

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

**RECEIVED**

**Apr 12 2022**

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

Case No. 2011-CP-10-08011

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Withdrawn, Substituted, Refiled December 23, 2020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, LLC.....Respondent

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 the.....Petitioner

**BRIEF OF RESPONDENT**

James E. Smith, Jr. #8733  
JAMES E. SMITH JR., PA  
1422 Laurel Street  
Columbia, SC 29201  
(803) 933-9800  
James@JamesSmithPA.com

Austin T. Reed, #102808  
Jonathan M. Robinson, #68285  
Shanon N. Peake # 102723  
Rachel E. Lee, #104184  
SMITH ROBINSON HOLLER DUBOSE AND  
MORGAN, LLC  
2530 Devine Street, Third Floor  
Columbia, SC 29205

*ATTORNEYS FOR RESPONDENT*

## TABLE OF CONTENTS

Table of Authorities .....	ii
Statements of Issues on Appeal .....	1
1. Did the Court of Appeals correctly find the circuit court did not abuse its broad discretion in determining Petitioner failed to demonstrate “good cause” for relief, adhering to this Court’s precedence in <i>Sundown Operating Co. v. Intedger Industries, Inc.</i> , 383 S.C. 601, 681 S.E.2d 885 (2009)? .....	1
a. Did the Court of Appeals correctly find the circuit court did not abuse its broad discretion in thoroughly considering Petitioner’s “reasons why vacation of default entry would serve the interests of justice” and rejecting the same in its “good cause” analysis? .....	1
b. Did the Court of Appeals correctly find that the circuit court did not abuse its broad discretion in properly acknowledging Petitioner’s Rule 60(b), SCRPC argument, applying the proper standards, and dispensing of Petitioner’s argument? .....	1
2. Did the Court of Appeals correctly find the circuit court did not abuse its broad discretion by denying Petitioner’s Motion to Continue the damages hearing on one occasion but allowing the damages hearing to remain open to permit Petitioner to present his argument as to damages? .....	1
3. Did the Court of Appeals correctly find that the circuit court did not abuse its broad discretion in allowing Art Bradham to testify as an expert witness on damages? .....	1
4. Did the Court of Appeals correctly find the circuit court properly considered and rejected Petitioner’s argument regarding the Full and Final Release Agreement? .....	1
5. Did the Court of Appeals correctly affirm the circuit court’s decision regarding Petitioner’s Rule 60(b)(5), SCRPC Motion for Relief from Judgment? .....	1
Statement of the Case .....	2
A. Factual Background .....	2
B. Procedural History .....	5
Standards of Review .....	9
I. Motion Setting Aside an Entry of Default and Seeking Relief from Judgment .....	9

II.	Motion for a Continuance .....	10
III.	Qualification of an Expert Witness.....	10
	Argument .....	10
I.	The Court of Appeals correctly held the circuit court, in compliance with this Court’s precedent in <i>Sundown</i> , did not abuse its broad discretion in finding that Petitioner failed to demonstrate good cause for relief from entry of default judgment.....	10
	A. Timeline .....	12
	B. Judge Nicholson’s Ruling and the Court of Appeals’ Decision .....	13
II.	The Court of Appeals correctly held the circuit court did not abuse its broad discretion in denying Petitioner’s Motion to Continue the damages hearing.....	19
III.	The Court of Appeals correctly held the circuit court did not abuse its broad discretion by qualifying Art Bradham as an expert witness on damages .....	23
IV.	The Court of Appeals did not err in finding the Damages Satisfaction provision of a different Full and Final Release Agreement was inapplicable to the instant case.....	26
V.	The Court of Appeals correctly held Petitioner failed to demonstrate any of the necessary elements under Rule 60(b) and the circuit court did not abuse its discretion by not considering the Full and Final Release Agreement .....	28
	Conclusion .....	30

**TABLE OF AUTHORITIES**

**CASES**

<i>Assistive Tech. Med. Equip. Servs., LLC v. Hood &amp; Selander, CPAS, LLC,</i> 2020-UP-225 (Ct. App. 2020) .....	14
<i>Burroughs v. Worsham,</i> 352 S.C. 382, 390-91, 574 S.E.2d 215, 219 (2002) .....	9
<i>Darden v. Witham,</i> 263 S.C. 183, 194, 209 S.E.2d 42, 46 (1974) .....	9
<i>Dixon v. Besco Eng’g,</i> 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995).....	16

<i>Florence Cty. Dep't of Soc. Servs. V. Ward,</i> 310 S.C. 69, 73, 425 S.E.2d 61, 63 (Ct. App. 1992).....	25
<i>Glasscock v. Glasscock,</i> 304 S.C. 158, 403 S.E.2d 313 (1991) .....	9
<i>Gooding v. St. Francis Xavier Hosp.,</i> 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997) .....	23
<i>Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.,</i> 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006) .....	11
<i>Herron v. Century BMW,</i> 395 S.C. 461, 470, 719 S.E.2d 640, 645 (2011) .....	18
<i>Howard v. Holiday Inns, Inc.,</i> 271 S.C. 238, 246 S.E.2d 880 (1978) .....	21
<i>Jackson v. Speed,</i> 326 S.C. 289, 309, 486 S.E.2d 750, 760 (1997) .....	19
<i>Limehouse v. Hulsey,</i> 397 S.C. 49, 91 n.28, 723 S.E.2d 211, 233 n.28 (Ct. App. 2011).....	17
<i>Mitchell Supply Co., Inc. v. Gaffney,</i> 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988) .....	11, 16
<i>Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C.,</i> 353 S.C. 327, 338, 577 S.E.2d 468, 474 (Ct. App. 2003) .....	26
<i>O'Tuel v. Villani,</i> 318 S.C. 24, 28, 455 S.E.2d 698, 701 (Ct. App. 1995).....	23
<i>Raby Const., L.L.P. v. Orr,</i> 358 S.C. 10, 17, 594 S.E.2d 478, 482 (2004) .....	28
<i>Regions Bank v. Owens,</i> 402 S.C. 642, 648-49, 741 S.E.2d 51, 54-55 (Ct. App. 2013) .....	16
<i>Renney v. Dobbs House, Inc.,</i> 275 S.C. 562, 274 S.E.2d 290 (1981) .....	21
<i>Smith Comp. of Greenville, Inc., v. Hayes,</i> 311 S.C. 358, 360, 428 S.E.2d 900, 902 (Ct. App. 1993) .....	29

<i>State v. Lytchfield</i> , 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957) .....	19
<i>State v. Poindexter</i> , 314 S.C. 490, 494, 431 S.E.2d 254, 256 (1993) .....	25
<i>State v. Stone</i> , 376 S.C. 32, 36, 655 S.E.2d 487, 489 (2007) .....	24
<i>State v. White</i> , 372 S.C. 364, 374-75, 642 S.E.2d 607, 612 (Ct. App. 2007) .....	24
<i>Sundown Operating Co., Inc. v. Intedge Indus., Inc.</i> , 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009) .....	9, 10, 11, 13, 14, 16, 17, 28, 30
<i>Trotter v. Trane Coil Facility</i> , 393 S.C. 637, 645, 714 S.E.2d 289, 293 (2011) .....	21
<i>Watson v. Ford Motor Co.</i> , 389 S.C. 434, 447, 699 S.E.2d 169, 176 (2010) .....	10
<i>Williams v. Bordon's, Inc.</i> , 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980) .....	10
<i>Williams v. Ray</i> , 232 S.C. 373, 381, 102 S.E.2d 368, 372 (1958) .....	16
<i>Williams v. Vanvolkenburg</i> , 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994) .....	16
<i>Wilder Corp. v. Wilkie</i> , 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) .....	2, 14-15

**RULES**

Rule 11, SCRCP.....	14
Rule 40(i), SCRCP .....	19
Rule 55(c), SCRCP .....	11, 13, 14, 17, 28, 29, 30
Rule 59 (e), SCRCP .....	26, 29
Rule 60(b), SCRCP.....	11, 17, 18, 28, 29, 30
Rule 60(b)(5), SCRCP .....	28, 29, 30

Rule 220(c), SCACR .....	16
Rule 611, SCRE .....	25
Rule 702, SCRE .....	23

## COUNTER-STATEMENT OF ISSUES ON APPEAL

As it asserted at the Court of Appeals, Respondent believes the issues presented by Petitioner can be consolidated, simplified, and restated to whether the circuit court abused its discretion in finding Appellant did not establish good cause to set aside default or sufficient grounds for relief from the default judgment. However, for this Court's benefit, to completely and thoroughly address the issues presented by Petitioner, Respondent sets forth the following counter-issues on appeal in response to those framed by Petitioner:

1. Did the Court of Appeals correctly find the circuit court did not abuse its broad discretion in determining Petitioner failed to demonstrate "good cause" for relief, adhering to this Court's precedence in *Sundown Operating Co. v. Intedger Industries, Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009)?
  - a. Did the Court of Appeals correctly find the circuit court did not abuse its broad discretion in thoroughly considering Petitioner's "reasons why vacation of default entry would serve the interests of justice" and rejecting the same in its "good cause" analysis?
  - b. Did the Court of Appeals correctly find that the circuit court did not abuse its broad discretion in properly acknowledging Petitioner's Rule 60(b), SCRCF argument, applying the proper standards, and dispensing of Petitioner's argument?
2. Did the Court of Appeals correctly find the circuit court did not abuse its broad discretion by denying Petitioner's Motion to Continue the damages hearing on one occasion but allowing the damages hearing to remain open to permit Petitioner to present his argument as to damages?
3. Did the Court of Appeals correctly find that the circuit court did not abuse its broad discretion in allowing Art Bradham to testify as an expert witness on damages?
4. Did the Court of Appeals correctly find the circuit court properly considered and rejected Petitioner's argument regarding the Full and Final Release Agreement?
5. Did the Court of Appeals correctly affirm the circuit court's decision regarding Petitioner's Rule 60(b)(5), SCRCF Motion for Relief from Judgment?

## STATEMENT OF THE CASE

This case involves a business acquisition/expansion that quickly went south. The voluminous record depicts a complex transaction that has been winding its way through the courts since 2011; however, the basic issue of this litigation is quite simple—(1) Petitioner failed to timely answer a Summons and Complaint; (2) Petitioner never pursued a Motion to Set Aside Default<sup>1</sup>; and (3) Petitioner failed to provide evidence of good cause for failure to Answer the Complaint from December 1, 2011 to January 1, 2012, and May 14, 2012 to August 10, 2012. The question before this Court is whether the Court of Appeals correctly found the circuit court did not abuse its discretion.

### **A. Factual Background**

In 2008, Mr. G. Murrell Smith Jr., and Mr. Jeff Reed formed Assistive Technology Medical Equipment Services, LLC (“ATMES”) for the purpose of merging two separate durable medical equipment (“DME”) companies—Reliable Medical Equipment of South Carolina, LLC (“Reliable”) and Abacare Home Medical, Inc. (“Abacare”). (Appx. 166-67, 177). In 1998, Mr. Smith and Mr. Reed started the DME company, Reliable, in Sumter, South Carolina. (Appx. 177). Petitioner and the Estate of Dorothy A. Connelly were co-owners of Abacare, also a DME company, located in Mount Pleasant, South Carolina. (Appx. 177, 628). After the formation of ATMES, Mr. Smith, Mr. Reed, Petitioner, and Ms. Kimberly Cuce became partners in ATMES, each having a twenty-five percent ownership in the company. (Appx. 182). On November 7, 2008, ATMES entered into a stock purchase and assignment agreement with Abacare, purchasing

---

<sup>1</sup> Petitioner failed to put forth any effort to set aside default until the appellate level. *See Wilder Corp. v. Wilkie*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review.”).

the Abacare stock for \$809,500.<sup>2</sup> (Appx. 628-633). ATMES became the parent company for Reliable and Abacare.

Not long after becoming partners, Petitioner started to derail and threaten the overall success of the company, failing to perform his duties.<sup>3</sup> (Appx. 184, 446). On June 30, 2009, Mr. Smith and Mr. Reed executed a Bill of Sale and Transfer and a Promissory Note with Petitioner, wherein Petitioner sold his twenty-five percent ownership in ATMES to Mr. Smith and Mr. Reed. (Appx. 87-96, 634-38). On July 10, 2009, Mr. Smith, Mr. Reed, Ms. Cuce, and Petitioner executed a mutual Full and Final Release as it related to their business relationship. (Appx. 97). The Full and Final Release applied to “the period in which all members operated under ATMES and during the period of negotiation and in preparation of the closing documents and other documents referenced hereinabove.” (Appx. 125).

During the time of ATMES’s formation and the purchase of Abacare, specifically between the years 2006 and 2009, South Carolina law regarding whether DME products were considered exempt from sales taxes was changing. Specifically, in August 2007, the South Carolina Administrative Law Court issued a ruling in favor of DME products being tax exempt; however, the South Carolina Supreme Court reversed the decision in April of 2009. (Appx. 168, 178-79). As a result of the Supreme Court’s decision in *Home Medical Systems, Inc. v. South Carolina Department of Revenue*, the South Carolina Department of Revenue (SCDOR) audited DME companies for past unpaid sales taxes. 382 S.C. 556, 677 S.E.2d 582 (2009) (Appx. 180-81, 639). As the parent company of two DME companies, ATMES reviewed past taxes for both Reliable

---

<sup>2</sup> Petitioner assigned his rights in Abacare to ATMES, and ATMES bought the Connelly Estate’s shares. (Appx. 628).

<sup>3</sup> It also became apparent to Mr. Smith and Mr. Reed that Petitioner and Ms. Cuce were engaged in an inappropriate relationship that had a negative impact on the business relationship. (Appx. 183-84).

and Abacare. (Appx. 179-81, 639, 688). During the review, ATMES found that prior to the Supreme Court's ruling, Reliable had been underreporting its sales tax liabilities on DME products by claiming a deduction. (Appx. 180-81). Although all DME companies were underreporting liabilities prior to the *Home Medical Care* decision, Abacare's underreporting of liabilities was not justifiable. (Appx. 180-81). Rather, Abacare had a sales tax liability not based on deductibles prior to the recent court decision but based on the fact the company had been significantly underreporting its income to SCDOR prior to ATMES acquiring the company. (Appx. 179-81).

Upon the discovery of the underreported past taxes, ATMES hired Mr. Art Bradham, a certified public accountant ("CPA"), to review the taxes. (Appx. 56, 390). During the investigation, Mr. Bradham discovered a shareholder meeting minutes report from July 31, 2007, indicating that Mr. David Selander, Abacare's CPA, had informed the shareholders, including Petitioner that the taxes that were being reported were "significantly understated." (Appx. 148). Mr. Selander advised Petitioner that Abacare could "owe a substantial amount of tax, penalties, and interest." (Appx. 148). Mr. Bradham explained that after the purchase of Abacare by ATMES, SCDOR executed a tax examination of Abacare and determined a significant amount of sales tax liability was owed. (Appx. 393). Based on his investigation and the SCDOR report, Mr. Bradham opined that \$100,000 in sales tax was not reported to SCDOR prior to ATMES's purchase of Abacare and because of this failure to report, the value of the net income of Abacare was substantially overstated by \$774,000.<sup>4</sup> (Appx. 393). Based on Petitioner's and the other shareholder's failure to report the proper sales tax, which their accountant made them aware of in 2007, ATMES suffered approximately \$875,000 in damages. (Appx. 394).

---

<sup>4</sup> Mr. Bradham testified that \$87,000 worth of sales tax and \$13,000 in interest was not reported prior to the purchase of Abacare. (Appx. 393).

## B. Procedural History

On October 31, 2011, ATMES filed a Summons and Complaint against Petitioner, Hood & Selander (Abacare's previous accounting firm), the personal representatives of Dorothy and James Connolly's Estates, and Ms. Cuce, asserting the purchase price of Abacare had been artificially inflated. (Appx. 38-54). The suit asserted that the defendants had prior knowledge of the \$100,000 sales tax liability and failed to disclose this material information to SCDOR and falsely represented the company's profitability prior to the purchase by ATMES. (Appx. 39-54). On November 18, 2011, Mr. Matthew Keller, attorney at the Mason Law Firm, emailed Petitioner informing him that he was named in the October 31 lawsuit.<sup>5</sup> (Appx. 706).

ATMES filed two proofs of service for Petitioner. (Appx. 59, 708). The first proof of service was a return receipt by certified mail executed on December 1, 2011. (Appx. 708). The second was an affidavit provided by a service processor, showing personal service on Petitioner on January 6, 2012. (Appx. 59). Petitioner's Answer from the December 1, 2011 service was due on January 1, 2012, and Petitioner never filed an Answer. Additionally, even if the January 6, 2012 service was considered, Petitioner failed to Answer or provide *any* communication to Respondents regarding the lawsuit.<sup>6</sup>

On February 2, 2012, Petitioner was involuntarily admitted into MUSC Psychiatric Center for his mental health and was subsequently discharged from care on February 15, 2012. (Appx.

---

<sup>5</sup> It is Respondent's belief that based on this email to Petitioner, Mr. Matthew Keller was representing the interests of Petitioner in November 2011; however, no one from the Mason Law Firm ever contacted Mr. James E. Smith, Jr., Respondent's attorney. Moreover, Judge Nicholson expressly provided Petitioner with the opportunity to supplement the record with affidavits in support of his assertion that the Mason Law Firm had contacted Respondent's Counsel. (Appx. 251-52). None was provided.

<sup>6</sup> Petitioner admits he was served with the lawsuit on **December 1, 2011**. (Pet. Br. 4); (Appx. 10). Petitioner has failed to provide any evidence that he was unable to provide an Answer from December 1, 2011, to January 1, 2012.

101, 112-13). Petitioner was admitted again to the psychiatric center on February 22, 2012 and discharged from care on March 5, 2012. (Appx. 107, 112-13).

Even after a substantial period of time, Petitioner, nor anyone on his behalf, provided an Answer to the Complaint or any type of communication to ATMES. In order to move forward the stagnate litigation, on March 30, 2012, ATMES filed an Affidavit of Default against Petitioner. (Appx. 61-62).

On May 14, 2012, nearly six months since the Complaint had been served on Petitioner, Mr. Cameron Marshall, Counsel for Petitioner, notified the circuit court that he was representing Petitioner. (Appx. 710). In his letter to the circuit court, Counsel for Petitioner requested the court advise him when Plaintiff's Motion for Default Judgment was to be heard so he may appear on Petitioner's behalf. (App. 710). Based on the letter, both Counsel for Petitioner and Petitioner were aware that Petitioner was in default, yet there was still no attempt to provide an Answer or to file any motion contesting default or a motion requesting to set aside default.

On June 8, 2012, Counsel for Petitioner sent Mr. Smith and Mr. Reed a letter regarding payment that he alleged was owed to Petitioner by way of the Promissory Note that was executed in 2009. (Appx. 711). Mr. Smith responded, explaining to Counsel for Petitioner that Petitioner was in default and that they were awaiting the damages hearing. (Appx. 85).

Finally, three months after Counsel for Petitioner's initial letter of representation, on **August 10, 2012**, a motion requesting enlargement of the time to file an Answer was filed. (Appx. 63). The motion asserted that due to Petitioner's involuntary commitment to MUSC from February 2, 2012, to March 5, 2012, he was unable to file a timely Answer. (Appx. 63-64). Additionally, the motion claimed Petitioner had meritorious defenses to the suit. (Appx. 64). On August 22,

2012, Petitioner filed an Amended Answer, along with counterclaims and crossclaims. (Appx. 65).

On December 16, 2013, Judge J.C. Nicholson, Jr., held the hearing for default and Petitioner's motion for relief. (Appx. 213). At the hearing, Counsel for Petitioner informed Judge Nicholson that Petitioner hired him in May 2012, but admitted nothing was filed with the court until August because he was "working on the case." (Appx. 219). Based on the evidence presented at the hearing, Judge Nicholson found Petitioner in default by a written order filed April 30, 2014. (Appx. 7-11). In the order, Judge Nicholson found Petitioner demonstrated good cause for failure to timely file an answer during the dates of his involuntary hospitalizations for his mental health, which had ongoing outpatient care until May 2012. (Appx. 10). However, Judge Nicholson held that good cause **did not exist** from the time Petitioner obtained counsel on May 14, 2012, to when an Answer was finally filed with the court on August 10, 2012. (Appx. 10). The court found there was no good cause for the **three-month delay** for Petitioner answering the Complaint that he and counsel were clearly aware of. (Appx. 7-11). Further, Judge Nicholson held that because Petitioner was in default, he could not enter an Answer, counterclaim, or cross claims, and could not pursue default judgment against ATMES.<sup>7</sup> (Appx. 11).

A damages hearing was conducted by Judge Deadre Jefferson on November 1, 2016. (Appx. 333-461). At the November 1 hearing, Petitioner was not present.<sup>8</sup> (Appx. 333-461). Counsel for Petitioner attempted to argue that he was unaware of the damages hearing being set

---

<sup>7</sup> Petitioner filed a Motion to Reconsider, which was denied. (Appx. 130). Petitioner filed an appeal with the South Carolina Court of Appeals, and the court dismissed the appeal as not immediately appealable because damages had not been ruled on. (Appx. 13).

<sup>8</sup> At the time of the hearing, Petitioner was residing in Florida, where he was on probation and was required to have a specific travel order to enter South Carolina. Petitioner had a travel order for South Carolina; however, it was for October 31, 2016—the wrong day. (Appx. 353-54).

for November 1; however, the court docket clearly demonstrated the damages hearing was set for November 1 for at least two-weeks prior to the hearing. (Appx. 351-61, 456-57). Judge Jefferson heard testimony from Mr. Smith and Mr. Bradham and at the end of the hearing, Judge Jefferson informed the parties she would reschedule the hearing in order for Petitioner to be present before the award of damages would be decided. (Appx. 386-455). The damages hearing reconvened on January 5, 2017, and Petitioner was present.<sup>9</sup> (Appx. 464).

Two weeks after the damages hearing, Petitioner submitted a motion to consider additional evidence and reconvene the damages hearing with Judge Jefferson, specifically to consider the expert testimony of Mr. Ronald Burkett, a CPA. (Appx. 20, 150, 157-58). Judge Jefferson took into consideration the deposition of Mr. Burkett. (Appx. 20). After conducting two hearings and considering Plaintiff's expert, Judge Jefferson entered a default judgment award of \$875,144 in favor of ATMES. (Appx. 19-31). The court found the testimony of Mr. Bradham credible and his explanation of the damage calculations reliable. (Appx. 31).

Petitioner filed a motion to reconsider and for relief from judgment. (Appx. 161-62). Judge Jefferson denied Plaintiff's motion, finding that, as throughout this process, Petitioner once again was attempting to make an argument against default judgment that had already been decided on by Judge Nicholson and did not present any arguments for reconsideration by the court. (Appx. 32-35).

On March 8, 2018, Petitioner filed a notice of appeal in the South Carolina Court of Appeals. (Appx. 164). The Court of Appeals filed an unpublished opinion on July 29, 2020, affirming the circuit court and finding the court did not abuse its discretion by finding Petitioner in default. (Appx. 783). Petitioner filed a Petition for Rehearing. (Appx. 786-806). The Court

---

<sup>9</sup> Petitioner and Mr. Reed were witnesses at the reconvened hearing. (Appx. 465-550).

of Appeals granted rehearing and on the same day withdrew, substituted, and refiled the unpublished opinion. (Appx. 811). In the refiled opinion, the Court of Appeals did not change its position; however, it addressed issues Petitioner raised regarding a motion for a continuance and Mr. Bradham testifying as an expert witness. (Appx. 813). Again, the Court of Appeals correctly held that the circuit court did not abuse its discretion in its findings. (Appx. 813).

On February 26, 2021, Petitioner filed a Petition for Writ of Certiorari with the South Carolina Supreme Court, which was granted. (Appx. 815).

### **STANDARDS OF REVIEW**

The issues presented by Petitioner in this case are subject to an **abuse of discretion** standard of review. As this Court is well-aware, an abuse of discretion standard of review affords considerable deference to our circuit courts. *See, e.g., Burroughs v. Worsham*, 352 S.C. 382, 390-91, 574 S.E.2d 215, 219 (2002). Indeed,

A reviewing court is never justified in substituting its discretion for that of the trial court; in determining whether the lower court has abused its discretion, the question is not whether the reviewing court agrees with the court below, but, rather, whether it believes that a judicial mind, in view of the relevant rules of law applicable to the particular case and on due consideration of all the circumstances, could reasonably have reached the conclusion of the court below, of which complaint is made.

*Darden v. Witham*, 263 S.C. 183, 194, 209 S.E.2d 42, 46 (1974), overruled on other grounds by *Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313 (1991).

#### **I. Motion Setting Aside an Entry of Default and Seeking Relief from Judgment**

“The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge.” *Sundown Operating Co., Inc. v. Intedge Indus., Inc.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009). “The trial court’s decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion.” *Id.* “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 without evidentiary support.” *Id.* at 607, 681 S.E.2d at 888.

## **II. Motion for Continuance**

“It has long been the rule in 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 appellant.” *Williams v. Bordon’s, Inc.*, 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980).

## **III. Qualification of an Expert Witness**

“The qualification of a witness as an expert is within the trial court’s discretion, and this Court will not reverse that decision absent an abuse of discretion.” *Watson v. Ford Motor Co.*, 389 S.C. 434, 447, 699 S.E.2d 169, 176 (2010).

## **ARGUMENT**

Petitioner presents a multitude of issues to the Court in hopes of distracting the Court from the simple, straightforward issues in this case. First, did Judge Nicholson abuse his discretion? Second, did Judge Jefferson abuse her discretion? The answer to both is plainly, “no.” The circuit court’s reasoning was grounded in the controlling law and the record. This Court should dismiss the writ of certiorari as improvidently granted or affirm the Court of Appeals’ decision.

### **I. The Court of Appeals correctly held the circuit court, in compliance with this Court’s precedent in *Sundown*, did not abuse its broad discretion in finding that Petitioner failed to demonstrate good cause for relief from entry of default judgment.**

Petitioner claims the Court of Appeals erred in holding that Petitioner failed to demonstrate good cause for relief from entry of default and that this holding conflicts with this Court’s decision

in *Sundown*. (Pet. Br. 10-20). Petitioner’s argument is without merit. Petitioner failed to show good cause, and there is certainly no conflict between the lower courts’ decisions and *Sundown*.

A decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the circuit court. *Harbor Island Owners’ Ass’n v. Preferred Island Props., Inc.*, 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006). A circuit court’s decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Mitchell Supply Co., Inc. v. Gaffney*, 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988).

In *Sundown*, this Court issued an opinion detailing the standards for relief in default judgment matters to rectify “confusion in the case law.” 383 S.C. at 607, 681 S.E.2d at 888. Rule 55(c) of the South Carolina Rules of Civil Procedure grants power to the courts to set aside an entry of default. However, this empowerment requires the defaulting party to show “good cause.” Rule 55(c), SCRPC. “This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice.” *Sundown*, 383 S.C. at 607, 681 S.E.2d at 888. “Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted.” *Id.* at 607-08, 681 S.E.2d at 888. Importantly, the *Sundown* Court made certain, “The trial court need not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause.” *Id.* at 608, 681 S.E.2d at 888. “The Rule 60(b) factors are . . . relevant to a Rule 55(c) analysis, but only inasmuch as proof of any one of these factors is sufficient to show “good cause.” *Id.* at 608, 681 S.E.2d at 889.

## A. Timeline

The circuit court correctly held Petitioner failed to show good cause. A brief recap of the timeline in this case is helpful. Respondent filed its Summons and Complaint on October 31, 2011. (Appx. 36-54). The Summons directed Petitioner to file an Answer within 30 days after service, and if Petitioner failed to do so, “judgment by default will be rendered against you for the relief demanded in the complaint.” (Appx. 37). On December 1, 2011, the Complaint was duly served on Petitioner.<sup>10</sup> (Appx. 8). This made Petitioner’s Answer due January 2, 2012. Petitioner did not Answer. Petitioner was also served personally by a process server on January 6, 2012. (Appx. 59). Petitioner still did not Answer at this time, despite the fact that another lawyer had been assisting Petitioner in the matter for quite some time. Petitioner acknowledged that he had a different law firm “working on this issue.” (Appx. 224). These findings have never been challenged and are the law of the case.

On February 2, 2012, Petitioner was involuntarily admitted into MUSC Psychiatric Center for his mental health and was discharged from care on February 15, 2012. (Appx. 101, 112-13). Petitioner was admitted again to the psychiatric center on February 22, 2012, and was discharged from care on March 5, 2012. (Appx. 107, 112-13). Respondent was cognizant of Petitioner’s treatment. To be sure, Respondent has never obscured this fact, and this fact was the reason Respondent waited until March 30, 2012, to file an Affidavit of Default against Petitioner.<sup>11</sup> (Appx. 61-62). However, Petitioner still failed to file an Answer.

---

<sup>10</sup> In his brief, Petitioner admits that service occurred on December 1, 2011. (Pet. Br. 4).

<sup>11</sup> Petitioner has never filed an Affidavit of a physician declaring that he was incompetent prior to his hospitalization, during his hospitalization, or following his release, despite being prompted by the circuit court. (Appx. 223, 225).

Another month went by, and Petitioner subsequently engaged his current Counsel in May of 2012. On May 14, 2012, over six months since the Complaint had been served on Petitioner, Counsel for Petitioner, notified the circuit court that he was representing Petitioner. (Appx. 710). There was still no attempt to provide an Answer or to file any motion contesting default or to set aside default. Finally, three months after Counsel for Petitioner's initial letter of representation, on **August 10, 2012**, a motion requesting enlargement of the time to file an Answer was filed. (Appx. 63). On August 22, 2012, Petitioner filed an Amended Answer, along with counterclaims and crossclaims. (Appx. 65).

### **B. Judge Nicholson's Ruling and the Court of Appeals Decision**

Judge Nicholson heard Petitioner's motion for enlargement of time to answer and Respondent's arguments for default judgment on December 16, 2013. (Appx. 7, 210). Judge Nicholson issued a well-reasoned order denying Petitioner's motion in April 2014. (Appx. 7-11). Judge Nicholson began his order by discussing Rule 55 of the South Carolina Rules of Civil Procedure and by discussing this Court's decision in *Sundown*. He ruled in pertinent part:

After reviewing the supplemental affidavits and considering arguments of counsel and the Court record, I find that Defendant DeClemente was properly served with the Complaint on December 1, 2011. I find pursuant to supplemental affidavits and representations at the hearing, Defendant DeClemente knew he had to answer the Complaint and had the benefit of counsel in around the time he was served with the Complaint. However, I find that DeClemente demonstrated "good cause" pursuant to Rule 55(c) throughout his hospitalization, which was ongoing until sometime in May 2012. However, good cause did not exist from the time DeClemente obtained counsel in May 2012 to the time DeClemente filed Defendant's Motion to Enlarge Time and Answer Counterclaims on August 10, 2012. I find that the timing of motion for relief was not prompt. Defendant DeClemente's Motion to Extend Time and/or Relief from Default pursuant to Rule 55(c) is DENIED.

(Appx. 10).

The Court of Appeals affirmed Judge Nicholson’s ruling in an unpublished decision. *See Assistive Tech. Med. Equip. Servs., LLC v. Hood & Selander, CPAS, LLC*, 2020-UP-225 (Ct. App. 2020).

\* \* \*

Neither of the lower courts committed reversible error. A party must give a good explanation for being in default. Petitioner failed to do so, and he cannot demonstrate an abuse of the circuit court’s discretion. *First*, there were no errors of law. The lower courts cited Rule 55(c), accurately discussed this Court’s decision in *Sundown*, and correctly listed the factors the court was required to consider in determining “good cause.” Nothing about the lower court’s legal analysis was incorrect. *Second*, the factual analysis is accurate and sound. The circuit court found Petitioner demonstrated “good cause” during his hospitalization, but the court also found Petitioner did not have good cause for failing to answer or otherwise defend the lawsuit from May 2012 to August 2012. (Appx. 10). Indeed, this finding is sensible, and the Court of Appeals agreed.

Moreover, based on Judge Nicholson’s Order that Petitioner had “good cause” during his hospitalization, it is difficult to understand why there was not an immediate motion to have default set aside in May on the basis of his hospitalization. An Answer with a general denial could have easily been attached to a motion along with an explanation that further defenses would be forthcoming after time for an adequate investigation. Yet, inexplicably, nothing was filed from May to August.<sup>12</sup> In fact, Counsel for Petitioner’s letter to the Court on May 14, 2012, shows that

---

<sup>12</sup> Petitioner has constantly argued that the “case was complex”; however, Petitioner did not communicate with Respondent’s Counsel the need for additional time to file his motion nor did he file a Motion to Set Aside Default. *See Wilke*, 330 S.C. at 76, 497 S.E.2d at 733 (“[A]n issue cannot be raised for the first time on appeal . . .”). Failure to communicate with Respondent’s counsel was in direct violation with Rule 11, SCRPC. “All motions filed shall contain an affirmation that the movant’s counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in

Petitioner and his counsel were aware he was in default and did not express any intention to obtain relief from default. Instead, Counsel for Petitioner's letter merely expressed an intent to defend against default damages. There is certainly no abuse of discretion in finding there was no good reason why Petitioner failed to defend the suit for three months. There comes a time in which a parties' complete disregard to pending litigation does not support vacation of an entry of default judgment.

Furthermore, another part of the circuit court's order is important, because although the circuit court's analysis was grounded in the lack of a good reason for the delay in action from May 2012 to August 2012, the circuit court's order also explains other detrimental facts that came to light during the hearing on Petitioner's motion for enlargement of time. As noted above, the hearing disclosed another lawyer had been assisting Petitioner *before* his hospitalization and *before* he retained his current counsel. The circuit court noted that the language on the summons was clear, and the court ultimately found Petitioner knew he had to answer the Complaint and that he had the benefit of counsel around the time he was served with the Complaint. In fact, this Court can affirm because Petitioner did not have good cause in failing to answer the Complaint by January 1, 2012. Petitioner has admitted he was served with the Complaint on December 1, 2011, making his responsive pleading due by January 1, 2012. (Pet. Br. 4). Although Petitioner was involuntarily hospitalized on February 2, 2012, this hospitalization—which occurred a month after his responsive pleading was due—does not give Petitioner good cause for failing to respond in a timely manner. Petitioner did not offer any evidence to the circuit court that his mental illness prevented him from fully understanding the realities of this action and that he needed to file a

---

the motion, unless the movant's counsel certifies that consultation would serve no useful purpose or could not be timely held.” Rule 11, SCRCP.

responsive pleading to the Complaint that was served on him on December 1, 2011. Petitioner did not offer any testimony from his medical doctors indicating that his illness was present during the timeframe or that it would have prevented him from understanding he needed to file a responsive pleading. Instead, the record shows the opposite is true as Petitioner was consulting with counsel during this time about the Complaint. (Appx. 706). Thus, the Court may affirm the circuit court because Petitioner failed to meet his burden to show that he had good cause for failing to timely respond during the operative time period—December 1, 2011, to January 1, 2012, an entire month before his first hospitalization. This Court can affirm the lower court’s decision for any reason appearing in the record. *See* Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”).

The lower courts’ decisions are in accord with existing precedent. Multiple cases confirm that a circuit court has the discretion to let default stand when the default stems from inattentiveness or neglect. *Regions Bank v. Owens*, 402 S.C. 642, 648-49, 741 S.E.2d 51, 54-55 (Ct. App. 2013) (holding some evidence supported the circuit court’s finding that a party did not take adequate steps to protect himself); *Dixon v. Besco Eng’g*, 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995) (upholding a finding of default when a lawyer mistakenly believed he had been given an unlimited extension to answer); *Williams v. Vanvolkenburg*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994) (holding a lawyer’s negligence in failing to answer is imputed to the client); *Mitchell Supply Co.*, 297 S.C. at 164-65, 375 S.E.2d at 324 (same). Indeed, it would be difficult to reconcile a decision reversing the circuit court supported with precedent. When construing the statutory predecessor to Rule 55, this Court explained the discretionary power to grant relief from default:

is vested in the trial, not the appellate, court. In an appeal from such an order of the circuit court it is not our function, nor is it within our

power, to substitute our judgment for that of the circuit judge simply because we might have reached a different conclusion had we been in his place.

*Williams v. Ray*, 232 S.C. 373, 381, 102 S.E.2d 368, 372 (1958).

Petitioner accuses the Court of Appeals and the circuit court in failing to comply with *Sundown*. (Pet. Br. 10-20). *First*, Petitioner argues the lower courts failed to consider Petitioner’s “reasons why vacation of default entry would serve the interests of justice.” (Pet. Br. 12-15). *Second*, Petitioner argues that the lower courts failed to acknowledge Petitioner’s Rule 60(b) factors and failing to apply “the correct, mere ‘good cause’ standard for relief from default entry.” (Pet. Br. 17-20). Essentially, Petitioner accuses the lower courts of fundamentally misapplying *Sundown*; however, Respondent encourages the Court to review Petitioner’s arguments and briefing to the Court of Appeals (which significantly misread and misapply *Sundown*) and the shifting/evolving of arguments that are now before this Court. Preservation concerns abound.

As to Petitioner’s first argument. *Sundown* mandates a party seeking relief from an entry of default under Rule 55(c) to (1) provide an explanation for the default and (2) give reasons why vacation of the default entry would serve the interests of justice. 383 S.C. at 607, 681 S.E.2d at 888-89. Petitioner attempts to impute error on the lower courts by complaining that the magic words of “reasons why vacation of default entry would serve the interests of justice” were not used in the court’s analysis. This is a red-herring. The lower courts cited to the specific language in *Sundown* and considered whether there was an explanation for default and whether there were reasons why vacation of the default entry would serve the interests of justice. The lower courts simply found that Petitioner did not meet this burden and concluded the explanation for the default was not satisfactory.<sup>13</sup> The lower courts’ analysis and application of *Sundown* is sound.

---

<sup>13</sup> Petitioner’s brief to the Court of Appeals focuses exclusively on the *Wham* factors. However, the *Wham* factors do not even come into play until after the explanation is accepted by the court.

Interestingly, *Sundown* was cited only once in Petitioner’s briefing to the Court of Appeals, and it was not cited for the proposition that Petitioner now champions. Petitioner’s argument—albeit without merit—is still evolving and flies in the face of preservation rules. *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 645 (2011) (noting issue preservation rules prevent a party from keeping an “ace card” up his sleeve, in the hope that an appellate court will accept that “ace card” and give him another opportunity to prove his case).

As to Petitioner’s second argument. Any argument as to the “standard” to which to apply a Rule 60(b) analysis was not clearly made to the circuit court or the Court of Appeals in his Appellant’s brief or reply brief. The first time Petitioner clearly presents this argument is in his Petition for Rehearing. Nevertheless, Petitioner claims he has submitted “proof of multiple Rule 60(b) factors including, mistake, excusable neglect, inadvertence, and adverse party misconduct.” (Pet. Br. 18). He has not. Petitioner claims the lower courts applied “the more rigorous standard for relief from default judgment.” (Pet. Br. 20). The proper standards were applied. There was no “bar” to Respondent’s lawsuit (*see* Section IV, *infra*). There was no “misconduct” by Respondent using “stolen documents.” (Pet. Br. 20). None of the arguments advanced by Petitioner has merit. The lower courts properly dispensed of the same.

The Court of Appeals correctly held the circuit court did not abuse its discretion in finding no good cause for Petitioner’s delay in answering this lawsuit and that his request for relief was untimely. This Court should affirm.

---

*See Limehouse v. Hulsey*, 397 S.C. 49, 91 n.28, 723 S.E.2d 211, 233 n.28 (Ct. App. 2011) (Few, C.J., dissenting). Nevertheless, an application of the *Wham* factors favors Respondent. First, the timing of Petitioner’s motion for relief was unacceptable. Second, Petitioner has no meritorious defenses; the only defense advanced by Petitioner (the Release) is dispensed of in Section IV. Third, Respondent would be significantly prejudiced if relief was granted; Respondent made certain strategic moves throughout the litigation of this case in light of Petitioner’s default and admission to all allegations in the Complaint.

**II. The Court of Appeals correctly held the circuit court did not abuse its broad discretion in denying Petitioner’s Motion to Continue the damages hearing.**

Petitioner argues the circuit court committed reversible error when it exercised its broad discretion and denied his Motion to Continue the damages hearing. (Pet. Br. 20-22). This is argument is a nonstarter; the Court should affirm.

Rule 40(i) of the South Carolina Rules of Civil Procedure governs motions for continuance. “If good and sufficient cause for continuance is shown, the continuance may be granted by the court.” Rule 40(i)(1) (emphasis added). Indeed, “[a] motion for continuance is within the sound discretion of the trial court and the ruling will not be reversed without a clear showing of abuse.” *Jackson v. Speed*, 326 S.C. 289, 309, 486 S.E.2d 750, 760 (1997). A reversal based upon the denial of a motion for continuance is about as rare as “the proverbial hens teeth.” *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957). The instant case is not the aforementioned rarity.

On November 1, 2016, the parties appeared before Judge Jefferson for a default judgment damages hearing. (Appx. 333). At the call of the case, counsel for Petitioner announced he was not ready to proceed. (Appx. 344). Counsel for Petitioner argued, *inter alia*, that the damages hearing should be continued because his client was not present. (Appx. 352-86). Petitioner was not present because his Florida probation prohibited his travel into South Carolina without court order. (Appx. 352-54). Although counsel for Petitioner secured a travel order, he secured it for the wrong day. (Appx. 354). Counsel for Petitioner claimed his oversight was due to the Clerk’s Office allegedly moving the damages hearing from October 31, 2016, to November 1, 2016. (Appx. 353-56).

However, the record does not support that the Clerk’s Office was to blame for Counsel’s mistake. The Court’s docket had been set for more than two weeks. (Appx. 360-61). The only

Motion that was scheduled to be heard on October 31 was a completely different Motion to Compel. (Appx. 384). The damages hearing was always set for November 1, and this hearing date never changed. (Appx. 384). The Clerk's Office email<sup>14</sup> that Counsel for Petitioner appears to reference at the hearing was moving the October 31 Motion to Compel to November 1 to convenience the parties. (Appx. 384-85). The following exchange between Counsel for Petitioner and Judge Jefferson is instructive:

**THE COURT:** And so I'm standing by my original ruling. And I found out from the clerk's office that she sent her original notices on 10/4. And the only motion that was set to be heard on Monday was a motion to compel. Everything else was scheduled for Tuesday, which is today.

She then sent out a supplemental notice on the 25th, because my secretary brought to her attention that there was one motion set on Monday and the rest of the motions were set on Tuesday. So the only change that was made was the motion to compel that was set for Monday was set for today.

So, certainly, as early as October 4th, you were aware that all of motions were scheduled – this motion at least was scheduled for Tuesday.

**COUNSEL:** That may have been my mistake thinking it was the – otherwise, I wouldn't have submitted –

**THE COURT:** There was one motion set for Monday, but there were a whole group of others set for Tuesday. So, as a matter of courtesy, when my secretary saw both of those things set on separate days, instead of you-all having to come two days, she simply brought that to Ms. Caroline's attention, and then she sent another notice on the 25th indicating to you-all that instead of coming on two days you needed to come on one.

**COUNSEL:** That may have been my mistake that the damages hearing was on the 31st.

---

<sup>14</sup> This email was never presented to the circuit court, and Petitioner did not include it in the Record on Appeal.

(Appx. 384-85). Thus, despite Petitioner’s arguments to the contrary, the Clerk’s Office was not to blame for Counsel’s oversight. (*Id.*). This alone is sufficient for this Court to affirm Judge Jefferson’s well-reasoned denial of Petitioner’s Motion for Continuance. This was certainly not an abuse of the broad discretion afforded to our circuit courts.

The thrust of Petitioner’s argument is focused on the alleged “prejudice” to Petitioner stemming from the denial of his Motion for Continuance. (Pet. Br. 20-22). However, Petitioner’s complained prejudice is non-existent. Petitioner cites to *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 274 S.E.2d 290 (1981), and *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E.2d 880 (1978); however, neither give Petitioner the support he seeks. *See Trotter v. Trane Coil Facility*, 393 S.C. 637, 645, 714 S.E.2d 289, 293 (2011) (“Where a party is not prejudiced by the denial of a motion for a continuance, reversal is not required.”).

In both *Renney* and *Howard*, this Court explained that notice shall be given to a defaulting party as to any damages hearings and that a defaulting party will be permitted to participate by cross-examining witnesses and objecting to evidence presented during the damages hearing. *Renney*, 275 S.C. at 566-68, 274 S.E.2d at 292-93; *Howard*, 271 S.C. at 241-42, 246 S.E.2d at 882. Here, Petitioner was afforded both notice and participation as discussed in *Renney* and *Howard*. This was not the empty chair situation that is being championed by Petitioner. (Pet. Br. at 21-22) (“The circuit court’s denial of DeClemente’s request for continuance deprived him of the right to contest damages, in violation of this Court’s precedent.”). Petitioner was aware since 2014 that this damages hearing would be taking place. (Appx. 457-58). Counsel for Petitioner, who has reiterated time and time again his preparation in this case, was present and was permitted to fully participate during the damages hearing. Not only was he permitted to participate, he did participate by extensively arguing and cross-examining the witnesses offered by Respondent. Furthermore,

there is no constitutional requirement for an individual, who is also represented by counsel, to be present at a default judgment hearing.

Nevertheless, any perceived prejudice in the eyes of Petitioner was certainly cured by the Court leaving the November 1 damages hearing open. Judge Jefferson reconvened the damages hearing on January 5, 2017, which certainly eviscerated any argument Petitioner may have had that he was prejudiced by the Court denying his Motion for Continuance. (Appx. 464). Petitioner was afforded the opportunity to contest damages by eliciting the testimony of himself and Jeffery Reed. (Appx. 464-551). Moreover, Judge Jefferson allowed Petitioner to produce the deposition of his expert witness two-weeks after the January 5 hearing. (Appx. 20, 150, 157-58).

Petitioner argues the reconvened hearing was not curative of any prejudice because (1) Petitioner was unable to provide counsel the complicated facts and industry knowledge necessary to fully cross-examine Bradham and Smith and (2) Petitioner's rebuttal testimony was given without having witnessed that of Bradham and Smith. (Pet. Br. 22). These arguments lack merit and can easily be dispensed in turn. *First*, Petitioner was represented by Counsel who had been involved in this case for years; indeed, Petitioner's counsel took extensive depositions of both Mr. Smith and Mr. Bradham prior to the damages hearings.<sup>15</sup> (Appx. 400). Additionally, the record does not reflect any attempt on Petitioner's behalf to re-call either Mr. Bradham or Mr. Smith as witnesses. In fact, at the re-convened damages hearing, the circuit court asked whether Petitioner subpoenaed Mr. Bradham as a witness; Petitioner responded in the negative. (Appx. 470). *Second*, Petitioner could have requested a transcript of Bradham and Smith's testimony or

---

<sup>15</sup> The circuit court made note of Mr. Bradham's extensive deposition, commenting that the deposition transcript appeared to be six to eight inches tall. (Appx. 400, 460).

Petitioner's counsel could have simply provided his client with the information that was testified to by Bradham and Smith.

Based on the foregoing, the circuit court did not abuse its discretion in denying Petitioner's Motion for Continuance, especially in light of the absence of any prejudice to Petitioner.

**III. The Court of Appeals correctly held the circuit court did not abuse its broad discretion by qualifying Art Bradham as an expert witness on damages.**

Petitioner argues the circuit court committed reversible error by qualifying Art Bradham as an expert witness on damages. (Pet. Br. 22-24). Petitioner's argument fails.

Under Rule 702 of the South Carolina Rules of Evidence, a witness can be qualified as an expert witness if the witness has "specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

"The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's discretion." *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997). "An abuse of discretion occurs when there is an error of law or a factual conclusion which is without evidentiary support." *Id.* "To be competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'" *Id.* at 253, 487 S.E.2d at 598 (quoting *O'Tuel v. Villani*, 318 S.C. 24, 28, 455 S.E.2d 698, 701 (Ct. App. 1995)). Indeed, the circuit courts in our state are well-versed and are well-equipped to assess the qualification of an expert witness.

At the November 1, 2016 damages hearing, Respondent offered Mr. Bradham as an expert witness to testify to the economic losses sustained by Respondent stemming from its purchase of

Abacare. (Appx. 387-88). Mr. Bradham detailed his subject matter qualifications to the circuit court. At the time of the hearing, Mr. Bradham had been a CPA for “at least 15 years.” (Appx. 388). He has a B.S. in Accounting from the University of South Carolina, and a Masters in Taxation from Florida Atlantic. (Appx. 388). He is also a certified evaluation analyst, an enrolled agent admitted to practice in United States Tax Courts and has owned his own tax firm for 10 years. (Appx. 388). The following exchange at the November 1 hearing, when Mr. Bradham was being offered as an expert witness, is important:

**RESPONDENT:** At this point I would like to offer Mr. Bradham as an expert witness on the issue of economic losses suffered by ATMES in this litigation.

**THE COURT:** Any objection or questions to his expertise only?

**PETITIONER:** Well, I object to his testimony, Judge.

**THE COURT:** That’s not the question, Mr. Marshall. At this posture of the hearing, I need to know if you have any exception to his education, training and experience as an expert witness.

**PETITIONER:** No. In that regard, no.

**THE COURT:** So admitted. You may proceed.

(Appx. 391-92) (emphases added). Petitioner did not attempt to voir dire Mr. Bradham and plainly conceded to Mr. Bradham being qualified to testify as an expert witness on the economic damages sustained to the business. (Appx. 391-92). To be sure, Petitioner had no quarrel—until now—with Mr. Bradham’s expert qualification. (Appx. 391-92). Therefore, the issue presented to this Court is plainly unpreserved. *See State v. Stone*, 376 S.C. 32, 36, 655 S.E.2d 487, 489 (2007) (“If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call.”).

Nevertheless, assuming the issue is preserved, as highlighted above, Mr. Bradham is a well-educated and well-trained CPA that was more than qualified to provide expert testimony in this

matter. (Appx. 387-92). The circuit court did not abuse its discretion in qualifying Mr. Bradham as an expert witness. *See, e.g., State v. White*, 372 S.C. 364, 374-75, 642 S.E.2d 607, 612 (Ct. App. 2007) (“There is no abuse of discretion as long as the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury’s good judgment and common knowledge.”).

The thrust of Petitioner’s argument appears to be whether Mr. Bradham *could* have been biased towards Respondent and *could* have been motivated to keep Respondent as a client. (Pet. Br. 23-24). These arguments are not factually or legally relevant as to whether an expert witness is *qualified* to give expert opinion testimony. Instead, these claims go to the weight and the credibility of the testimony—not the admissibility of the testimony. *See, e.g., State v. Poindexter*, 314 S.C. 490, 494, 431 S.E.2d 254, 256 (1993) (explaining it is within the trier’s discretion as to how much weight to give a particular expert’s testimony); *Florence Cty. Dep’t of Soc. Servs. V. Ward*, 310 S.C. 69, 73, 425 S.E.2d 61, 63 (Ct. App. 1992) (holding “it was within the trial court’s discretion as to how much weight to give the expert’s testimony”).

All of Petitioner’s arguments on this subject at the damages hearing were geared towards the credibility, i.e., weight—not the admissibility of the testimony. Indeed, Petitioner cross-examined Mr. Bradham regarding the same, as was his prerogative under the South Carolina Rules of Evidence. *See* Rule 611, SCRE (“A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.”). However, the circuit court, exercising its discretion, found the following:

The Court has fully and carefully considered the testimony of all of the witnesses presented, the arguments of counsel, and all documents and exhibits submitted to the Court. . . . The only remaining issue before this Court is the amount of damages to be

awarded to the Plaintiff. The Court further finds the testimony and conclusions reached by Plaintiff's damages expert, Art Bradham, to be persuasive, credible, and reliable. Moreover, the Court finds that Defendant DeClemente has failed to adequately challenge the testimony presented by Plaintiff. Defendant's expert, Ronald H. Burkett, testified he does not have an opinion as to the damages in this case, nor does he have an opinion as to the damages calculation reached by Plaintiff's expert Art Bradham. Burkett Dep. 30:17-31:9.

(Appx. 30). Mr. Bradham's report was thorough, detailed, and supported the economic losses suffered by Respondent stemming from Petitioner's deception. The circuit court performed a credibility analysis on the presented experts and found Mr. Bradham to be most "persuasive, credible, and reliable." (Appx. 30). "Credibility determinations regarding testimony are a matter for the finder of fact, who has the opportunity to observe the witnesses, and those determinations are entitled to great deference on appeal." *Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C.*, 353 S.C. 327, 338, 577 S.E.2d 468, 474 (Ct. App. 2003).

Based on the foregoing, the circuit court's reasoning was sound, and it did not abuse its discretion in qualifying Mr. Bradham as an expert witness.

**IV. The Court of Appeals did not err in finding the Damages Satisfaction provision of a different Full and Final Release Agreement was inapplicable to the instant case.**

Petitioner argues the Court of Appeals erred in failing to rule that the Damages Satisfaction provision of a Full and Final Release Agreement should have been considered and enforced at the damages hearing or by granting Petitioner's Rule 59(e) Motion. (Pet. Br. 24-26). The Court of Appeals did not err; the Full and Final Release Agreement is plainly not applicable to this litigation.

*First*, the Full and Final Release Agreement was simply a defense—albeit an unmeritorious defense as discussed below—to *liability* that Petitioner could have raised as an affirmative defense in a timely filed Answer. Judge Nicholson previously denied Petitioner's Motion to Extend Time

and/or Relief from Default because Petitioner failed to show the requisite threshold of “good cause.” (Appx. 7-11). Therefore, because all of the allegations of the Complaint were deemed admitted, this defense was not properly before the circuit court during the default damages proceedings. Liability had already been conclusively proven at the time of the damages hearings.

*Second*, the Full and Final Release Agreement is wholly inapplicable to the instant litigation. The Release Agreement was a release limited to Petitioner’s actions while he was a partner for ATMES. (Appx. 125). For example, the agreement released Petitioner from any and all claims that Respondent may have had against Petitioner for his inappropriate actions taken as a partner with ATMES such as, *inter alia*, an extra-marital affair with one of the other partners, testing positive for marijuana (which violated terms of employment), engaging in a fistfight with his brother at the business’s location, causing a third-party human resources company to be involved to remove him from the premises, and the preparation of the documents necessary for the remaining ATMES partners to buy out Petitioner. (Appx. 490).

Again, the instant lawsuit had nothing to do with Petitioner’s actions as a partner with ATMES. Instead, the instant lawsuit is grounded on material misrepresentations that were made to induce the parties into entering into a business relationship with Petitioner and the failure to disclose “significantly understated” sales tax reporting. (Appx. 148). Mr. Bradham testified that it was his opinion that Respondent suffered real economic damages in the amount of \$875,144 as a result of the erroneous filings of sales tax returns, the omission of disclosures of the positions taken on those sales tax returns, and the failure to report the overstated income to the business evaluator. (Appx 402-03). It was this misconduct, clearly outside of Petitioner’s released improper actions with Respondent, that was the genesis of this litigation.

Based on the foregoing, Petitioner, who has admitted liability, cannot now seek shelter under this inapplicable Release Agreement.

V. **The Court of Appeals correctly held Petitioner failed to demonstrate any of the necessary elements under Rule 60(b) and the circuit court did not abuse its discretion by not considering the Full and Final Release Agreement .**

Petitioner asserts he is entitled to relief under Rule 60(b)(5) because the damages judgment has been “satisfied, released, and discharged” under the Full and Final Release Agreement. (Pet. Br. 27-28). Once again, Petitioner attempts to muddy the waters in hopes of distracting this Court’s attention from the fact that Petitioner’s own misconduct had caused Respondent significant damages and the Full and Final Release Agreement is plainly not applicable to this litigation.

Under Rule 55(c), SCRPC, “the standard for granting relief from an entry of default . . . is mere ‘good cause.’” *Sundown*, 383 S.C. at 607, 681 S.E.2d at 888. “This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice.” *Id.* “Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRPC.” *Id.*, 383 S.C. at 608, 681 S.E.2d at 888. “The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the ‘good cause’ standard established in Rule 55(c).” *Id.* “Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or ‘other misconduct of an adverse party.’” *Id.*

Rule 60(b)(5), SCRPC states:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

“Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the [circuit court].” *Raby Const., L.L.P. v. Orr*, 358 S.C. 10, 17, 594 S.E.2d 478, 482 (2004). “Rule 60(b)(5) permits relief from judgment if, among other things, it is no longer equitable that the judgment should have prospective application.” *Smith Comp. of Greenville, Inc., v. Hayes*, 311 S.C. 358, 360, 428 S.E.2d 900, 902 (Ct. App. 1993).

*First*, at the default judgment hearing, Judge Nicholson heard Petitioner’s argument that the Full and Final Release precluded this lawsuit from being brought against him because he asserted the Release prevented Respondent from suing him. (Appx. 227-230). Petitioner argued that because of the Full and Final Release Agreement, default should not be entered against him. (Appx. 230-32). After the hearing, Judge Nicholson took into consideration the parties’ arguments and affidavits addressing the issues raised pursuant to the Rule 55(c) standard. (Appx. 10). Upon his review, Judge Nicholson found that Petitioner was in default pursuant to Rule 55(c) and did not find that the Full and Final Release Agreement precluded default from being entered against Petitioner. (Appx. 7-11).

*Second*, Judge Jefferson properly determined at the damages hearing that Petitioner was not discharged from paying damages to Respondent, even though Petitioner attempted to make the same argument concerning the Full and Final Release. (Appx. 19-31). Judge Jefferson explained that Judge Nicholson had already properly disposed of Petitioner’s argument regarding the release in accordance with Rule 55(c). (Appx. 21-23). Moreover, even after Petitioner’s 59(e) motion, when he yet again attempted to resurrect his argument pertaining to the Full and Final Release Agreement, Judge Jefferson once again explained that the standard which Judge Nicholson had examined Petitioner’s argument was a lower threshold, under Rule 55(c) which was considered for the entry of default, than Rule 60(b) which is the standard which she would have to view the

argument. (Appx. 35). Thus, Judge Jefferson correctly opined that Petitioner could not obtain relief from damages under Rule 60(b). (Appx. 35).

Based on the rulings of the circuit court, the Court of Appeals correctly held that the lower courts did not abuse their discretion in finding the Full and Final Release Agreement did not satisfy the damages judgment against Petitioner. (Appx. 812-14).

Regardless, a review of the Full and Final Release Agreement makes clear that, the damage judgment against Petitioner would not have been found to be “satisfied, released or discharged” pursuant to Rule 60(b)(5). *See* Rule 60(b)(5). To be sure, Rule 60(b) requires a more particularized showing than Rule 55(c) standards and Petitioner has failed to show that the judgment against him has met any of the factors of Rule 60(b). *Sundown*, 383 S.C. at 608, 681 S.E.2d at 888-89 (holding that Rule 60(b) “requires a more particularized showing” and “[t]he different standards under [Rule 55 (c) and 60(b)] underscore the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality . . . .”). Specifically, while the Full and Final Release Agreement provides that it discharges Petitioner from damages, that clause only applies to damages and other actions stemming from Petitioner’s actions during the timeframe he had a business relationship with Respondent. However, as detailed above, this litigation relates to Petitioner’s fraudulent actions as a co-owner in Abacare and his duty to report underreported sales tax and the sales tax liability of Abacare, which he failed to disclose. Thus, Petitioner’s assertion that the judgment against him is satisfied fails, and the record supports the amount of damages determined by the circuit court.

### **CONCLUSION**

Based on the foregoing, this Court should dismiss Petitioner’s writ of certiorari as improvidently granted or affirm the Court of Appeals.

*(Signature page to follow)*

Respectfully submitted,

s/ James E. Smith, Jr.

James E. Smith, Jr. #8733  
JAMES E. SMITH JR., PA  
1422 Laurel Street  
Columbia, SC 29201  
(803) 933-9800  
James@JamesSmithPA.com

Respectfully submitted,

s/Austin T. Reed

Austin T. Reed, #102808  
Jonathan M. Robinson, #68285  
Shanon N. Peake # 102723  
Rachel E. Lee, #104184  
SMITH ROBINSON HOLLER DUBOSE AND  
MORGAN, LLC  
2530 Devine Street, Third Floor  
Columbia, SC 29205

*ATTORNEYS FOR RESPONDENT*

April 12, 2022  
Columbia, South Carolina