

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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

Appellate Case No. 2021-000038

Opinion No. 2020-UP-225 (S.C. Ct. App. filed July 29, 2020)
Withdrawn, Substituted, Refiled December 23, 2020

Assistive Technology Medical Equipment Services, LLCRespondent,

v.

Hood and Selander CPAS, LLC, Donna S. Cash, as
Personal Representative for 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 thePetitioner.

BRIEF OF PETITIONER

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TABLE OF CONTENTS

Table of Authorities iii

Questions Presented 1

Statement of the Case..... 2

 I. Factual Background 2

 II. Beginning of the Litigation..... 4

 III. Default Proceedings 5

 IV. Damages Proceedings 6

 V. Appellate Proceedings 8

Standard of Review..... 9

Argument 10

 I. The Court of Appeals erred in holding that Petitioner failed to demonstrate ‘good cause’ for relief from entry of default, and this error conflicts with this Court’s holding in *Sundown Operating Co., Inc., v. Intedge Industries, Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009). 10

 A. The Court of Appeals failed to consider Petitioner’s “reasons why vacation of default entry would serve the interests of justice.” 12

 i. If the Circuit Court had considered Petitioner’s “reasons why vacation of default entry would have serve the interests of justice,” good cause would have been found under the *Wham* factors. 15

 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. 17

 II. The Court of Appeals erred in affirming the denial of Petitioner’s Motion to Continue the Damages Hearing. 20

 III. The Court of Appeals erred in affirming the Circuit Court’s qualification of Arthur Bradham as an expert witness on damages..... 22

IV.	The Court of Appeals erred in failing to rule that the damages satisfaction provision of the parties' Full and Final Release Agreement should have been considered and enforced at the damages hearing or by granting Petitioner's Rule 59(e) Motion.....	24
V.	The Court of Appeals erred in failing to address and rule on Petitioner's Rule 60(b)(5) Motion, which requires that the damages judgment be marked satisfied pursuant to the Release's Damages Satisfaction provision.....	27
	Conclusion	29

TABLE OF AUTHORITIES

CASES

Blakeley v. Rabon,
266 S.C. 68, 221 S.E.2d 767, 769 (1976)26

Campbell v. City of North Charleston,
431 S.C. 454, 848 S.E.2d 788 (Ct. App. 2020).....18

C.A.N. Enterprises, Inc. v. S.C. Health & Human Servs. Fin. Comm’n,
296 S.C. 373, 373 S.E.2d 584 (1988)26

Catawba Indian Tribe of S.C. v. City of Rock Hill,
501 F.3d 368 (4th Cir. 2007)26

Coleman v. Dunlap,
306 S.C. 491, 413 S.E.2d 15 (1992)10

Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc.,
616 F.3d 413 (4th Cir. 2010)12, 17

Dixon v. Besco Engineering, Inc.,
320 S.C. 714, 436 S.E.2d 636 (Ct. App. 1995).....17

Ecclesiastes Production Ministries v. Outparcel Associates, LLC,
374 S.C. 483, 649 S.E.2d 494, (Ct. App. 2007).....13

Ellis v. Taylor,
316 S.C. 245, 449 S.E.2d 487 (1994)26

Fields v. Reg’l Med. Ctr. Orangeburg,
363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) 9-10, 22

Home Medical Systems, Inc. v. South Carolina Department of Revenue,
382 S.C. 556, 677 S.E.2d 582 (2009) 2-3

Howard v. Holiday Inns, Inc.,
271 S.C. 238, 246 S.E.2d 880 (1978)21, 22, 25

Jackson v. Midlands Human Resources Center,
296 S.C. 526, 374 S.E.2d 505 (Ct. App. 1988).....25

Limehouse v. Hulsey,
397 S.C. 49, 723 S.E.2d 211 (Ct. App. 2011).....14

<i>Lolatchy v. Arthur Murray, Inc.</i> , 816 F.2d 951 (4th Cir. 1987)	12
<i>Mann v. Walker</i> , 285 S.C. 194, 328 S.E.2d 659 (Ct. App. 1985).....	12
<i>New Hampshire Ins. Co. v. Bey Corp.</i> , 312 S.C. 47, 435 S.E.2d 377 (Ct. App. 1993).....	11
<i>O’Shea v. Lesser</i> , 308 S.C. 10, 416 S.E.2d 629 (1992)	23
<i>Plyer v. Burns</i> , 373 S.C. 637, 647 S.E.2d 188 (2007)	9
<i>Renney v. Dobbs House, Inc.</i> , 275 S.C. 562, 274 S.E.2d 290 (1981)	21, 22
<i>Ricks v. Weinrauch</i> , 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1985).....	12, 17
<i>Roche v. Young Bros. of Florence</i> , 318 S.C. 207, 456 S.E.2d 897 (1995)	18
<i>S.C. Dep’t. of Transp. v. M&T Enters. of Mt. Pleasant, LLC</i> , 379 S.C. 645, 677 S.E.2d 7 (Ct. App. 2008).....	28
<i>Saro Investments v. Ocean Holiday Partnership</i> , 314 S.C. 116, 124 S.E.2d 835 (Ct. App. 1994).....	10
<i>Solley v. Navy Federal Credit Union, Inc.</i> , 397 S.C. 192, 723 S.E.2d 597 (Ct. App. 2012).....	25
<i>Southern Glass & Plastics Co. v. Duke</i> , 367 S.C. 421, 626 S.E.2d 19 (Ct. App. 2005).....	13
<i>Spence v. Wingate</i> , 395 S.C. 148, 716 S.E.2d 920 (2011)	23
<i>Sundown Operating Co., Inc. v. Intedge Industries, Inc.</i> , 383 S.C. 601, 681 S.E.2d 885 (2009)	<i>passim</i>
<i>Tolson v. Hodge</i> , 411 F.2d 123 (4th Cir. 1969)	12

Wham v. Shearson Lehman Bros., Inc.,
298 S.C. 462, 381 S.E.2d 535 (Ct. App. 1989)..... 10, 15-17

Williams v. Bordon's, Inc.,
274 S.C. 275, 262 S.E.2d 881 (1980)9, 20

RULES

Rule 1, SCRCP14

Rule 55, SCRCP *passim*

Rule 59, SCRCP 24-26

Rule 60, SCRCP *passim*

OTHER AUTHORITIES

Federal Practice and Procedure: Civil 2d, § 2694 (1983).....10

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 Industries Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009)?
 - a. Did the Court of Appeals err in failing to consider Petitioner’s “reasons why vacation of default entry would serve the interests of justice” in its ‘good cause’ analysis?
 - b. Did the Court of Appeals err in failing to acknowledge Petitioner’s Rule 60(b) factors and by applying a heightened standard rather than the mere ‘good cause’ standard for relief from entry of default?
2. Did the Court of Appeals err in affirming the denial of Petitioner’s Motion to Continue the damages hearing?
3. Did the Court of Appeals err in affirming the Circuit Court’s 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 Agreement 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 Petitioner’s Rule 60(b)(5) Motion for Relief from Judgment, as required by the Full and Final Release Agreement’s Damages Satisfaction provision?

STATEMENT OF THE CASE

I. Factual Background

Reliable Medical Equipment of South Carolina (Reliable) is a durable medical equipment (DME) company in Sumter, South Carolina owned by Murrell Smith and Jeff Reed. (App. p.177, lines 16-22). In the spring of 2008, Smith and Reed were approached by Kimberly Cuce about an opportunity to expand Reliable's presence in the state through the acquisition of a Charleston DME company called Abacare Home Medical, Inc. (Abacare). (App. p.176, lines 22- p.177, lines 1-12). At this time, 20% of Abacare's stock was owned by Petitioner, Phillip DeClemente, and the remaining 80% was owned by the Estate of Dorothy Connelly.

Smith and Reed sought the assistance of Arthur "Art" Bradham¹ to conduct due diligence investigation of the potential acquisition of Abacare and determine Abacare's financial condition. (App. p.198 (p.134, lines 20- p.135, lines 1-2)). Bradham eventually advised Reed and Smith to proceed with the purchase of Abacare. For the purpose of acquiring Abacare, Reed and Smith created Respondent company, Assistive Technology Medical Equipment Services, LLC (ATMES) to serve as the new parent company of both Reliable and Abacare. (App. p.166, lines 14- p.167, lines 1-10). In November of 2008, Respondent ATMES executed a Stock Purchase and Assignment Agreement with Petitioner DeClemente and the Estate of Dorothy Connelly and acquired control of Abacare. (App. p.628). Reed, Smith, Cuce, and DeClemente each became equal 25% owners of the newly formed company ATMES. (App. p.182, lines 14-24).

On April 20, 2009 this Court issued an opinion in the case *Home Medical Systems, Inc. v. South Carolina Department of Revenue*, which reversed the Administrative Law Court's ruling

¹ Bradham is Respondent's accountant, Reliable's accountant, and both Reed and Smith's personal accountant. (App. 197 (pp. 118-119)).

that certain DME products were exempt from sales tax. 382 S.C. 556, 677 S.E.2d 582 (2009). As a result of the decision, Abacare and Reliable both incurred significant tax liability on past sales of previously tax-exempt DME products. (App. p.207 (Tr. p.181, lines 1- p.182, lines 1-14)).

In June of 2009, DeClemente sold his 25% ownership interest in ATMES back to the company through the execution of several sales documents, including a Bill of Sale and Transfer, Promissory Note, and Full and Final Release. (App. p.87-99). The Promissory Note was for the amount of \$265,000 plus interest at a rate of 12% annually to be paid to DeClemente in monthly payments of \$7,341.84. (App. p.87-89). A portion of the Promissory Note was personally guaranteed by both Reed and Smith. (App. p.90-91). The Full and Final Release required that ATMES ...

[R]elease, acquit, and forever discharge Phillip L. DeClemente ... from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of services, expenses and compensation whatsoever which [Respondent] 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 in any of the entities set forth above whether known or unknown, foreseen or unforeseen and any consequences thereof, resulting or to result from ownership of any of the Companies referenced-above, employment in or with any of the entities referenced-above, business relationship with any of the businesses or individuals referenced-above as well as any negotiation contracts or documents executed as a result of the sale of the business as referenced herein.

(App. p.96).

Following DeClemente's departure from ATMES, audits were performed on Abacare and Reliable. Both companies were assessed penalties for past-due taxes. Respondent subsequently claimed that Abacare had been under-reporting on its tax returns prior to the 2008 purchase. In the late summer of 2011, ATMES informed DeClemente, its former 25% owner, that if he did not sign an affidavit in support of its allegations, then ATMES would file suit against him. (App. pp.704-

706). DeClemente declined to sign the proposed false affidavit and was then named as a defendant in this lawsuit, among other defendants associated with the Abacare transaction.

II. Beginning of the Litigation

On October 31, 2011, ATMES filed suit in the Charleston County Court of Common Pleas against Kimberly Cuce, the Estate of Dorothy A. Connelly, the Estate of James B. Connelly, Hood & Selander, CPAS, LLC,² and Phillip DeClemente. (App. pp.39-54). ATMES' lawsuit asserts nine causes of action stemming from the allegation that, at the time ATMES purchased Abacare, the defendants failed to accurately disclose Abacare's pre-existing tax liability. *See* (App. pp.40-43). DeClemente was served with Respondent's lawsuit on December 1, 2011. (App. pp.9).

On February 2, 2012, DeClemente suffered an incapacitating psychiatric collapse and was twice involuntarily hospitalized, once after using his car to block the Ravenel Bridge in Charleston, South Carolina. (App pp.112-123). These hospitalizations were between February 2, 2012 and March 6, 2012. *Id.* ATMES filed an Affidavit of Default against Petitioner on March 30, 2012. (App. pp.61-62). After the hospitalizations, DeClemente continued intensive outpatient treatment until May of 2012. (App. p.226, lines 4-10). During this time period, DeClemente did not comprehend that he was required to file an Answer to the lawsuit he had received in December of 2011. (App. p.223, lines 19- p.225, lines 1-4).

On May 9, 2012, DeClemente hired undersigned counsel to represent him in ATMES' lawsuit against him and to collect the money ATMES owed him pursuant to the Promissory Note, of which it stood in breach. On May 14, 2012, the undersigned filed notice of appearance and asked the clerk of court to notify him of the default hearing date so that he could represent Petitioner at the hearing. (App. p.710). At the time counsel made his appearance, no entry of

² Hood & Selander, CPAS, LLC (Hood & Selander) did accounting work for Abacare prior to the time it was purchased by ATMES.

default had been made by the clerk of court; nor was one ever made by the clerk. (App. p.213, lines 18-24).

On June 8, 2012, the undersigned sent a letter to ATMES' co-owner, Murrell Smith, requesting payment of the \$59,571.45 arrearage owed to DeClemente under the Promissory Note, and requesting that ATMES' monthly payments be resumed. (App. p.771). On June 12, 2012, the undersigned received a letter from Smith stating that DeClemente was in default in the lawsuit ATMES had filed against him and other defendants, and that any money owed to DeClemente would be set-off from any judgment awarded to Respondent at the damages hearing. (App. pp.85-86).

III. Default Proceedings

DeClemente filed his Answer to ATMES' lawsuit and Motion for Enlargement of Time to Answer, along with his counterclaims and cross-claims, contemporaneously on August 10, 2012. (App. pp.62-78). A default hearing was initially scheduled for September 22, 2012. However, because of six continuances requested by ATMES' counsel, and granted by the Circuit Court, the default hearing was not held until December 16, 2013 – over sixteen months after Petitioner requested to be heard on relief from default. (App. pp. 712-713). On November 5, 2013, Petitioner filed a Memorandum in Support of his Motion for Enlargement of Time to Answer. (App. pp.80-83).

On December 16, 2013, Circuit Judge J.C. Nicholson, Jr. heard oral argument on Petitioner's Motion for Relief from Default. (App. p.210). During this hearing, DeClemente argued that good cause for relief existed due to (a) DeClemente's involuntary hospitalization and subsequent outpatient treatment for severe psychiatric illness; (b) DeClemente's several meritorious defenses to ATMES' lawsuit, including the Full and Final Release, which bars the

lawsuit; and (c) the lack of prejudice to ATMES in allowing DeClemente to defend on the merits. (App. pp.216-232; p.249, lines 1- p.250, lines 1-22). Judge Nicholson took Petitioner's Motion for Enlargement of Time under advisement.

On April 30, 2014, Judge Nicholson issued a written Order denying Petitioner's Motion and entering default judgment against him. (App. pp.7-11). Petitioner filed a Motion for Reconsideration on May 5, 2014, (App. 130), which was denied by Form-4 Order on May 7, 2014. DeClemente gave notice of his intent to appeal the default order, but the appeal was dismissed by the appellate court as premature. (App. pp.12-13, 131). ATMES subsequently moved for a hearing to assess damages.

IV. Damages Proceedings

At the time ATMES' Motion for Damages Hearing was pending before the circuit court, DeClemente was prohibited from leaving the State of Florida without a date-specific Travel Order signed by a South Carolina Circuit Court Judge stating that his presence was required in the State of South Carolina for a court proceeding. (App. pp.352-353). On October 27, 2016, DeClemente's counsel obtained a Travel Order for October 31, 2016, after receiving notice that ATMES' Motion for Damages Hearing would be heard on that date. (App. p.15). On October 28, 2016, Petitioner's counsel received notice from the Charleston County Clerk of Court's Office that Respondent's Motion for Damages Hearing had been rescheduled for November 1, 2016. However, at that time there was unresolved dispute as to whether Petitioner was entitled to a jury trial on damages. As a result of this issue, the Clerk of Court informed Petitioner's counsel that the damages hearing would not be held on November 1st, and instead the court would hear argument on DeClemente's motion to have damages decided by a jury. (App. pp.351-352).

On November 1, 2016, DeClemente's counsel appeared at the hearing and explained to Circuit Judge Jefferson the reason DeClemente was not in attendance was that the clerk of court, on short notice, had rescheduled the October 31st hearing date to November 1st, not permitting sufficient time to obtain a travel order and obtain permission from the Florida Department of Probation for DeClemente to travel. (App. p.353, lines 23-25; p. 354, lines 7-12; p.358, lines 7-11; p.360, lines 1-8), Counsel further informed the court that the clerk had stated that instead of a damages hearing, the court would hear DeClemente's motion for a jury trial on damages. (App. p.350, lines 22- p.351, lines 1-19). The court denied DeClemente's motion for a jury trial, ruled that the clerk did not have authority to reschedule the damages hearing, and ordered that the damages hearing commence immediately. (App. p.351, lines 20- p.352, lines 1-15; p.384, lines 1-25). The court denied counsel's motion for continuance and overruled Petitioner's counsel's objection to the hearing proceeding in his client's absence. (App. p.386, lines 18-20; p.387, lines 14-22).

At the hearing, ATMES called its own Certified Public Accountant, Arthur Bradham, as an expert witness on damages. (App. p.387). Counsel's objection to Bradham's qualification as an expert was overruled. (App. p.392, lines 5-14).³ ATMES also called Murrell Smith, DeClemente's ex-business partner in ATMES, to testify at the damages hearing. (App. p.437). In an effort to mitigate its decision to conduct the damages hearing in DeClemente's absence, the court stated that it would reconvene the damages hearing at a later date and allow DeClemente to testify and to supplement the record with evidence addressing damages. (App. p.379, lines 3-8).

³ During cross-examination of Bradham, the court sustained all objections made in response to counsel's questioning concerning Bradham's credibility, bias, and conflicts of interest. (App. p.414, lines 2-21; p.419, lines 13- p.22; p.422, lines 25- p.423, lines 1-10; p.427, lines 14-21).

The damages hearing was reconvened on January 5, 2017. (App. p.464). DeClemente and ATMES co-owner Jeffrey Reed both testified at this hearing. (App. p.476; p.541) On January 24, 2017, DeClemente filed a Supplemental Motion to Consider Evidence of Damages, Adopt Proposed Order and Reconvene Damages Hearing. (App. pp.150-156). On July 27, 2017, Judge Jefferson held a status conference and ruled that she would allow DeClemente to re-open and supplement the record on damages, introduce expert testimony and schedule a deposition. (App. p.16-17). DeClemente filed the expert affidavit of Ronald H. Burkett, CPA, CVA on August 23, 2017, (App. pp.157-159), and Mr. Burkett was deposed by the parties on September 14th, (App. p.553).

On December 20, 2017, the circuit court issued a written Order awarding ATMES damages in the amount of \$875,144.00 – the exact amount opined by Bradham. (App. pp.19-31). On January 8, 2018, DeClemente moved to Amend Judgment and be Relieved from Judgment. (App. pp.161-162). This Motion requested that the judgment be amended and marked as “satisfied” pursuant to the damages satisfaction clause of the parties’ binding Release Agreement. *Id.* Judge Jefferson denied this Motion by written Order on January 26, 2018. (App. pp.32-35).

V. Appellate Proceedings

DeClemente served ATMES with Notice of Appeal on March 2, 2018, and it was filed on March 14, 2018. (App. p.163). Briefing was completed in December, 2018. (App. pp.715-757; pp.758-772; pp.773-782). On July 29, 2020, the Court of Appeals issued a dispositional Opinion without oral argument, ruling against DeClemente on all issues presented. (App. pp.783-755). On September 14, 2020, DeClemente filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. (App. pp.786-806). On December 23, 2020, the Court of Appeals granted DeClemente’s Petition, withdrew its previous Opinion, and refiled a Substitute Opinion without oral argument.

(App. p.809). The Appellate Court’s Substitute Opinion was identical to its withdrawn Opinion except for an additional small paragraph affirming the circuit court’s rulings during the damages hearings. (App. pp.811-814).

DeClemente filed his Petition for a Writ of Certiorari on February 26, 2021. (App. pp.815-838). ATMES filed its Return on April 19, 2021, three-weeks past its deadline, (App. pp.839-844), to which DeClemente filed his Reply on May 6, 2021, (App. pp.846-853). This Court granted DeClemente’s Petition on all Questions Presented on January 23, 2022.

STANDARD OF REVIEW

The standard of review for all questions presented herein is abuse of discretion.

“The decision whether to set aside an entry of default or a default judgment lies solely in the discretion of the trial judge. The trial court’s decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is entirely without evidentiary support.” *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 606-7, 681 S.E.2d 885, 888 (2009) (internal citations omitted).

Motions for continuances fall within the sound discretion of the trial judge, and are only reviewable when “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, 262 S.E.2d 881 (1980); *see also, Plyer v. Burns*, 373 S.C. 637, 647 S.E.2d 188 (2007) (stating the denial of a continuance is reviewable “only when an abuse of discretion appears from the record”).

The circuit court’s qualification of an expert, and the admission or exclusion of his or her testimony, may not be disturbed absent abuse of discretion. *Fields v. Reg’l Med. Ctr. Orangeburg*,

363 S.C. 19, 26, 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.* To justify reversal, the appealing party must show both the error of the ruling and its resulting prejudice. *Id.*

“The power to open, modify or vacate a judgment is possessed solely by the court that rendered the judgment.” *Coleman v. Dunlap*, 306 S.C. 491, 413 S.E.2d 15 (1992). Therefore, decisions on motions seeking relief from judgment are reviewed for abuse of discretion. *See Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 124, 441 S.E.2d 835, 840 (Ct. App. 1994).

ARGUMENT

I. The Court of Appeals erred in holding that Petitioner failed to demonstrate ‘good cause’ for relief from entry of default, and this error conflicts with the holding in *Sundown Operating Co., Inc. v. Intedg Industries, Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009).

This Court has granted review on all questions presented in the Petition for a Writ of Certiorari. Each of these questions highlights errors made by the lower courts; but, this Court need go no further than Petitioner’s first question to reach a just disposition of the case at bar.

Rule 55(c) of the South Carolina Rules of Civil Procedure provides that circuit courts may set aside an entry of default for good cause shown. Prior to this Court’s decision in *Sundown*, circuit courts applied what are known as the “*Wham* factors” in determining the existence of good cause for relief from default entry under Rule 55(c). Those factors are: (1) the timing of the defendant’s 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 535, 501-502 (Ct. App. 1989) (citing 10 C. Wright, A. Miller, and M. Kane, *Federal Practice and Procedure: Civil 2d*, § 2694 at 494 (1983)). In 2009, Chief Justice

Toal wrote for the majority in *Sundown Operating Co., Inc., v. Intedge Industries, Inc.* and took the opportunity to address “confusion in the case law regarding the application of the standards for relief set forth in Rule 55(c) and Rule 60(b).” 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). The *Sundown* opinion provided two important developments that now govern the circuit court’s disposition of Rule 55(c) motions for relief from entry of default.

First, *Sundown* added a threshold inquiry to Rule 55(c) analysis. Prior to proceeding to consideration of the *Wham* factors, the moving party is required to (1) provide an explanation for the default; and (2) give reasons why vacation of default entry would serve the interests of justice. *Sundown*, 681 S.E.2d at 888. Consideration of *both* threshold factors is mandatory.

Second, this Court affirmed “that the criteria for obtaining relief from default judgment under 60(b) – mistake, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation – are relevant in determining whether good cause has been shown under Rule 55(c), SCRCP.” *Sundown*, 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) (holding that, “as a practical matter,” the 60(b) factors are relevant under both rules)). However, *Sundown* made clear that Rule 60(b)’s heightened standard for relief should not be applied by circuit courts when considering the existence of Rule 60(b) factors on a motion for relief from entry of default. *Id.* Proof of any single Rule 60(b) factor “is sufficient to show good cause” and entitles the movant to relief from default entry. *Id.*

The lower courts’ decisions affirming default entry in this case are rooted in their failure to apply the two developments of law set forth by this Court in *Sundown*. The lower courts failed to consider the second prong of Rule 55(c)’s threshold inquiry – whether the moving party has given “reasons why the vacation of default entry would serve the interests of justice.” *Sundown*,

681 S.E.2d at 888. Furthermore, the lower courts both failed to consider the existence of Rule 60(b) factors under the lesser ‘good cause’ standard for relief from entry of default. Because the lower courts’ failures constitute errors of law, the decisions should be reversed and vacated for abuse of discretion.

A. The Court of Appeals failed to consider Petitioner’s “reasons why vacation of default entry would serve the interests of justice.”

In *Sundown*, this Court for the first time required circuit courts to consider a moving party’s “reasons why vacation of default entry would serve the interests of justice” as part of Rule 55(c) analysis.

South Carolina Courts have long recognized that the Rule 55(c) ‘good cause’ standard “should be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits.” *E.g., Ricks v. Weinrauch*, 293 S.C. 372, 374-75, 360 S.E.2d 535, 536 (Ct. App. 1985) (citing *Mann v. Walker*, 285 S.C. 194, 328 S.E.2d 659 (Ct. App. 1985)). The Fourth Circuit, which applies an identical version of Rule 55(c),⁴ holds this same view. *See e.g., Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc.*, 616 F.3d 413, 417 (4th Cir. 2010) (“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.”); *Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951, 954 (4th Cir. 1987) (“[‘A]n extensive line of decisions’ has held that Federal Rule of Civil Procedure 55(c) must be ‘liberally construed in order to provide relief from the onerous consequences of default and default judgments.’” (quoting *Tolson v. Hodge*, 411 F.2d 123, 130 (4th Cir. 1969))).

Based upon the foregoing, “reasons why vacation of default entry would serve the interests of justice” is best interpreted as asking whether justice would be promoted by disposition of the

⁴ *See* Rule 55, SCRPC Reporter’s Notes (“Rules 55(c) and 55(d) are identical to the Federal Rules.”).

case on its merits, as opposed to by technicality. The case at bar embodies the importance of this question.

In June of 2009, ATMES and DeClemente executed several documents in exchange for DeClemente's 25% ownership interest in ATMES. (App. pp.87-99). This included a Promissory Note for \$265,000.00, personally guaranteed, partially, by ATMES owners Smith and Reed. (App. pp.87-90). At the time Petitioner filed his Answer to ATMES' lawsuit, the company owed him approximately \$73,418.40 in missed payments, and \$51,392.88 for the remaining balance owed under the Promissory Note's Acceleration Clause. (App. pp.71-74). Respondent was fully aware of this debt at the time it chose to file this contractually prohibited lawsuit against DeClemente. (App. pp.85-86). Allowing ATMES to collect "damages" against DeClemente and simultaneously evade payment of the significant contractual damages owed to him is the antithesis of "interests of justice."

Among the other documents ATMES and DeClemente executed in June of 2009 was a Full and Final Release Agreement, which releases DeClemente from any and all claims arising out of his business relationship with ATMES and its subsidiaries, Abacare and Reliable. (App. pp.97-99). Adherence to fundamental principles of contract law and promotion of judicial economy *do* serve the "interests of justice." The Full and Final Release prohibits ATMES' suit against DeClemente. The Release is binding and unambiguous. If the circuit court had allowed DeClemente to assert his defense to liability guaranteed by the Full and Final Release, ATMES' contractually prohibited lawsuit would have been expeditiously dismissed.⁵ More than a decade of

⁵ Indeed, it is well recognized that our court system's role in contract matters is to "ascertain and give effect to the intentions of the parties," *Ecclesiastes Production Ministries v. Outparcel Associates, LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) (collecting cases), and that release agreements, where applicable and unambiguous, operate as a bar to subsequent claims, *see e.g., Southern Glass & Plastics Co. v. Duke*, 367 S.C. 421, 427-29, 626 S.E.2d 19, 22-23 (Ct. App. 2005) (finding that unambiguous release agreement required dismissal of intended claims).

litigation could have been avoided. Allowing DeClemente to assert the Release as a bar to ATMES' improper lawsuit would not only have embodied the "interests of justice" first introduced in *Sundown*, but also sound public policy and the spirit of the South Carolina Rules of Civil Procedure. *See*, Rule 1, SCRCP ("[The South Carolina Rules of Civil Procedure] shall be construed to secure the just, speedy, and inexpensive determination of every action.").

As noted by Justice Few in a Court of Appeals dissent, "*Sundown* changed the analysis of good cause by requiring for the first time that the trial court focus on the reasons why vacation of default entry would serve the interests of justice." *Limehouse v. Hulsey*, 397 S.C. 49, 93-94, 723 S.E.2d 211, 235 (Ct. App. 2011) (Few, J., dissenting). Justice Few wrote that "*Sundown* requires a broader inquiry, namely that the reasonableness of the explanation be considered as *part* of the analysis of whether vacating the default would serve the interests of justice. *Limehouse*, 723 S.E.2d at 234 (Few, J., dissenting) (emphasis added).

Stripping DeClemente of his contractual rights guaranteed by the parties' Full and Final Release, and awarding ATMES an \$875,144.00 windfall, does *not* serve the interests of justice. But this is exactly what the trial court did, and exactly what the Court of Appeals affirmed. Petitioner submits that patently inequitable outcomes like this are precisely why this Court mandates consideration of a moving party's "reasons why vacation of default entry serve the interests of justice" as part of Rule 55(c) analysis; and it is why this Court rejects isolated focus on the time at which the moving party formally seeks relief from default entry.

The circuit court's Order of Default is erroneously based solely on the timing of DeClemente's formal motion for relief from default entry. (App. p.10) ("I find that the timing of [Petitioner's] motion for relief was not prompt."). Judge Nicholson's plain legal error is also seen in the transcript of the December 16, 2013 hearing on DeClemente's Motion for Enlargement of

Time. *See* (App. p.224 (p.15, lines 17-18)) (the trial court stating, “I’m concerned about time. That’s the first element.”); (App. p.226 (p.17, lines 23-24)) (the trial court cutting off Petitioner’s counsel’s attempt to discuss lack of prejudice to ATMES and stating, “we hadn’t got – we’re still talking about time right now.”). Though the trial court’s Default Order makes passing reference to *Sundown*, (App. p.9), *Sundown*’s mandatory threshold analysis was not conducted in this case, (App. p.10).⁶ The trial court erred by not considering Petitioner’s “reasons why vacation of default entry would serve the interests of justice.”

The Court of Appeals attempted to mitigate the circuit court’s error by reading the term “satisfactory explanation” into the circuit court’s Order. *Compare* (App. p.813) (the Appellate Court’s Opinion stating, “Appellant did not put forth a satisfactory explanation for the default.”) *with* (App. p.10) (the circuit court making no reference to *Sundown*’s mandatory threshold “interests of justice” inquiry and only focusing on the first *Wham* factor – timing). Both lower courts failed to consider “Petitioner’s reasons why vacation of default entry would serve the interests of justice.” Both lower court decisions were therefore controlled by errors of law and constitute abuse of discretion.

i. If the Circuit Court had considered Petitioner’s “reasons why vacation of default entry serve the interests of justice,” good cause would have been established under the *Wham* factors.

Once DeClemente’s reasons why vacation of default entry serve the interests of justice are considered, it becomes clear that he meets *Sundown*’s threshold burden, allowing for analysis under the *Wham* factors: (1) the timing in which relief was sought; (3) the existence of a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief from default entry is

⁶ The circuit court’s legal error can be traced back to its explanation of the analysis provided during the December 16, 2013, hearing. *See* (App. 219 (p. 10:20-23)) (In describing ‘good cause’ analysis, the circuit court stating, “It’s just basically three issues; right? The time of the motion, the meritorious defense, and the degree of prejudice to the Plaintiff.”).

granted. *Wham*, 381 S.E.2d at 501-502. The *Wham* factors weigh in DeClemente's favor and good cause for relief from default entry is clear from the record.

First, DeClemente's delay in answering was explained, and not unreasonable under the circumstances. He was involuntarily hospitalized until March of 2012, and then proceeded with intensive outpatient treatment until May. (App. p.226, lines 4-10). During this time period, DeClemente did not comprehend that he was required to file an Answer to the lawsuit he had received in December of 2011. (App. p.223, lines 19- p.225, lines 1-4). When DeClemente finally retained counsel on May 9th, Petitioner's counsel immediately filed notice of appearance and a request to be notified of the default hearing date so that he could defend against default judgment. (App. p.710). Petitioner's counsel did not file a formal motion requesting relief because the clerk had not entered default, as required by Rule 55(a). *See* Rule 55(a), SCRCP (stating that once an affidavit showing a party's failure to answer is filed, "the clerk *shall* enter his default upon the calendar") (emphasis added). DeClemente was unable to properly assist counsel in the investigation of ATMES' complex, unfounded lawsuit. Counsel filed DeClemente's Answer asserting DeClemente's meritorious defenses, counterclaims and cross claims, contemporaneously with a Motion for Enlargement of Time to Answer. (App. pp.63-78). This was done for efficiency, and to give the court a better understanding of why relief from default is proper. DeClemente's delay was negligible and not unreasonable.

Second, DeClemente unquestionably has meritorious defenses to ATMES' lawsuit. *See* (App. p.742) (Petitioner's Appellate Brief setting forth DeClemente's nine (9) meritorious defenses). The parties' Full and Final Release Agreement is a dispositive, absolute defense to Respondent's lawsuit. ATMES conceded this during the December 16, 2013 hearing on DeClemente's Motion for Enlargement of Time. (App. p.241, lines 6-18).

Finally, ATMES suffers no prejudice if DeClemente is granted relief. When pressed on how ATMES would be prejudiced by DeClemente being allowed to file an answer, ATMES provided the vague response that it “would have to do some things differently,” then continued to attack the timing of Petitioner’s formal motion for relief. (App. p.245, lines 4- p.246, lines 1-22). The fact is that ATMES would have suffered *no* prejudice. As acknowledged by the Fourth Circuit in applying the same analysis, “delay in and of itself does not constitute prejudice to the opposing party.” *Colleton Prep. Academy*, 616 F.3d at 419. ATMES sought six (6) continuances and delayed the damages hearing on DeClemente’s Motion for over sixteen (16) months. (App. p.712). It is DeClemente, not ATMES, who has been prejudiced by delay.

Although the trial court is not required to make a specific finding on each of the *Wham* factors when denying a motion for relief from default entry, there still must be “sufficient evidentiary support on the record for the finding of the lack of good cause.” *Dixon v. Besco Engineering, Inc.*, 320 S.C. 714, 179, 436 S.E.2d 636, 639 (Ct. App. 1995). Judge Nicholson’s decision lacks sufficient evidentiary support. *Arguendo*, even if the first *Wham* factor weighs against DeClemente, the second and third factors resoundingly weigh in favor of good cause. Judge Nicholson’s failure to grant relief from default constitutes abuse of discretion.

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*, 360 S.E.2d at 536. “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*, 681 S.E.2d at 888-89.

The *Sundown* Court held that “Rule 60(b) factors are indeed relevant to a Rule 55(c) analysis, *but only inasmuch as proof of any one of these factors is sufficient to show good cause*. 681 S.E.2d at 889 (internal quotations omitted, emphasis added). This Court also directed that “[n]o trial court should ever find good cause lacking based solely on the absence of a Rule 60(b) factor.” *Id.* Accordingly, Rule 60(b) factors are only considered under a heightened standard when a party seeks relief from default judgment, and Rule 60(b) factors are considered under the more lenient ‘good cause’ standard when seeking relief from default entry. This distinction was recognized by the Court of Appeals in *Campbell 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).⁷

In the case at bar, however, the lower courts erroneously failed to acknowledge and analyze DeClemente’s multiple 60(b) factors when ruling on his motion for relief from default. (App. p.813). DeClemente has submitted proof of multiple Rule 60(b) factors including, mistake, excusable neglect, inadvertence, and adverse party misconduct, to show good cause for vacation of default entry. *See* (App. pp.739-742) (App. pp.794-796).

The clerk of court had not entered default at the time Petitioner’s counsel was retained, nor did the clerk ever do so. *See* (App. p.213, lines 18-24). This caused considerable confusion at the start of the December 16, 2013 default hearing. (App. p.213, lines 22- p.214, lines 1- p. 215, lines 1-16). There being no entry of default on the record, DeClemente’s counsel filed notice of appearance along with a request that he be apprised of when a hearing on ATMES’ request for

⁷ In *Campbell*, 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*, 848 S.E.2d at 792.

default would take place so that he could represent DeClemente during the proceeding. (App. p.710). The filing was made just days after counsel was retained, and makes clear DeClemente's intent to seek relief from default. Rule 55(a) requires that the clerk of court enter default against a party before judgment is entered. Rule 55(a), SCRC. Because the clerk of court had not yet made, and never did make, entry of default, Petitioner's counsel mistakenly believed that a formal motion was not yet necessary and could be properly filed prior to a hearing.

On June 12, 2012, Petitioner's counsel determined that ATMES owed DeClemente more than \$120,000.00 pursuant to the Promissory Note executed between the parties in June of 2009. (App. p.711). The company had stopped making payments shortly before DeClemente's psychiatric collapse and once Smith and Reed's personal loan guarantees had expired. Petitioner's counsel contacted ATMES' co-owner, Murrell Smith, requesting payment of the delinquent balance and that payments be resumed as required by the Promissory Note. *Id.* Smith responded to counsel stating that DeClemente was in default and that a set-off for the debt would be applied to any amount awarded to ATMES after the default hearing. (App. pp.84-85). Petitioner's counsel then began investigating the complex lawsuit and on August 10, 2012 filed an Answer, Counter-claims and Cross-claims. (App. p.65).⁸ Although the clerk had not entered default, DeClemente's Answer was accompanied by a Motion for Enlargement of Time to Answer in anticipation of a default hearing. (App. pp.63-64).

Further, ATMES' lawsuit is indisputably barred by the parties' Full and Final Release Agreement, leading DeClemente to believe that ATMES was not pursuing a meritless lawsuit

⁸ The majority of background investigation was done without the assistance of DeClemente, who was still in a fragile state following his psychiatric collapse; however, a full investigation was necessary to fully represent DeClemente's interests. This took time. Petitioner's counsel believed that a full Answer containing DeClemente's meritorious defenses and counter-claims was necessary to the trial court's determination of whether he would be relieved from default and allowed to respond to the lawsuit.

against him. The record exposes ATMES' further misconduct in its use of stolen documents in the initiation and prosecution of its prohibited lawsuit. (App. p.199 (p.140, lines 6-16)); (App. p.209 (p.197, lines p.198, lines 1-15)).

The record fully supports the showing of mistake, inadvertence, excusable neglect and opposing party misconduct pursuant to Rule 60(b). However, these factors were not considered, or, in the instances in which they were, they were considered under the more rigorous standard for relief from default judgment. The lower courts' 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 abuse of discretion warranting reversal.

II. The Court of Appeals erred in affirming the denial of Petitioner's Motion to Continue the Damages Hearing.

The Court of Appeals ruled that the circuit court did not abuse its discretion in denying Petitioner's counsel's request to continue the November 1, 2016 damages hearing to allow his client's attendance. (App. p.813). This ruling was erroneous.

When actions are called, a motion for continuance may be granted for good and sufficient cause shown. Rule 40(i)(1), SCRCP. Although "motions for continuance are addressed to the sound discretion of the trial judge," the circuit court's ruling should be reversed where "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). The circuit court's decision to deny a party's motion should be placed under greater scrutiny where the continuance is sought to secure a defaulting defendant's right to contest damages. As stated by this Court:

Participation by the [defaulting] 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, unjust results.

Renney v. Dobbs House, Inc., 275 S.C. 562, 568, 274 S.E.2d 290, 293 (1981). Defaulting defendants are entitled to participate in damages hearings and contest damages claimed against them. *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 241, 246 S.E.2d 880, 882 (1978). This is because a defaulting defendant concedes to liability, but “*does not concede to the amount of liability.*” *Id.* A defaulting defendant’s right to participate in the damages hearing is their last remaining safeguard against an unjust award.

The circuit court’s statement that there was no legal obstacle to DeClemente’s attendance at the damages hearing is a clear misstatement of fact. (App. p.357, lines 10- p.358, lines 1-6). The Florida Department of Probation allowed DeClemente to leave Florida only to attend court proceedings. The Department required Travel Orders to be submitted three days in advance of court dates and would find DeClemente in violation of probation if he did not return to the State of Florida directly after the hearing’s conclusion. (App. p.353, lines 23-25; p. 354, lines 7-12; p.358, lines 7-11). Like all Travel Orders obtained during this litigation, Petitioner’s Travel Order obtained for attendance at the damages hearing allowed DeClemente be outside the State of Florida on only one day, October 31, 2016. (App. p.15). When the October 31st hearing was rescheduled⁹ to November 1st, with short notice, Petitioner was unable to secure a Travel Order for the rescheduled November 1st hearing date. (App. p.360, lines 1-18).

The circuit court’s denial of DeClemente’s request for a continuance deprived him of the right to contest damages, in violation of this Court’s precedent. *See e.g., Howard*, 246 S.E.2d at

⁹ Further complicating this issue, there was dispute between the parties as to whether the damages hearing would take place before a jury. (App. p.350, lines 22- p. 351, lines 1- p.352, lines 1-18). Petitioner’s counsel was advised by the circuit court clerk’s office that the damages hearing would not be held on November 1st, because on October 31st the issue remained unresolved. *Id.* Other defendants in this case, such as Donna Cash, were opposed to the damages hearing moving forward without reaching a full determination of respective liability. *See* (App. 128-29). Defendant Cash maintained this opposition to the damages hearing, but settled out of the case the eve of the November 1, 2016, hearing. (App. p.338, lines 7- p. 339, lines 1-4).

882. Due to his absence, Petitioner was unable to aid his counsel in the cross-examination of Respondent's "expert" witness, Bradham, and that of Petitioner's ex-business partner, Murrell Smith. Petitioner's expertise in the DME industry, knowledge of the accounting practices at issue, and his employment relationship with both witnesses made his attendance critical to the fact-finding purpose of the proceeding. *See Renney*, 274 S.E.2d at 293 *supra*.

ATMES has argued that this error was remedied by reconvening the damages hearing at a later date and allowing Petitioner to submit rebuttal evidence. (App. 770-71). Respondent's argument fails to recognize the prejudicial effect of the trial court's ruling. Petitioner was unable to provide counsel the complicated facts and industry knowledge necessary to fully cross-examine Bradham and Smith. DeClemente's later rebuttal testimony was given without having witnessed that of Bradham and Smith. The circuit court's attempt to correct its erroneous ruling in no way remedied its violation of Petitioner's rights as recognized by this Court in *Howard* and its progeny.

The circuit court's ruling constituted abuse of discretion and resulted in extreme prejudice to DeClemente.

III. The Court of Appeals erred in affirming the Circuit Court's qualification of Art Bradham as an expert witness on damages.

"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." *Fields v. Regl. Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). "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, ATMES called its accountant, Art Bradham, to give expert testimony. His qualification as an expert was unreasonable, unfair, and erroneous for several reasons.

First, Bradham is employed not only as CPA for Respondent ATMES, but also as personal CPA for its owners Smith and Reed. (App. p.197 (Tr. p. 117, lines 24- p. 118, lines 1- p.119, lines 1-19). The extreme bias created by these employment relationships is manifestly unfair to DeClemente. Second, Bradham's testimony on behalf of his current clients, ATMES, Reed and Smith, was given against the interests of his former client, DeClemente. (App. p.406, lines 5-16).¹⁰ 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.¹¹ The parties' interests in the damages judgment are in obvious conflict, and Bradham's testimony breached his fiduciary duty owed to his former client, DeClemente. If this breach were not already clear enough, Bradham's testimony was based upon a *stolen draft* report that was prepared for the confidential and exclusive use of DeClemente, who was Bradham's client while an owner of ATMES. (App. p.404, lines 24- p. 405, lines 1- p. 406, lines 1-4). Bradham's conflict of interest should have disqualified him from giving expert testimony in this case, and the 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 ATMES' purchase of Abacare. Bradham was hired to perform due diligence in the acquisition of Abacare. (App. p.198 (Tr. p.134, lines 20- p.135, lines 1-2)). However, the record demonstrates that Bradham's "due diligence" consisted of very little effort; perhaps even falling below the ordinary professional standard of care.

¹⁰ Bradham attempted to refute this fact during his testimony with contradictory statements, stating that DeClemente was not a client, but a partner in ATMES, (App. p.406, lines 5-10), but then going on to state that he owes a fiduciary duty to ATMES *and* its partners – which includes DeClemente, (App. p. 406, lines 11-16).

¹¹ See (App. pp.750-7510) (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)).

Bradham did not contact a single person involved in the management or accounting of Abacare in order to assess the company's financial condition, but instead relied on a stolen draft of a confidential report prepared for DeClemente's use only. (App. p.200 (Tr. p.141, lines 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 it was stolen. (App. p 209 (Tr. p.197, lines 7-13)). Bradham's motivation to help his current clients, Reed and Smith, obtain unjust enrichment from his former client, DeClemente, after recommending that his clients purchase Abacare based only upon an unfinished confidential report stolen from DeClemente, disqualifies him from giving expert testimony in this case.

Qualifying Bradham as a damages expert in this case was both unreasonable and unfair, and DeClemente suffered prejudice in the amount of \$875,144.00 as a result of Judge Jefferson's erroneous decision to qualify him. 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* (App. p.245), *with* (App. p.31). The circuit court's reliance upon Bradham's "expert" testimony requires reversal.

IV. The Court of Appeals erred in failing to rule that the damages satisfaction provision of the parties' Full and Final Release Agreement should have been considered and enforced at the damages hearing or by granting Petitioner's Rule 59(e) Motion.

Following entry of Judge Jefferson's damages judgment, DeClemente moved to amend judgment pursuant to Rule 59(e). (App. pp.161-162). DeClemente's Motion sets forth the following argument:

Pursuant to SCRCP 59 Mr. DeClemente 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 Release states that Mr. DeClemente is forever discharged from any damages awarded against him as a result of his business relationship with Plaintiff[[]].

(App. p.161). Judge Jefferson denied the motion, and ruled that Petitioner's Rule 59(e) motion attempted to rebut his liability and was "merely the latest effort by [DeClemente] to have entry of default against him vacated." (App. 33-34). This ruling is erroneous for two reasons.

First, this Court has long recognized that when a defendant is held liable by default, "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). Plaintiffs are still required to prove the amount of unliquidated damages by a preponderance of the evidence regardless of the defendant's default status. *Solley v. Navy Federal Credit Union, Inc.*, 397 S.C. 192, 203, 723 S.E.2d 597, 603 (Ct. App. 2012); *see generally, 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 submitted."). Although they have lost their right to contest liability, defaulting defendants still maintain 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.

DeClemente's Rule 59(e) Motion contests that damages are owed, and is not an attempt to assert a contractual defense to liability. The Release states that ATMES is required to "release, acquit, and forever discharge" DeClemente from "any and all ... demands, rights, damages, cost, loss of services, expenses and compensation whatsoever" arising from the parties' prior business relationship. (App. p.97). Contrary to Judge Jefferson's conclusion, DeClemente's proof that he owes no monetary damages, as a matter of contract law, is entirely unrelated to Judge Nicholson's erroneous finding of liability by default.

Second, a just determination of Petitioner's Rule 59(e) Motion required the circuit court to read the Release's damages satisfaction clause and determine its enforceability. "South Carolina follows an objective contract interpretation rule, meaning that if the language of a contract is

perfectly plain and capable of legal construction, such language determines the force and effect of the instrument.” *Catawba Indian Tribe of S.C. v. City of Rock Hill*, 501 F.3d 368, 372 (4th Cir. 2007) (quoting *Blakeley v. Rabon*, 266 S.C. 68, 221 S.E.2d 767, 769 (1976)). A finding of liability by default does not relieve the circuit court of its duty to determine the enforceability of the Release’s damages satisfaction clause, as “[t]he court’s duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties’ failure to guard their rights carefully.” *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994); *see also*, *C.A.N. Enterprises, Inc. v. S.C. Health & Human Servs. Fin. Comm’n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988) (this Court holding that it was bound to enforce the contract in accordance with “established principles of contract law,” despite the fact that adverse party would “receive a windfall”).

DeClemente attempted to introduce the Release’s damages satisfaction clause during the January 5, 2017 damages hearing. (App. pp.511, lines 11-22). Judge Jefferson refused to hear counsel’s argument, refused to read the Release’s satisfaction provision, and erroneously ruled that the damages satisfaction provision related to liability rather than damages. (App. p.511, lines 23-p.512, lines 1-24). Judge Jefferson’s subsequent Order denying Petitioner’s Rule 59(e) Motion confirms that the court did not read the Full and Final Release to determine whether the damages satisfaction clause renders her damages award satisfied. (App. p.33-34).

The circuit court was required to make this finding, regardless of Petitioner’s default status, and doing so would have no impact on Judge Nicholson’s prior finding that DeClemente was liable by default. The court’s failure to consider the Release’s damages satisfaction clause was abuse of discretion and requires reversal.

V. The Court of Appeals erred in failing to address and rule on Petitioner’s Rule 60(b)(5) Motion, which requires that the damages judgment be marked satisfied pursuant to the Release’s Damages Satisfaction provision.

In the same Motion discussed in Section IV, *supra*, Petitioner argued that he is entitled to relief under Rule 60(b)(5), SCRPC because the damages judgment “has been satisfied, released, and discharged, pursuant to the Full and Final Release.” (App. p.162).¹² The circuit court denied this motion and its decision 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.

(App. p.35) (emphasis added).

The circuit court’s statement of the factual and legal record is inaccurate. DeClemente never previously argued for satisfaction of the damages judgment pursuant to Rule 60(b)(5) (nor did he ever raise the damages satisfaction clause of the Release) when arguing to Judge Nicholson that default entry is improper in this case. Nor was it even possible for Petitioner to have brought a motion for damages satisfaction before Judge Nicholson because damages had not been entered at that stage in the litigation. *See* (App. p.11) (Judge Nicholson’s Order continuing Respondent’s

¹² This language is from Rule 60(b)(5), SCRPC, which provides that “the court may relieve a party or his legal representative from a final judgment ... [when] *the judgment has been satisfied, released, or discharged ...*” *Id.* This language is also essentially identical to that contained in the Full and Final Release. *See* (App. p.97) (Respondent agreeing to “release, acquit and forever discharge” Petitioner from any and all “damages, cost, loss or services, expenses and compensation”).

motion for damages hearing to be set for the next term of court). 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) motion for satisfaction of the damages judgment is controlled by an error of fact.

Second, the circuit court's denial of DeClemente's motion for relief from the damages 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 the damages judgment, DeClemente introduced the Damages Satisfaction provision of the parties' Full and Final Release as dispositive proof that ATMES is contractually required to satisfy the damages judgment. (App. p.161); *see* (App. p.97-99) (Full and Final Release attached as Exhibit). 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 denial of DeClemente's Rule 60(b)(5) Motion is therefore controlled by an error of law.

Although Judge Nicholson's erroneous default judgment prevented DeClemente from having ATMES' contractually prohibited, meritless lawsuit against him dismissed, Petitioner's default status has no affect upon Respondent's contractual duty to satisfy the erroneous 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 affirmed this decision and should be reversed accordingly.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that this Court reverse the lower courts' decisions and remand this case to the trial court.

Respectfully submitted,



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