THE STATE OF SOUTH CAROLINA
In The Supreme Court

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
J.C. Nicholson, Jr., Circuit Court Judge
Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2021-000038

Unpublished Opinion No. 2020-UP-255 (S.C. Ct. App. filed Dec. 23, 2020)

Assistive Technology Medical Equipment 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 .... Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner hereby certifies that a Petition for Rehearing was made and the Court of Appeals issued its final Opinion on December 23, 2020.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that Petitioner failed to demonstrate ‘good cause’ for relief, and did its Opinion conflict with *Sundown Operating Co. v. Intedge Indus., Inc.*?

   A. Did the Court of Appeals err in failing to consider DeClemente’s “reasons why vacation of default would serve the interests of justice,” in its ‘good cause’ analysis?

   B. Did the Court of Appeals err by failing to acknowledge DeClemente’s Rule 60(b) factors and by applying a heightened standard rather than the mere ‘good cause’ standard for relief from default entry?

2. Did the Court of Appeals err in affirming the denial of DeClemente’s Motion to Continue the damages hearing?

3. Did the Court of Appeals err in affirming the circuit court’s expert qualification of Art Bradham as an expert witness on damages?

4. Did the Court of Appeals err in failing to rule that the Damages Satisfaction provision of the parties Full and Final Release should have been considered and enforced at the damages hearing or by granting Petitioner’s Rule 59(e) Motion?

5. Did the Court of Appeals err in failing to address and rule on DeClemente’s Rule 60(b)(5) Motion for Relief from Judgment as required by the Release’s Damages Satisfaction provision?

STATEMENT OF THE CASE[1]

Synopsis of Factual Background

In 2008, Reliable Medical Equipment of South Carolina (Reliable), owned by Jeffery Reed and Murrell Smith, merged with Abacare Home Medical, Inc. ("Abacare"). (R. pp. 165:2-25, 166:1-10). Eighty percent (80%) of Abacare's stock was owned by the Estate of Dorothy Connelly, and the remaining twenty percent (20%) by Philip DeClemente, Petitioner. Prior to the merger's closing, Reed and Smith employed their CPA, Art Bradham to investigate Abacare and give them advice and insight on the financial aspects of the proposed merger. (R. p. 197 (Tr. 134:20-25, 135:1-2)).

In 2008, Reed, Smith, DeClemente and Kimberly Cuce became equal partners in their newly formed durable medical equipment company, Assistive Technology Medical Equipment Services, LLC (Respondent ATMES). (R. p. 181:16-21). (R. pp. 165:2-25, 166:1-10). On November 7, 2008, DeClemente assigned his Abacare ownership interest to ATMES, and ATMES purchased the remaining Abacare shares from the Connelly Estate. (R. pp. 626-631).

In June of 2009, DeClemente sold his 25% interest in ATMES back to the company. The sale's terms and conditions are contained in a "Bill of Sale and Transfer" a "Promissory Note" and a "Full and Final Release." (R. pp. 86-98). The Note is for $265,000, plus interest, and is partially personally guaranteed by Reed and Smith. The Note requires monthly payments of $7,341.84 to DeClemente. (R. p. 86). The Full and Final Release agreement prohibits ATMES

[1] "In cases seeking review of a decision of the Court of Appeals, Rule 242, SCACR, requires the Petitioner to file two copies of an Appendix. This requirement is suspended. Instead, the necessary documents to comprise the Appendix will be obtained from the electronic records of the case before the Court of Appeals." *See*, Order Re: Operation of Appellate Courts During the Coronavirus Emergency, Section (e) (As Amended May 29, 2020)). All citations herein shall be to the Record on Appeal, Briefs, and Petition for Rehearing filed with the South Carolina Court of Appeals in Appellate Case No. 2018-0000460.

and its remaining owners, Reed, Smith and Cuce from ever bringing suit against DeClemente, and to satisfy and discharge all damages he might incur, future and prior, known and unknown, in any way related to the parties' business relationship. (R. p. 96).

Synopsis of Litigation

On October 31, 2011, ATMES violated its Release agreement with Declemente when the company filed suit against him, Cuce, the Connelly Estate and Hood & Selander, CPAS, LLC, (Abacare's CPA firm). Respondent's lawsuit asserts nine causes of action stemming from the Abacare purchase, and alleges that the defendants overvalued Abacare's worth by not accurately disclosing the company's potential pre-purchase tax liability. (R. pp. 35-57). DeClemente was served with the lawsuit on December 1, 2011. *See*, (R. p. 9) (as stated by Judge Nicholson, incorrectly, but insignificantly, in his written Order entering default judgment).

On February 2, 2012, DeClemente suffered a severe psychiatric collapse. (R. p. 99). He was twice involuntarily hospitalized after using his car to block the Ravenel Bridge in Charleston, South Carolina. *Id*. The hospitalizations spanned February 2, 2012 through March 6, 2012, (R. pp. 111-112). Due to his ongoing illness and intensive outpatient treatment after hospitalization, including heavy dosages of Lithium and Thorazine, DeClemente signed over power of attorney to his father on March 23, 2012. (R. pp. 62-63, 111-112)

On March 30, 2012, Respondent's counsel filed an affidavit of default against Petitioner. (R. pp. 60-61). On May 9, 2012, Petitioner hired undersigned counsel, Cameron Marshall, to defend him against Respondent's contractually prohibited lawsuit and to collect the monthly installment payment arrearage ATMES owed Declemente pursuant to the parties' Promissory Note. On May 14, 2012, Marshall entered his appearance on the record. Since Respondents had not yet moved for entry of default or default judgment, and the Clerk had not entered default on

the record, Marshall and asked the Clerk of Court, by filed appearance letter, to inform him of any developments and scheduling on the issue of default so that he could appear and defend DeClemente's interests. (R. p. 708).

On June 8, 2012, Marshall sent Murrell Smith a letter requesting payment of the arrearage owed DeClemente, as required by the Promissory Note. (R. p. 709). On June 12, 2012, Smith responded by letter stating that Respondent had filed suit against DeClemente, who had failed to answer, and that Respondent was awaiting a default hearing. Though acknowledging ATMES indebtedness to DeClemente, Smith declined to honor the Promissory Note, stating that any money owed DeClemente would be set-off from the amount of any judgment which ATMES might secure as a result of Respondent's lawsuit against DeClemente. (R. pp. 84-85).

On August 10, 2012, Petitioner filed his Answer, Counterclaims and Crossclaims in Respondent's lawsuit, as well as a Motion for Enlargement of Time to Answer. (R. pp. 62-78). A hearing on Petitioner's Motion for Enlargement of Time was scheduled for September 22, 2012. However, ATMES moved for continuance of the hearing, and the continuance was granted. Respondent moved for continuance of the hearing on DeClemente's motion for relief from default entry five more times, and each time the motions were granted. (R. pp. 710-711). After DeClemente's motion for default relief was rescheduled for the sixth time, the motion was finally heard on December 16, 2013, more than sixteen months after DeClemente moved for relief. On November 5, 2013, DeClemente filed a memorandum in support of his motion (R. pp. 79-122). After hearing the parties, Judge Nicholson took DeClemente's motion under advisement.

On April 30, 2014, Judge Nicholson denied relief from entry of default and entered default judgment against DeClemente. (R. pp. 6-10). On May 5, 2014, Petitioner filed a Motion

for Reconsideration. (R. p. 129). Judge Nicholson entered a Form 4 Order denying Petitioner's Motion for Reconsideration on May 7, 2014.

Respondent moved for a damages hearing on September 19, 2016, and the hearing was initially scheduled for October 31, 2016. On October 28, 2016, DeClemente's counsel received notice from the Clerk of Court that the damages hearing would be rescheduled for November 1, 2016. Prior to the rescheduled November 1st hearing date, the Clerk of Court's office advised DeClemente's counsel that the hearing would not take place November 1st due to time constraints caused by an overflowing docket of previously scheduled cases. Petitioner lived in Florida at the time and was not able to change travel plans on such short notice to attend court on the rescheduled November 1st date. (R. p. 353:1-16). In an abundance of caution exercised to ensure protection of DeClemente's due process right to attend the hearing, and to ensure the court's awareness of the clerk's rescheduling of the hearing, DeClemente's counsel appeared on November 1st.

The case was in fact called for the damages hearing, and Petitioner's counsel moved for continuance, citing as good cause, *inter alia*, Mr. DeClemente's unavoidable forced absence and the clerk's notice of rescheduling. (R. pp. 343-381). Judge Jefferson denied the request and ordered the damages hearing to proceed in Petitioner's absence. Petitioner's counsel objected to the hearing moving forward in his client's absence, but was overruled. (R. p. 378:3-11). Respondent called Art Bradham to testify as its expert witness. (R. p. 386:6-7). Petitioner's counsel objected to Bradham's qualification as an expert in the case on the grounds of Bradham's conflict of interest, involvement as a fact witness, and inherent bias, as Bradham was both Reed and Smith's personal accountant. (R. pp. 386:14-22), (R. p. 391:7-8), (R. p. 395:13-15), (R pp. 476-480). The objections were overruled and the court qualified Bradham as

Respondent's expert witness. On January 5, 2017, Judge Jefferson reconvened the damages hearing to allow DeClemente's testimony.[2]

On January 24, 2017, Petitioner filed a Supplemental Motion to Consider Evidence of Damages, Adopt Proposed Order, and Reconvene Damages Hearing. (R. pp. 149-155). The circuit court conducted a telephone hearing on Petitioner's Motion on July 27, 2017. (R. p. 15-17). Judge Jefferson denied Petitioner's Motion but allowed him to introduce expert testimony on damages and allowed scheduling of the expert's deposition. *Id.* On August 23, 2017, Petitioner filed the expert affidavit of Ronald H. Burkett, CPA, CVA. (R. pp. 156-159). The parties deposed Mr. Burkett on September 14, 2019 and the circuit court was provided a copy of the deposition transcript. (R. pp. 551-567). Mr. Burkett gave his expert opinion that he did not believe that Respondent suffered any damages as a result of DeClemente's conduct. (R. pp. 156-159).

On December 20, 2017, Judge Jefferson issued her Order awarding Respondent actual damages in the amount of $875,144.00 – the exact amount opined by Bradham. (R. 18-30). On January 8, 2018, Petitioner filed a Motion to Amend Judgment and Be Relieved from Judgment. (R. pp. 160-161). Petitioner's Motion seeks amendment of the court's Order of Damages Judgment to reflect the judgment's satisfaction, as contractually required by the Damages Satisfaction provision of the parties' Full and Final Release. *Id*; (R. p. 96). By written order dated January 26, 2018, Judge Jefferson denied Petitioner's Motion to amend judgment. (R. pp. 31-34).

Petitioner served Respondent with Notice of Appeal on March 2, 2018, which was filed on March 14, 2018. (R. p. 162) On July 29, 2020, the Court of Appeals issued a dispositional

[2] At the time, both parties had outstanding motions with regard to a subpoena issued to Art Bradham seeking essential documents relevant to damages. However, Judge Jefferson declined to rule on either party's subpoena-based motions, and ordered the damages hearing to proceed without subpoena compliance. (R. p. 473:13-16).

Opinion without oral argument. No. 2018-000460, 2020 WL 4346753 (Ct. App. July 29, 2020). On September 14, 2020, Petitioner filed his Petition for Rehearing and Suggestion for Rehearing *En Banc*. (*Petition for Rehearing*, pp. 1-21). On December 23, 2020, The Court of Appeals granted DeClemente's Petition, withdrew its previous Opinion and filed a substitute Opinion. No. 2018-000460, 2020 WL 7687830 (Ct. App. Dec. 23, 2020). The appellate court's substitute opinion was identical to its previous opinion, with the exception of an additional section affirming the circuit court's rulings during the damages hearing. *Id*, 2020 WL 7687830 at *2.

DeClemente now seeks writ of certiorari from this Court to review the Court of Appeals' decision.

ARGUMENT

I. The Court of Appeals Erred in Holding that Petitioner Failed to Demonstrate 'Good Cause' For Relief, and Its Opinion Conflicts with *Sundown Operating Co. v. Intedge Indust. Inc.*

A. The Court of Appeals failed to properly consider DeClemente's "reasons why vacation of the default entry would serve the interests of justice."

Rule 55(c), SCRCP gives the standard for setting aside entry of default as mere "good cause." This standard requires the moving party to put forth a "satisfactory explanation for the default" and "reasons why vacation of the default entry would serve the interests of justice." *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). *Sundown* requires circuit courts to consider a party's reasons why vacation of default entry would serve the interests of justice in determining whether to grant relief from default entry.

Rule 55(c) is liberally construed to see that justice is promoted and disposition of cases is on their merits. *E.g.*, *Melton v. Olenik*, 379 S.C. 45, 54, 664 S.E.2d 487, 492 (Ct. App. 2008); *see also*, (*Petition for Rehearing*, p. 12) (collecting Fourth Circuit cases stating disfavor of default

judgments). Even prior to *Sundown*, 'good cause' was assessed by examining the totality of the circumstances as opposed to a single factor in isolation. *See*, *Ricks v. Weinrauch*, 293 S.C. 372, 375, 360 S.E.2d 535, 537 (Ct. App. 1987).

Prior to *Sundown*, the language "reasons why vacation of default entry would serve the interests of justice," was not used in this Court's decisions governing Rule 55(c) analysis. Although it had been acknowledged by the Court of Appeals that "the reasons for the failure to act promptly" were relevant to a showing of good cause, *New Hampshire Ins. Co. v. Bey Corp.*, 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993), Sundown for the first time directed circuit courts to consider the "interests of justice" when determining "good cause."

This Court's longstanding liberal construction of Rule 55(c), and its decision in *Sundown* to include the interests of justice language for the first time in *Sundown*, suggests that interests of justice analysis is mandatory. Case law formally addressing the importance of *Sundown*'s language – "reasons why the vacation of default entry would serve the interests of justice" – and its role in Rule 55(c) good cause analysis is scant; making the issue appear novel and undeveloped, and worthy of Supreme Court review.

During his tenure on the Appellate bench, Justice Few wrote that *Sundown* requires the circuit court to consider the interests of justice as part of its Rule 55(c) 'good cause' analysis. In his dissent to the majority opinion in *Limehouse v. Hulsey*, Justice Few wrote, "*Sundown* changed the analysis of good cause by requiring for the first time that the trial court <u>focus</u> on reasons why vacation of default entry would serve the interests of justice." 397 S.C. 49, 93-94, 723 S.E.2d 211, 235 (Ct. App. 2011) (Few, C.J., dissenting) (emphasis added). As stated in this dissenting opinion, Petitioner believes the circuit court must consider both a party's explanation for the default and the interests of justice "in determining whether or not the explanation for the

default is satisfactory." *Id*. 91, 723 S.E.2d at 233 (Few, C.J., dissenting). The Court of Appeals' majority opinion in *Limehouse* was subsequently reversed on other grounds. As a result, this Court was not afforded the opportunity to address the merits of the dissenting opinion's interpretation of *Sundown*. Petitioner is unaware of any authority which directly addresses the analysis given in Justice Few's dissent, nor any authority interpreting *Sundown's* "interests of justice" language.

The circuit court's default judgment Order is based solely on Petitioner's explanation of the timing of his motion for relief from default entry. (R. p. 9). ("I find that the timing of motion for relief was not prompt."). The Court of Appeals affirmed the circuit court's default judgment on substantially the same basis.

In affirming the circuit court, the Court of Appeals' Opinion also makes passing reference to Petitioner's supposed "benefit of prior counsel." However, any prior attorney consultation did not result in formal representation. (*Petition for Rehearing*, p. 7, n. 1). Moreover, any minimal prior legal consultation occurred while Petitioner was suffering from severe, untreated mental illness, and while Petitioner was incapable of rational thought and behavior. (R. pp. 99-122, pp. 223:17-25, 224:1-4); *see also*, (R. p. 111) (DeClemente stating in his affidavit: "During the month of January 2012 I suffered from a mental illness and was unable to consult with an attorney to answer said Complaint."). The proposition that Petitioner was able to "benefit" from any legal consultation while experiencing severe psychiatric illness is incorrect.

The issue before the Court of Appeals was whether the circuit court's entry of default and its default judgment were without evidentiary support or were controlled by an error of law. *Williams v. Vanvolkenburg*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994). Like the

circuit court, the appellate court failed to consider “reasons why vacation of the default entry would serve the interests of justice”, and its decision is thus controlled by error of law.

There are multiple reasons relief from default would serve the interests of justice. First, adherence to fundamental principles of contract law is in the interest of justice. Allowing default judgment in a lawsuit brought in violation of a contract is unjust. Second, failure to promote judicial economy does not serve the interests of justice. This litigation has now been ongoing for ten years and could have been largely avoided if the circuit court had properly granted DeClemente’s motion for relief from default entry. (*Petition for Rehearing*, p. 13). Third, the seriousness of Petitioner’s mental illness, requiring multiple extended hospitalizations and intensive outpatient after-care treatment, including powerful anti-psychotic medications, cannot be overstated. The delay in DeClemente’s motion for relief was largely due to his mental illness and inability to assist counsel, once finally retained. (R. pp. 99-122), 223:17-25, 224:1-4). Fourth, Respondent’s misconduct, exhibited by misrepresentation, contract breaches and filing of a contractually prohibited lawsuit, is also highly relevant to interests of justice analysis. Fifth, the time consuming complexity of the contractually prohibited litigation into which Petitioner was unexpectedly drawn is relevant to interests of justice analysis. Sixth, prevention of Respondent’s attempted unjust enrichment should have been considered in the court’s interest of justice analysis. Seventh, the lower courts’ duty to secure fundamental equity for litigants should have been considered. Eighth, Petitioner’s absolute, dispositive meritorious defense - the Release - should have been considered by the lower courts. Ninth, Respondent’s on the record admission that DeClemente has a meritorious defense to their prohibited lawsuit is important to the required analysis. Tenth, the fact that Respondent suffered no prejudice, and could not articulate

prejudice, should have been considered. Eleventh, the fact that DeClemente was surprised by Respondent's contractually prohibited lawsuit should have been considered. (R. p. 227:11-20).

These are all important reasons why vacation of default entry would serve the interests of justice. Because the lower courts failed to consider the interests of justice in deciding whether good cause for relief existed, default entry against Petitioner is controlled by an error of law worthy of this Court's review.

B. The Court of Appeals erred by failing to acknowledge Petitioner's Rule 60(b) factors, and failing to apply the correct, mere 'good cause' standard for relief from default entry.

Rule 55(c)'s standard for relief from entry of default is mere "good cause." Rule 60(b)'s standard for relief from default judgment is "more rigorous," requiring a particularized showing of Rule 60(b) factors. *Ricks v, Weinrauch*, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct. App. 1987). "The different standards under the two rules underscores the clear intent to make it more difficult for a party to avoid a default once the court has entered a default judgment." *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 608, 681 S.E.2d 885, 888-89 (2009).

The *Sundown* Court held that "Rule 60(b) factors are indeed relevant to a Rule 55(c) analysis, but only insomuch as proof of any <u>one</u> of these factors is sufficient to show good cause. 383 S.C. at 608, 681 S.E.2d at 889 (internal quotations omitted, emphasis added). This Court also stated, "[n]o trial court should ever find good cause lacking based solely on the absence of a Rule 60(b) factor." *Id*. Thus, Rule 60(b) factors are only considered under a heightened standard when seeking relief from default judgment, and Rule 60(b) factors are considered under a more lenient standard when asserted for relief from default entry. This distinction was recognized by the Court of Appeals in *Cambell v. City of North Charleston*, 431 S.C. 454, 848 S.E.2d 788 (Ct.

App. 2020). (Finding Rule 60(b) factors are considered under the "good cause" standard when seeking relief from entry of default).[3] In the case at bar, however, the Court of Appeals erroneously failed to acknowledge and analyze DeClemente's multiple 60(b) factors when ruling on either his motion for relief from default entry or his motion for relief from default judgment.

DeClemente has submitted proof of Rule 60(b) factors including, mistake, excusable neglect, inadvertence, and adverse party misconduct, to show good cause for vacation of default entry. *See*, (*Brief of Appellant*, pp. 18-21, (*Petition for Rehearing*, pp. 9-11). Respondent's contractually prohibited lawsuit against DeClemente is a fraudulent attempt at unjust enrichment, and an egregious breach of the parties' Full and Final Release. DeClemente's severely diminished mental capacity, combined with the fact that Respondent was contractually prohibited from ever suing him, caused his surprise, inadvertence and excusable delay in responding to Respondent's frivolous lawsuit. Additionally, the record exposes Respondent's further misconduct in its use of stolen documents in the initiation and prosecution of its prohibited lawsuit. (R. pp. 156-158, 198 (Tr. 140:6-16)), (R. p. 208 (Tr. 197:7-25, 198:1-15)). In his Petition for Rehearing, DeClemente urges proper application of his established Rule 60(b) factors to the "good cause" analysis of relief from default entry. (*Petition for Rehearing*, pp. 7-11).

[3] In *Cambell*, the Court of Appeals examined *Roche v. Young Bros. of Florence*, 318 S.C. 207, 456 S.E.2d 897 (1995) for the purpose of discerning whether the City of North Charleston's conduct constituted inadvertence under Rule 60(b)(1) for the purpose of obtaining Rule 55(c) relief from entry of default.The Appellate court stated, "[w]e recognize *Roche* was based on a Rule 60(b) motion and this is a Rule 55(c) motion, which is governed under a more lenient standard. ... Because the City specifically argues the good cause of their failure was inadvertence, *Roche* is instructive only insofar as to what constitutes inadvertence." *Campbell v. City of North Charleston*, 431 S.C. 454, 461-62, 848 S.E.2d 788, 792 (Ct. App. 2020) (internal citations omitted).

The Court of Appeals' failure to acknowledge and analyze Petitioner's Rule 60(b) factors under the "good cause" standard conflicts with this Court's *Sundown* holding and constitutes error of law and fact, warranting this Court's review.

II. **The Court of Appeals' Erred in Affirming the Denial of DeClemente's Motion To Continue The Damages Hearing, and Its Ruling Conflicts with This Court's Decision in *Howard v. Holiday Inns, Inc*.**

On November 1, 2016, DeClemente's counsel moved for continuance of the damages hearing due to Petitioner's unavoidable, legally mandated absence, detailed *infra*. As a result of the clerk of court providing Petitioner's counsel only three full days' notice that the damages hearing had been rescheduled to November 1st, Petitioner was unable to obtain approval of a new Travel Order from the Florida Office of Community Corrections (Probation Department). An amended Travel Order was required so that DeClemente could attend the damages hearing without violating the terms of his probation. [4] The circuit court, incorrectly believing there was no legal obstacle to DeClemente's attendance, denied the continuance motion and ordered the damages hearing to proceed in his absence. This ruling constitutes abuse of discretion and denial of due process. The appellate court's affirmation also conflicts with this Court's ruling in *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E.2d 800 (1978).

When actions are called, a motion for a continuance may be granted "[i]f good and sufficient cause for continuance is shown." Rule 40(i)(1), SCRCP. "It has long been the rule in

[4] DeClemente's probationary sentence in S.C., involving the Ravenel Bridge, was transferred to Florida. As a result, Petitioner was unable to enter the State of South Carolina without first obtaining a Travel Order signed by a circuit court judge and containing the specific hearing date. Once a Travel Order was obtained (and numerous were obtained during the litigation) Petitioner was allowed to enter the State of South Carolina to attend a hearing,but was required to immediately return to Florida upon the hearing's conclusion. (R. p. 14). Judge Jefferson incorrectly stated that Petitioner's most recent prior Travel Order allowed him to leave the State of Florida for all hearings, without the necessity of obtaining a new order, with a new hearing date, each time. (R. p. 356:12-13) ("I read the other order and it clearly allows for him to travel for hearings.").

this State that motions for a continuance are addressed to the sound discretion of the trial judge, and his ruling will not be upset unless it clearly appears that there was an abuse of discretion to the prejudice of the appellant." *Williams v. Bordon's, Inc.*, 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980). An abuse of discretion occurs when a ruling is based on an error of law or when based on a factual conclusion without evidentiary support. *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009).

At the time of the damages hearing, Petitioner's default status had left him at a grievous disadvantage in the case. The single remaining right he had at his disposal was to contest damages.

In *Howard v. Holiday Inns, Inc.*, this Court ruled that defaulting defendants have the right to participate in damages hearings through "cross-examination and objection to plaintiff's evidence." 271 S.C. at 241, 246 S.E.2d at 882. The justification for this ruling is that, "In essence, the defaulting defendant concedes to liability. However, a defaulting defendant *does not concede to the amount of liability*." *Id*. 242, 246 S.E.2d at 882 (emphasis added). *Howard*'s progeny recognizes the importance of defaulting defendants' participation in damages hearings. In *Renney v. Dobbs House, Inc.*, this Court stated:

> Participation by the defending party will give to the judge and/or jury a broader understanding of the amount which should be awarded and will tend to insure a more fair verdict and judgment. When the defaulting party is not given the opportunity to participate in the damages hearing, the trial court and this court should closely scrutinize the award to prevent harsh, unwarranted results.

275 S.C. 562, 568, 274 S.E.2d 290, 293 (1981).

By preventing DeClemente's attendance at the damages hearing, the circuit court denied Petitioner his single remaining right; effective defense against an improper damages judgment. It was crucial that DeClemente be permitted to utilize his factual knowledge of the case and his

medical industry expertise to assist in cross-examination of Respondent's witnesses, exposing Respondent's illegal effort to gain unjust enrichment. The circuit court allowed Respondent's damages "expert" and Murrell Smith to testify in Petitioner's absence, depriving counsel of his client's crucial insight necessary for effective cross-examination.

The circuit court's attempt to remedy its error was, in short, too little too late. Petitioner's testimony, capable of clearly and effectively rebutting Smith and Bradham's testimony, was given nine (9) weeks later, and without due process benefit of having been present for the opposing witnesses' testimony. As the direct result of the court's plainly erroneous denial of DeClemente's continuance motion, the effectiveness of Petitioner's rebuttal testimony was severely diminished. The circuit court's attempt to correct its erroneous exclusion of Declemente from the damages hearing in no way remedied the court's deprivation of Petitioner's due process right to fully participate in the damages hearing, as recognized by this Court in *Howard, supra*.

The Court of Appeals erroneously affirmed the circuit court's deprivation of DeClemente's right to fully participate in the damages hearing, and its decision conflicts with *Howard*. This Court's discretionary review is warranted.

III. The Court of Appeals Erred In Sustaining the Circuit Court's Expert Qualification of Art Bradham as an Expert Witness, In Violation of The American Institute of Certified Public Accountants Code of Professional Conduct.

The circuit court's qualification of an expert, and the admission or exclusion of his testimony, may not be disturbed on appeal absent abuse of discretion. *Fields v. Regl. Med. Ctr. Orangeburg*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005). "A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair." *Id.* at 26, 609 S.E2d at 509. "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the

ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof." *Id*.

In support of its damages claim, Respondent called its employee, Certified Public Accountant Art Bradham, to give expert testimony. Bradham is also a fact witness in this case, and his qualification as an expert was unreasonable and unfair.

First, Bradham is employed not only as CPA for Respondent ATMES, but also as CPA for Smith and Reed personally. (R. 196 (Tr. 118-119) (*Brief of Appellant*, pp. 30-31). The extreme bias created by these employment relationships is manifestly unfair to DeClemente.

Second, Bradham's testimony on behalf of his current clients, (Respondent, Reed and Smith) was given <u>against the interests of his former client</u>, DeClemente. (*Brief of Appellant*, pp. 29-32). As a result of his current and former employment relationships, Bradham owes both parties a fiduciary duty to act in good faith and with due regard for each party's interests.[5] The parties' interests in the damages judgment are in obvious conflict. By allowing Bradham to testify as an expert, the circuit court ensured Bradham's breach of the fiduciary duty he owes DeClemente. Bradham's conflict of interest disqualifies him from giving expert testimony in this case, and the circuit court committed error by qualifying him.

Third, Bradham is an essential fact witness in this case because of his role as financial advisor and consultant to Reed and Smith in Respondent's purchase of Abacare. Bradham was hired to perform due diligence in the acquisition of Abacare. (R. p. 197 (Tr. 134:20-25, 135:1-2)). However, the record demonstrates that Bradham's "due diligence" consisted of very little

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[5] *See*, (*Brief of Appellant*, pp. 29-30) (citing, *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992), and *Spence v. Wingate*, 395 S.C. 148, 160-62, 716 S.E.2d 920, 927-28 (2011)).

effort;[6] perhaps even falling below the ordinary professional standard of care. Bradham's motivation to help his current clients, Reed and Smith, obtain payment for a business decision they allege ended poorly for them, and which Bradham haphazardly approved based only upon a stolen report, disqualifies him from giving expert testimony in this case.

Qualifying Bradham as a damages expert in this case was both unreasonable and unfair. The damage DeClemente suffered as a result of the improper testimony is enormous. The circuit court was not just influenced by Bradham's testimony; rather, the court's absurdly inflated damages judgment is the exact amount to which Bradham testified. *Compare*, (R. p. 24), *with* (R. p. 30). The court gave no weight to the testimony of DeClemente's CPA, who opined that Respondent suffered no damage. Bradham's claim that Respondent's alleged unawareness of Abacare's potential $100,000 tax liability caused nearly $900,000 in damages has no credibility. The Court of Appeals' failure to address the facts requiring Bradham's disqualification from expert testimony warrants discretionary review by this Court.

IV. The Court of Appeals Erred in Failing to Rule that the Damages Satisfaction Provision of the Parties' Full and Final Release Should Have Been Acknowledged and Enforced at the Damages Hearing and by Granting Petitioner's Rule 59(e) Motion

Following entry of the circuit court's damages judgment, Petitioner filed a Rule 59(e) motion to amend the judgment to reflect the judgments' satisfaction, as contractually required by the Damages Satisfaction provision of the parties' Full and Final Release. (R. pp. 160-161). The

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[6] Mr. Bradham did not contact a single person involved in the management or accounting of Abacare in order to assess the company's liabilities, but instead relied on a stolen draft of a confidential report prepared for a separate purpose. (R. p. 199 (Tr. 141:1-11)). Indeed, Bradham did not contact the accounting firm that prepared the report, Burkett, Burkett & Burkett, CPAS, to discuss the accuracy of its content because he knew the report was stolen. *See*, (R. p. 208 (Tr. 197:7-13) (In response to the question of whether he ever thought about calling Burkett to ask if they had issued a final report, Bradham stated: "I was not in a position to call Mr. Burkett and say 'I've got a document I wasn't supposed to have or whatever.' So no.").

circuit court denied the motion, ruling that Petitioner was barred from contesting ***liability*** by virtue of his default status. (R. pp. 31-34). It is axiomatic that a party against whom default judgment has been rendered cannot contest liability, and DeClemente's Rule 59(e) motion does not in any way contest liability.

This Court has long recognized that even though a defendant in default is held to have admitted liability, "he does not concede to the *amount* of liability." *Howard*, 271 S.C. at 241-42, 246 S.E.2d at 881-82 (emphasis added); *see also*, *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981) (recognizing "that a defendant in default admitted liability but did not admit the damages as set forth in the prayer for relief.").

Petitioner is unaware of any case law holding that a party who is the beneficiary of a default judgment is necessarily entitled to the award of any amount of damages, regardless of how minimal. Even when a defendant has been held in default, the plaintiff is still required to prove the amount of unliquidated damages by a preponderance of the evidence. *See*, *Solley v. Navy Federal Credit Union, Inc.*, 397 S.C. 192, 203, 723 S.E.2d 597, 603 (Ct. App. 2012) ("The amount of damages in a default action must be proved by the preponderance of the evidence."); and *Jackson v. Midlands Human Resources Center*, 296 S.C. 526, 529, 374 S.E.2d 505, 506 (Ct. App. 1988) ("Although a defendant is in default as to liability, the award of damages must be in keeping ... with the proof that has been submitted."). Thus, a defaulting defendant still maintains the right to argue that the plaintiff has failed to meet their burden of proof, and is not entitled to monetary damages in any amount.

During the damages hearing and in his Rule 59(e) motion for reconsideration, DeClemente merely states the obvious fact that Respondent is contractually obligated to satisfy the damages judgment. The Damages Satisfaction provision of the parties' Full and Final

Release is Respondent's binding contractual promise, and legal requirement, to "release, acquit and forever discharge Phillip L. DeClemente ... from any and all ... *damages, cost, loss of services, expenses and compensation* whatsoever which ... now has or which may hereinafter accrue." (R. p. 122) (emphasis added). Contrary to the circuit court's finding, the Damages Satisfaction provision goes to the very heart of the damages issue, *not* the liability issue.

The Court of Appeals erroneously failed to acknowledge and enforce the Release's Damages Satisfaction provision requiring Respondent to satisfy the damages judgment against DeClemente, and the error warrants this Court's review.

V. The Court of Appeals Erred in Failing to Address and Rule On DeClemente's Rule 60(b)(5) Motion For Relief From Judgment Required by the Release's Damages Satisfaction Provision.

Rule 60(b)(5), SCRCP, provides: "the court may relieve a party or his legal representative from a final judgment ... [when] the judgment has been *satisfied, released, or discharged*." *Id*. (emphasis added). DeClemente's motion for amendment of judgment informs the court that the Damages Satisfaction provision of the parties' Release agreement constitutes full satisfaction of the damages judgment, and asks the court to have the record accurately reflect the judgment's satisfaction.

"[M]otions for relief under Rule 60(b) are addressed to the discretion of the court and appellate review is limited to determining whether the trial court abused its discretion." *Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 124, 441 S.E.2d 835, 840 (Ct. App. 1994). "An abuse of discretion arises where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support." *Tri-County Ice and Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990). The circuit

court's denial of DeClemente's Rule 60(b)(5) motion to have the record correctly reflect judgment satisfaction was controlled by errors of both fact and law.

First, the circuit court's denial of Petitioner's Rule 60(b)(5) motion is based on factual conclusions without evidentiary support. Judge Jefferson's written order denying the motion states:

> Defendant made these very same arguments under Rule 60(b) before Judge Nicholson at a December 16, 2012 hearing and in corresponding motions and briefs. Judge Nicholson issued a ruling April 24, 2014 whereby he expressly rejected these same arguments and held Defendant in default for failing to timely answer the Complaint. The present Motion to Amend is another attempt by Defendant to rehash the same arguments previously considered and ruled upon by Judge Nicholson. As aforementioned, this Court lacks the authority to reverse or modify Judge Nicholson's findings. (emphasis added).

(R. p. 34). The circuit court's statement of the factual and legal record is wildly incorrect. DeClemente never previously moved for Rule 60(b)(5) satisfaction of the damages judgment, or even raised the Damages Satisfaction provision at all, when arguing to Judge Nicholson that default judgment is improper in this case. Nor was it even possible for DeClemente to have brought a motion for damages satisfaction before Judge Nicholson because damages had not been entered at that stage in the litigation. Obviously, a damages judgment cannot be marked as satisfied until the judgment actually exists. Not only did Judge Nicholson not rule on Petitioner's Rule 60(b)(5) motion for damages satisfaction, the issue was never even raised to Judge Nicholson because he had no involvement in any aspect of Judge Jefferson's erroneous damages judgment. Therefore, Judge Jefferson's Order denying DeClemente's Rule 60(b)(5), SCRCP, motion for satisfaction of damages judgment is controlled by an error of fact.

Second, the circuit court's denial of Petitioner's motion for relief from judgment under Rule 60(b)(5) was controlled by an error of law. In support of his Rule 60(b)(5) motion for satisfaction of damages judgment, DeClemente introduced the Damages Satisfaction provision of

the parties' Release agreement as dispositive proof that Respondent is contractually required to satisfy the damages judgment. (R. p. 160, ¶ 2). The circuit court was required to examine the Release to determine whether the Damages Satisfaction clause is unambiguous and, if so, the court was required to enforce it. Judge Jefferson failed to do so, and her order is therefore controlled by an error of law.

Although the erroneous default judgment prevented DeClemente from having Respondent's contractually prohibited, meritless lawsuit against him dismissed, Petitioner's default status has no affect upon Respondent's contractual duty to satisfy the fraudulently obtained damages judgment. "A court must enforce an unambiguous contract according to its terms, regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to safeguard their rights carefully." *S.C. Dep't. of Transp. v. M&T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 655, 677 S.E.2d 7, 13 (Ct. App. 2008).

Judge Jefferson's refusal to examine and enforce the Release's Damages Satisfaction provision constitutes error of fact and law.

The Court of Appeals committed factual and legal error by also refusing to examine and enforce the Release's Damages Satisfaction provision. These errors warrant this Court's discretionary review.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests that this Court grant his Petition For a Writ of Certiorari to review the Court of Appeals' Opinion on the questions presented herein.

Respectfully Submitted,

/s/ Cameron L. Marshall
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Attorney for Petitioner

February 26, 2021
Charleston, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
J.C. Nicholson, Jr., Circuit Court Judge
Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2020-000038

Unpublished Opinion No. 2020-UP-255 (S.C. Ct. App. filed Dec. 23, 2020)

Assistive Technology Medical Equipment 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 ....Petitioner.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for Respondents, James E. Smith, Jr. with a copy of Petitioner's *PETITION FOR A WRIT OF CERTIORARI* by emailing the same to the following AIS email address:

James E. Smith, Jr.
james@jamessmithpa.com
Counsel for Respondents

The undersigned also certifies that, on the date indicated below, a copy of Petitioner's *PETITION FOR A WRIT OF CERTIORARI* has been sent to the South Carolina Court of Appeals via email using that court's email address, ctappfilings@sccourts.org.

[SIGNATURE AND DATE ON FOLLOWING PAGE]

February 26, 2021
Charleston, South Carolina

s/ Cameron L. Marshall
Cameron L. Marshall

RECEIVED
Feb 26 2021
SC Court of Appeals

February 26, 2021

VIA EMAIL ONLY
Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
By Email to: supctfilings@sccourts.org

RE: Appellate Case No. 2021-000038
Assistive Technology Medical Equipment Services, LLC
v.
Phillip DeClemente.

Dear Mr. Shearouse:

Please find attached Mr. DeClemente's *Petition for a Writ of Certiorari* in reference to the matter above, along with proof of email service of this document on opposing counsel.

A copy of this letter, Mr. DeClemente's Petition, and proof of service has also been emailed to the Court of Appeals.

We have promptly placed a check in the mail for the $250.00 filing fee. Thank you for your assistance in this matter.

Respectfully,

s/ Cameron L. Marshall
Cameron L. Marshall

Enclosures as stated
cc via email: Hon. Jenny Abbott Kitchings, Clerk of Court, S.C. Court of Appeals
cc via email: James E. Smith, Jr., Esquire

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