF AT LEAST ONE 60(b) FACTOR IS SUFFICIENT TO SHOW "GOOD CAUSE" FOR RELIEF FROM DEFAULT ENTRY, SUCH SHOWING TO BE EVALUATED UNDER THE LESS RIGOROUS SCRCP 55(c) STANDARD.

Sundown addresses "confusion in the case law regarding the application of the standards for relief [from default] set forth in Rule 55(c) and Rule 60(b)." *Sundown*, 383 S.C. at 607, 681 S.E.2d at 888. Appellant submits that this Court's decision is rooted in the same confusion which *Sundown* sought to address. As a result, this Court has misapplied the law, and overlooked the evidence entitling Appellant to relief from default entry.

"[A]n entry of default may be set aside for reasons that would be insufficient to relieve a party from default judgment." *Sundown*, 383 S.C. at 607, 681 S.E.2d at 888. In contrast with Rule 55(c)'s "good cause" standard for relief from entry of default, relief from default judgment "requires a more particularized showing of [one of the Rule 60(b) factors]." *Id.* "The different standard underscores the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgment." *Id.* Appellant has appealed the lower court's entry of default against him. Therefore, the lesser "good cause" standard applies. Appellant's appeal of default judgment pursuant to Rule 60(b) and the heightened standard is addressed in his Final Reply Brief. (Appellant's Reply Brief, pp. 4-5).

Under *Sundown*, when a party seeks Rule 55(c) relief from entry of default, "proof of any one of [the Rule 60(b), SCRCP] factors is sufficient to show "good cause." " *Id.*, 383 S.C. at 608, 681 S.E.2d at 889. *Sundown* affords parties relief from entry of default by demonstrating good cause through establishing one of the Rule 60(b) factors.

When a party is seeking to obtain relief from entry of default under a Rule 60(b) factor, the lesser 55(c) "good cause" standard still applies. In contrast, the heightened "particularized finding" standard only applies when a party is seeking relief from default judgment under Rule 60(b), SCRCP. The *Sundown* court cautioned trial courts against applying a heightened standard to Rule 55(c) motions which utilize proof of a Rule 60(b) factor. *Id. Sundown* reiterates that 60(b) factors are always relevant to 55(c) analysis. *Sundown*, 383 S.C. at 609, 681 S.E.2d at 889 (citing *New Hampshire Ins. Co. v. Bey Corp.*, 312 S.C. 47, 50, 435 S.E.2d 377, 378-79 (Ct. App. 1993)).

Appellant's arguments for relief from entry of default are based, in part, upon mistake, inadvertence, excusable neglect, misrepresentation and adverse party misconduct under Rule 60(b), SCRCP. Appellant is entitled to relief from default entry under both the traditional Rule 55(c) analysis and also analysis incorporating consideration of Rule 60(b) factors. The trial court's analysis of Appellant's arguments for relief from entry of default was conducted only under the Rule 55(c) framework and failed to acknowledge Appellant's overwhelming evidence of Rule 60(b) factors. This Court's Opinion overlooked the explanations for Appellant's untimely answer and motion for relief from default, including the presence of mistake, inadvertence, excusable neglect, and opposing party misconduct. The opposing party misconduct pertains to the fact that Respondent filed suit against Appellant in violation of a binding contract prohibiting such suit. (R. p. 96). This unconscionable behavior caused Appellant to be surprised by the lawsuit. This Court overlooked Appellant's meritorious, absolute defense and the lack of prejudice to Respondent. Appellant's briefs clearly demonstrate the existence of a meritorious defense and Respondent's failure to show the lower court how any prejudice would arise from granting Appellant relief from default. This Court also overlooked Appellant's evidence of Rule

60(b) factors, mistakenly stating, "Appellant failed to show any of the necessary elements under Rule 60(b)."

a. The Case at Bar is Factually Distinguishable From *Sundown*.

Appellant's briefs argue, in part, that evidence of excusable neglect, inadvertence, mistake, misrepresentation, and adverse party misconduct under Rule 60(b)(1), in conjunction with a reasonable explanation for untimeliness, is sufficient to show good cause warranting relief from entry of default. This argument was not addressed in this Court's Opinion. The Opinion summarily affirms the lower court's erroneous order denying Rule 55(c) relief. That order is based entirely upon the court's finding that Appellant's formal motion for relief from default entry "was not prompt." (R. p. 9). The lower court failed to consider the totality of the circumstances and appears to find that the delay was caused solely by attorney mistake. The lower court cites *Sundown*, but *Sundown* is clearly distinguishable from the case at bar.

The case at bar is importantly different than *Sundown* because here Appellant shares no responsibility for the time which accrued after retaining counsel on May 9, 2012. The nine week delay between Appellant's notice of representation/intent to defend against default, (R. p. 708), and the filing of a formal motion for relief from default, (R. pp. 62-63), is attributable, in part, to the clerk of court's mistaken failure to enter default. The failure to enter default led Appellant's counsel to mistakenly fail to include a formal motion for relief from default with his prompt May 14, 2012 default-related filing and notice of appearance. (R. p. 708). Another important difference between *Sundown* and the case at bar is that in *Sundown* the petitioner put forth "*no*" explanation for failing to respond to the first summons and complaint served upon it. *Sundown*, 383 S.C. at 609, 681 S.E.2d at 889 (emphasis added). In the case at bar, Appellant has informed the lower court and this Court of multiple explanations.

In addition to the three mistakes surrounding entry of default, Appellant was suffering from mental illness, (R. pp. 100-122), and did not recognize his duty to respond to the complaint because Respondent had contractually promised to never sue him. The lower court's April 30, 2014 order denying Appellant relief from entry of default states, "[Appellant] knew he had to answer the Complaint." (R. p. 9).[1] However, this statement is in contradiction with statements made on the record during Appellant's December 16, 2013 hearing on his motion for relief from entry of default. (R. p. 223, Lines 17-25, p. 224, Lines 1-4).

The totality of the circumstances involved in this case are factually distinguishable from the facts presented to the Supreme Court in *Sundown*. Unlike the petitioner in *Sundown*, Appellant has submitted evidence of "good cause" for vacation of default entry.

b. The Arguments made by Appellant are Legally Distinguishable From Those Made by the Petitioner in *Sundown*.

The circuit and Appellate Courts have also both failed to apply *Sundown*'s mandated consideration of Rule 60(b) elements. Although Rule 60(b) addresses relief from default judgment, and the petitioner in *Sundown* had not provided the Court with evidence of 60(b) factors, the *Sundown* Court confirmed that "proof of any one of [the Rule 60(b)] factors is sufficient to show good cause" for relief from entry of default under Rule 55(c). *Sundown*, 383 S.C. at 608, 681 S.E.2d at 889.

The same analytical framework for relief from default judgment under Rule 60(b), SCRCP, is used when analyzing Rule 55(c) relief from default entry, with one important difference: relief from default entry requires that evidence of 60(b) elements must only meet the less rigorous "good cause" standard rather than the heightened standard for relief from default

[1] The lower court's order and this Court's Opinion also reference Appellant as having "the benefit of prior counsel." It is worth noting that any prior consultation did not amount to formal representation in this matter, and that prior counsel never entered appearance on Appellant's behalf.

judgment. *See*, *Sundown*, 383 S.C. at 608, 681 S.E.2d at 889 (cautioning courts against "apply[ing] a heightened standard to Rule 55(c) motions" based upon proof of a 60(b) factor).

In addition to evidence of Rule 60(b)(3) and Rule 60(b)(5) factors,[2] Appellant's brief also establishes 60(b)(1) as evidence of "good cause" for relief from default. (Appellant's Brief pp. 18-21). Case law discussing relief from default judgment under Rule 60(b)(1), provides guidance for the analysis required under 60(b)(1) when applied to cases involving relief from default entry. Rule 60(b)(1), SCRCP, provides "mistake, inadvertence, surprise, or excusable neglect" as specified grounds for relief default judgment. In addition to these factors, trial courts are required to consider the following factors in determining whether to set aside default judgment or, as applied in this case, entry: 1) the promptness with which relief is sought, 2) the reasons for failure to act promptly, 3) the existence of a meritorious defense, and 4) the prejudice demonstrated by the party opposing the motion. *McClurg v. Deaton*, 380 S.C. 563, 573, 671 S.E.2d 87, 93 (Ct. App. 2008).

When courts analyze relief from default judgment under Rule 60(b)(1), emphasis is placed on the existence of a meritorious defense in comparison to the other factors. In *McClurg v. Deaton*, this Court stated "that in order to obtain relief from a default judgment under Rule 60(b)(1) . . ., not only must the movant make a proper showing he is entitled to relief based upon one of the specified grounds, he must also make a prima facie showing of a meritorious defense." *Id.*, at 573, 671 S.E.2d at 93; *Tri-County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990) (holding, that in order to obtain relief from a default judgment pursuant to Rule 60(b)(1), the movant must also show a meritorious defense); *Thompson v. Hammond*, 299 S.C. 116, 119, 382 S.E.2d 900, 903 (1989) (holding, that to justify relief under

[2] Appellant has also established evidence of Rule 60(b) subsection (3), fraud, misrepresentation, or other misconduct of an adverse party, and subsection (5), the judgment has been satisfied, released, or discharged, as contractually required by the Release. (Appellant's Final Reply Brief p. 4).

Rule 60(b)(1), a party must establish that he has a meritorious defense and that judgment was taken against him by mistake, inadvertence, or excusable neglect). This Court has also guided trial courts to consider the presence or absence of prejudice to the opposing party when ruling on 60(b)(1) motions for relief from default judgment. *See*, *Stearns Bank Nat. Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 341, 644 S.E.2d 793, 789 (Ct. App. 2007).

Case law discussing analysis of Rule 60(b)(1) directs trial courts to grant relief from entry of default under Rule 55(c) when a party provides evidence of: 1) excusable neglect or mistake; and 2) the existence of a meritorious defense. *Eg.*, *McClurg*, 574-575, 671 S.E.2d at 93-94. Trial courts are also directed to consider the degree of prejudice to the opposing party. *Stearns Bank Nat. Ass'n*, 341, 644 S.E.2d at 789. Appellant's Brief addresses each such element with sufficient evidence. (Appellant's Final Brief, pp. 18-25). As stated in *Sundown*, this showing is considered under the mere "good cause" standard, as opposed to the heightened "particularized finding" standard. *Id.* at 608, 681 S.E.2d at 889.

c. This Court's Opinion Overlooked Material Evidence in the Record Establishing Mistake, Excusable Neglect, Inadvertence, Adverse Party Misconduct, Meritorious Defenses, and Lack of Prejudice.

The evidence in this case proves the existence of at least one meritorious defense and lack of prejudice to Respondent. Judge Nicholson and Respondent both acknowledged that the Release was a meritorious defense at the December 16, 2013 hearing on Appellant's motion for relief from entry of default. (Appellant's Final Brief pp. 21-25). In addition to overlooking this crucial evidence, this Court also overlooked the fact that the clerk of court mistakenly failed to enter default against Appellant. Over sixteen months after Appellant had moved for relief from default, (R. 62-63), and after Respondent sought and was granted *eight* continuances on Appellant's motion for relief, the trial court verbally entered default against Appellant. (R. p.

214). The clerk of court's mistake and excusable neglect, combined with Respondent's failure to ensure that default was entered, led to Appellant's mistake and excusable neglect in waiting nine weeks to file a formal motion for relief from default, and weighs against this Court's finding that Appellant's motion for relief was untimely.

Following Mr. Murrell Smith's June 12, 2012 letter to Appellant's counsel, in which he refused to remedy Respondent's financial delinquency and stated that Appellant was in default, (R. pp. 84-85), Appellant's counsel investigated the underlying complex lawsuit and on August 10, 2012 filed an answer, counter-claims, cross-claims, and motion for enlargement of time in which to answer. (Appellant's Final Brief p. 4).

Respondent filed an affidavit of default on March 30, 2012, (R. pp. 60-61), but took no action to make sure that default was entered by the clerk of court. Default was not entered by the lower court until December 16, 2013, when the lower court acknowledged that default had not been entered and that Respondent had done nothing since filing its affidavit in March of 2012. *See*, (R. p. 212, Lines 22-24) (the lower court stating to opposing counsel, "There's never been an Entry of Default. All that's been filed is an Affidavit of Default. Ok?"); (R. p. 214, Lines 13-16) (the lower court stating to opposing counsel, "One thing I was trying to make sure, is that you realized there was nothing that had been filed as a result of your Affidavit of Default, is what I'm trying to make sure you understand").

Rule 55(a), SCRCP, requires the clerk of court to enter default. Since the clerk had mistakenly failed to enter default, Appellant was mistaken as to whether a formal motion for relief from default was required. It is axiomatic that a party cannot be relieved from something which does not exist. The clerk's mistaken failure to enter default, Respondent's failure to ensure that default was entered, and Appellant's resulting mistaken failure to more quickly file a

formal motion for relief from entry of default – when default had not yet been entered – are mistakes relevant to Appellant's showing of "good cause" for vacation of default entry. *See*, *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 608, 681 S.E.2d 885, 889 (2009) (stating, "proof of any one of [the Rule 60(b), SCRCP] factors is sufficient to show "good cause"" for vacation of entry of default); *see also*, Rule 60(b)(1), SCRCP (listing, "*mistake*, inadvertence, surprise, or excusable neglect" as grounds for relief) (emphasis added).

The fact that this series of mistakes caused Appellant's failure to file a formal motion for relief from default is established by Appellant's May 14, 2014 court filing addressing potential default. (R. p. 708). That filing was made just five days after Appellant retained counsel. If at that time default had been entered, Appellant's counsel would have just as easily filed a formal motion for relief under Rule 55(c). This Court's Opinion overlooks these material facts, and rehearing is necessary.

II. *SUNDOWN* REQUIRES THE COURT TO CONSIDER "REASONS WHY VACATION OF DEFAULT ENTRY WOULD SERVE THE INTERESTS OF JUSTICE" IN DETERMINING WHETHER OR NOT A PARTY'S EXPLNATION FOR DEFAULT IS "SATISFACTORY."

The standard for granting relief from entry of default under Rule 55(c), SCRCP, is mere "good cause." Before *Sundown*, trial courts considered three factors – referred to as the *Wham* factors – in determining whether a party had met the good cause standard: 1) the timing of the motion for relief; 2) whether the defendant has a meritorious defense; and 3) the degree of prejudice to the plaintiff if relief is granted. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 500-01 (Ct. App. 1989).

In *Sundown*, the South Carolina Supreme Court introduced an initial threshold burden prior to consideration of the *Wham* factors – "satisfactory explanation for the default." *Sundown*, 38 S.C. at 609, 681 S.E.2d at 887 (emphasis added). Under *Sundown*, a party sets forth a

"satisfactory explanation for the default" by providing an explanation for the default and giving reasons why vacation of default entry would serve the interests of justice. *Id.*

Appellant submits that this Court misapplied *Sundown* by failing to consider whether "vacation of default entry would serve the interests of justice." This Court mandates that relief from default under Rule 55(c) should be liberally granted. *Melton v. Olenik*, 379 S.C. 45, 54, 664 S.E.2d 487, 492 (Ct. App. 2008) ("Rule 55(c) should be liberally construed to promote justice and dispose of cases on the merits."); *Ricks v. Weinrauch*, 293 S.C. 372, 374, 664 S.E.2d 535, 536 (Ct. App. 1987) (In reference to Rule 55(c), SCRCP, this Court stating, "this section is liberally construed to see that justice is promoted and to strive for the disposition of cases on their merits."); *Renney v. Dobbs House, Inc.*, 275 S.C. 561, 566-67 (1981) ("It is the policy of the law to favor the trial of cases on the merits.").

The Fourth Circuit Court of Appeals shares this same view:

> We have repeatedly expressed a strong preference that, as a general matter, defaults should be avoided and that claims and defenses be disposed of on their merits. ... This imperative arises in myriad procedural contexts, but its primacy is never doubted.

Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc., 616 F.3d 413, 417 (4th Cir. 2010); *see also*, *Tazco, Inc. v. Director, Office of Workers Compensation Program, U.S. Dep't of Labor*, 895 F.2d 949, 950 (4th Cir. 1990) ("The law disfavors default judgments as a general matter."); *Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951, 954 (4th Cir. 1987) ("an abuse of discretion in refusing to set aside default . . . need not be glaring to justify reversal"); *Tolson v. Hodge*, 411 F.2d 123, 130 (4th Cir. 1969) ("Any doubts about whether relief should be granted should be resolved in favor of setting aside default."). This Court's misapplication of *Sundown* conflicts with the requirement that Rule 55(c) be liberally construed to promote justice and dispose of cases on the merits.

Adherence to contractual precedent and promotion of judicial economy "serve the interests of justice" and are relevant to Appellant's "good cause" showing. The lower court and this Court erred by failing to acknowledge the parties' Release, the lower court's consideration of which would have led to the immediate dismissal of all Respondent's claims against Appellant. *E.g.*, *Southern Glass & Plastics Co. v. Duke*, 367 S.C. 421, 626 S.E.2d 19 (Ct. App. 2005) (finding the parties' release agreement was a bar to all subsequent claims); *Bowers v. Dept. of Transp.*, 360 S.C. 149, 600 S.E.2d 543 (Ct. App. 2004) (affirming lower court's summary judgment dismissal of all claims based on prior release agreement executed by the parties); *Hyman v. Ford Motor Co.*, 142 F.Supp.2d 735 (D.S.C. 2001) (applying South Carolina law in finding that the parties' release agreement was a bar to all subsequent claims).

This Court erred in finding that Appellant's explanation for the default was unsatisfactory, in light of the mistakes made by the clerk of court, Respondent, and Appellant, as well as other reasons discussed *supra* and in Appellant's briefs.[3] Analysis under the *Wham* factors is warranted. Appellant's delay in formally seeking relief from default was not extreme, approximately nine weeks, Appellant has an absolute, meritorious, contractual defense to Respondent's frivolous lawsuit and Respondent has shown no evidence of prejudice.[4] *See*, *Sundown*, 383 S.C. at 607-608, 681 S.E.2d at 888 ("Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." (citing *Wham*, 298 S.C. at 465, 381 S.E.2d at 500-01)).

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[3] Additional explanations in the record include the litigation's multi-party complexity, counsel's difficulty communicating with his mentally-ill client, delay with medical providers supplying mental health records, and counsel's belief that relief from default would best be asserted once the case was understood through document examination and the filing of an answer.

[4] Regarding the third factor, Respondent's showing of prejudice is only that it "would have done some things differently." (Appellant's Final Brief, p. 24-25).

This Court's incorrect application of *Sundown* allows Respondent to violate a binding contract without repercussion, and move forward with its nearly decade-old quest for unjust enrichment. No language in the *Sundown* Opinion can be interpreted as sanctioning such an adverse impact on judicial economy, contract law, precedent, and the interests of justice.

III. THIS COURT'S PASSING REFERENCE TO THE RELEASE MISAPPREHENDS APPELLANT'S ARGUMENT AND REQUIRES RECONSIDERATION.

This Court's misapprehension of Appellant's argument concerning satisfaction of the damages judgment led the Court to overlook material facts and controlling authority. The lower court's failure to amend its damages judgment and enter satisfaction of the damages award violates fundamental contract law and this State's public policy. Judge Jefferson erroneously ruled that Judge Nicholson had previously found that the Release could not be enforced on the issue of damages satisfaction. But, in fact, the issue was never raised to nor considered by Judge Nicholson. This Court also erred by overlooking and failing to rule upon Appellant's motion to have the Release enforced and the damages judgment entered into the record as "satisfied."

a. This Court Erred by Failing to Address Appellant's Argument that the Parties' Release Requires Satisfaction of the Damages Judgment.

Following the lower court's entry of its damages judgment, Appellant moved to amend the judgment pursuant to SCRCP 59.[5] Appellant set forth the following argument:

> Pursuant to SCRCP 59[(e)] [Appellant] requests that the Court's Order of Judgment be amended to state the judgment against him has been satisfied by the [full and final release]. The fourth paragraph of the [full and final release] states that [Appellant] is forever discharged from any damages awarded against him as a result of his business relationship with [Respondent].[6]

[5] Appellant's written motion was titled "MOTION TO AMEND JUDGMENT AND BE RELIEVED FROM JUDGMENT," wherein, he moved to amend judgment to reflect its satisfaction under SCRCP 59, and also moved for relief from default judgment under SCRCP 60. (R. pp. 160-61).

[6] Appellant had previously attempted to introduce the damages satisfaction clause of the Full and Final Release during the January 5, 2017 damages hearing. (R. pp. 508-510). However, Judge Jefferson, without justification, refused to consider the damages satisfaction clause. *See*, (R. p. 510, Lines 7-11) ("[Appellant's Counsel]: I can read

(R. p. 160) (emphasis added). Respondents filed a return in opposition to Appellant's motion, wherein they avoided addressing the Release's damages satisfaction provision, instead focusing on the finality of the lower court's earlier default judgment.

The lower court denied Appellant's motion to amend its damages judgment to conform to the Release's damages satisfaction provision, stating:

> [T]he Court has considered and ruled upon this very argument by [Appellant] on multiple occasions. ... Judge Nicholson considered the arguments as to default, including the full and final release, and nevertheless entered default judgment against [Appellant] on April 24, 2014. ... The instant Motion to Amend Judgment is merely the latest effort by [Appellant] to have entry of default against him vacated. In response, this Court reiterates that it does not have jurisdiction to overturn the default decision rendered by Judge Nicholson on April 24, 2014. ... [Appellant] is therefore not eligible for relief from judgment under Rule 59, SCRCP.[7]

(R. pp. 32-33). The Rule 59(e) portion of Appellant's motion does not request relief from entry of default, nor does it contest liability, nor does it contest the damages award entered by Judge Jefferson. Appellant's motion for relief from default judgment, made pursuant to SCRCP 60, bears no relation to his Rule 59(e) motion to amend the damages judgment to comply with the parties' Release contract.

The lower court emphasized Appellant's default status, and incorrectly merged the issue of liability with the issue of judgment satisfaction. Consequentially, the lower court improperly failed to consider and enforce the Release's damages satisfaction provision, which requires that Respondent satisfy the damages award.

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the [damages and satisfaction clause] if you would allow me. [Judge Jefferson]: No, I would assume it is a standard release that basically says you are not responsible for anything.") (emphasis added).

[7] Appellant is unaware of any authority which states that default status precludes parties from seeking, under Rule 59(e), to amend a damages award to conform with a binding contract between parties.

The lower court's damages judgment incorrectly states that Appellant's argument to have the judgment marked satisfied, in compliance with the Release's damages satisfaction provision, had already been ruled upon by Judge Nicholson. This is not true, as the damages satisfaction requirement was never even raised to Judge Nicholson. The section of the parties' Release requiring satisfaction of the damages judgment is as follows:

> [T]he undersigned do intend to and do hereby ... release, acquit, and forever discharge [Appellant] ... from any and all claims, actions, causes of action, demands, rights, damages, cost, loss of services, expenses and compensation whatsoever which the undersigned now has or which may have hereinafter accrue on account of or in any way growing out of any and all ownership interest or employment ... whether known or unknown, foreseen or unforeseen and any consequences thereof...

(R. p. 96) (emphasis added). Judge Jefferson failed to consider this damages Release and erred in denying Appellant's 59(e) motion for satisfaction of the damages judgment. This Court has also overlooked the Release's damages satisfaction provision, requiring rehearing.

b. This Court's Opinion Overlooks Fundamental Contract Law Requiring that the Damages Judgment be Reflected as "Satisfied."

The lower court failed to consider and enforce the Release's damages provision. This Court's Opinion also overlooks and fails to rule upon the damages satisfaction issue.

Under Rule 59(e), SCRCP, a party may file a motion to alter or amend judgment "when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). "The purpose of Rule 59(e), SCRCP, to alter or amend judgment is to request the trial judge to "reconsider matters properly encompassed in a decision on the merits."" *Arnold v. State*, 309 S.C. 157, 172-73, 420 S.E.2d 834, 842 (1992) (quoting *Budinich v. Becton Dickonson and Co.*, 486 U.S. 196, 200 (1988)). "A party cannot for the first time raise an issue by way of a Rule 59(e) motion which

could have been raised at trial." *Miller Constr. Co., LLC v. PC Constr. of Greenwood, Inc.*, 418 S.C. 186, 206, 791 S.E.2d 321, 332 (Ct. App. 2016). Where the circuit court fails to rule on an issue brought before it, a party must file a "Rule 59(e), SCRCP motion to amend or alter judgment on [that] ground" in order to preserve that issue for appellate review. *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991).

Appellant raised the Release's damages satisfaction requirement during the January 5, 2017 damages hearing. *See supra*, text accompanying note 6. Judge Jefferson refused to read and consider the Release. *Id.* Appellant then raised the Release's damages satisfaction clause in his January 8, 2018 Rule 59(e), SCRCP, Motion to Amend Judgment. Judge Jefferson again refused to consider the damages satisfaction clause and failed to rule whether or not the Release requires satisfaction of the damages judgment. The issue of judgment satisfaction is properly preserved for this Court's review and correction in accordance with controlling authority. *Noisette*, 304 S.C. at 58, 403 S.E.2d at 124. This Court's failure to rule on the issue requires rehearing.

This Court should now analyze the Full and Final Release in accordance with the principles of contract interpretation. *See*, *Wilson Group, Inc. v. Quorum Health Resources, Inc.*, 880 F.Supp. 416, 425 (D.S.C. 1995) ("In construing [a] release, the court must seek to ascertain and give effect to the intention of the parties") "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 document's force and effect." *Ecclesiastes Production Ministries v. Outparcel Assocs., L.L.C.*, 347 S.C. 483, 498, 649 S.E.2d 494, 501 (Ct. App. 2007) (citing *Superior Auto. Ins. v. Maners*, 261, 263, 199 S.E.2d 719, 722 (1973)). "If practical, documents will be interpreted to give effect to all of their provisions." *M & M Group, Inc. v.*

Holmes, 379 S.C. 468, 476, 666 S.E.2d 262, 266 (Ct. App. 2008) (citing *Ecclesiastes*, 347 S.C. at 498, 649 S.E.2d at 502)).

The Release's language is unambiguous: 1) Appellant is released from any and all claims, actions, and causes of actions; and 2) Appellant is forever discharged from any and all damages, cost, expenses, and compensation in any way related to Respondent or its other entities. (R. p. 96) (emphasis added). Both the lower court and this Court lack authority to strike the Release's damages satisfaction provision. *See*, *U.S. Bank Trust Nat. A'ssn v. Bell*, 385 S.C. 364, 379, 684 S.E.2d 199, 207 (Ct. App. 2009) ("[The Appellate Court is] without any authority to alter an unambiguous contract by construction or to make a new contract for the parties."). Regardless of whether the damages judgment was obtained by trial or default, this Court is required to enforce the Release's unambiguous damages provision. *See generally*, *S.C. Dept. of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 655, 677 S.E.2d 7, 13 (Ct. App. 2008) ("A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully."). Rehearing is necessary so that this Court may issue its ruling on enforcement of the Release's damages provision.

IV. THIS COURT'S OPINION OVERLOOKS APPELLANT'S THIRD ISSUE ON APPEAL AND ITS CORRESPONDING ARGUMENTS IN HIS FINAL BRIEF

The third issue, as written in Appellant's statement of issues on appeal reads as follows: "Did the trial court commit error by ordering DeClemente to pay damages?" (Appellant's Brief, p. 1). Under this main issue, Appellant presented this Court with three separate sub-issues:

A. Did the trial court commit error by failing to allow DeClemente's presence at important stages of the damages hearing?

B. Did the trial court commit error by failing to order the judgment satisfied, as required by the Full and Final Release?

C. Did the trial court commit error by allowing ATMES's CPA to testify as an expert witness against his former client, DeClemente?

(Appellant's Brief, p. 1). As stated in Section III of this Petition, *supra*, Appellant believes that this Court misapprehended his argument regarding the Issue on Appeal III(B). However, this Court's Opinion completely overlooked his arguments pertaining to Issue on Appeal III(A) and Issue on Appeal III(C).

The South Carolina Supreme Court has long held that default cases with large awards involving unliquidated damages should be viewed with great concern. *Renney v. Dobbs House, Inc.*, 275 S.C. 561, 566-67 (1981) ("It is generally recognized that courts should closely scrutinize default judgments to prevent harsh results and drastic action."). The South Carolina Supreme Court has stated the following with regard to such cases:

> It has been declared that no rule can be formulated setting a definite boundary beyond which a court of equity cannot go as a matter of power, or will not go as a matter of policy, in preventing the enforcement of an unconscionable judgment. Indeed, there is authority for the rule that in a proper case, a court of equity may look behind a judgment at law in order to do justice between parties, and that relief from a judgment may be decreed in equity where it is against the conscience to execute the judgment.

Renney, 275 S.C. at 567 (quoting 46 Am.Jur.(2d) *Judgments* § 807). Regardless of default status, "it is incumbent upon the judge ... to make a judicial determination of the amount recoverable based on the proof." *Id.* The South Carolina Supreme Court has also long adhered to the principle that even though a defaulting defendant has conceded to liability, "he does not concede to the *amount* of liability." *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 241-42, 246 S.E.2d 880, 881-82 (1978) (emphasis included). In *Howard*, the Supreme Court "held that where an

appearance has been made the defaulting party [is] entitled to participate in a limited way in the damages-assessment hearing." *Renney*, 275 S.C. at 567, 274 S.E.2d at 293 (citing *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E.2d 880 (1978)). "Participation by the defending party will give to the judge and/or jury a broader understanding of the amount which will be awarded and will tend to insure a more fair verdict and judgment." *Renney*, 275 S.C. at 568-69, 274 S.E.2d at 293.

The lower court's damages judgment is largely based upon the "expert" testimony of Mr. Art Bradham. Mr. Bradham worked as Respondent's CPA while Appellant was a partner in Respondent company. (Appellant's Brief, pp. 31-32). Discovery in this case revealed that both Jeff Reed and Murrell Smith also employ Mr. Bradham as their accountant for personal matters. (Appellant's Brief, pp. 30-31). Additionally, Appellant was not present when Mr. Bradham testified at the damages hearing. (Appellant's Brief, pp. 26-27). Despite counsel's best efforts, the lower court refused to continue Mr. Bradham's testimony to allow for Appellant to participate in the most important phase of the proceedings. These important issues were raised and argued in Section III(A) and Section III(C) of Appellant's brief. This Court's Opinion overlooked both arguments and failed to rule upon these issues. Rehearing is required.

CONCLUSION

Appellant respectfully requests that the Court grant rehearing in this matter and suggests that rehearing *en banc* is appropriate and warranted. For the reasons set out in his briefs, Appellant requests that this Court reverse the orders appealed from and remand this case for further proceedings and disposition on the merits.

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Respectfully submitted,

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Attorney for Appellant Phillip DeClemente

September 11, 2020
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge
Deadra L. Jefferson, Circuit Court Judge

Case No. 2011-CP-08011
Appellate Case No. 2018-000460

Assistive Technology Medical Services, LLC,
Respondent,

v.

Hood & Selander, CPAS, LLC; Donna C. Cash, as Personal Representative of the Estate of Dorothy A. Connelly; W.E. Applegate, III, as Personal Representative of the Estate of James B. Connelly; Kimberly Cuce; and Phillip DeClemente,
Defendants,

Of whom Phillip DeClemente is the Appellant.

PROOF OF SERVICE

The undersigned counsel for Appellant hereby certifies that he has served a copy of *Appellant's Petition for Rehearing and Suggestion for Rehearing en banc* on Respondent on the date shown below, by emailing a copy of the same to its counsel, addressed as follows:

James E. Smith, Jr.
1422 Laurel Street
Columbia, S.C. 29201
james@jamessmithpa.com
Counsel for the Respondent

September 14, 2020

s/ Cameron L. Marshall
S.C. Bar # 64192
7 Gamecock Ave., Ste 707
Charleston, South Carolina 29407
Telephone: (843) 795-2298
Email: cameron@attorneymarshall.com
Counsel for Appellant

CAMERON MARSHALL

ATTORNEY AT LAW

September 14, 2020

RECEIVED
Sep 14 2020
SC Court of Appeals

Honorable Jenny A. Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate St.
Columbia, SC 29201

RE: Assistive Technology Medical v. Phillip Declemente
Case No. 2018-000460

Dear Ms. Kitchings,

Please find enclosed a check for $50.00 for the filing of our Petition for Rehearing in the above referenced case. The petition was filed by email on September 14, 2020.

Thank you for your assistance in this matter.

Respectfully,

Cameron L. Marshall

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