

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

Apr 22 2022

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 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Withdrawn, Substituted, Refiled December 23, 2020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.

REPLY BRIEF OF PETITIONER

Cameron L. Marshall (#64192)
7 Gamecock Avenue, Suite 707
Charleston, South Carolina 29407
(843) 795-2298
(843) 795-5081 (*facsimile*)
cameron@attorneymarshall.com

Attorney for Petitioner

TABLE OF CONTENTS

Table of Authorities ii

Introduction.....1

Argument in Reply.....1

 I. Petitioner’s arguments concerning analysis for relief from default entry
 under *Sundown* are preserved for this Court’s consideration.1

 II. Respondent has provided this Court with no reason to affirm the lower
 courts’ denial of Petitioner’s Motion for Relief from Default.3

 III. The Full and Final Release Agreement *does* apply to this litigation.5

 IV. The circuit court’s denial of Petitioner’s motion to continue the damages
 hearing constituted abuse of discretion, and supplementation of the record
 failed to cure this decision’s resulting prejudice.....7

 V. Allowing Arthur Bradham to testify as an expert witness in this case was
 abuse of discretion, regardless of his skill, experience and knowledge.....10

 VI. The merits of Petitioner’s Rule 60(b)(5) Motion are not controlled by the
 circuit court’s finding of liability by default.12

Conclusion15

TABLE OF AUTHORITIES

CASES

Atl. Coast Builders & Contractors, LLC v. Lewis,
398 S.C. 325, 730 S.E.2d 282 (2012)1, 2

Blakeley v. Rabon,
266 S.C. 68, 221 S.E.2d 767 (1976)7

Busillo v. City of North Charleston,
404 S.C. 604, 745 S.E.2d 142 (2013)11

Canal Ins. Co. v. Natl. House Movers, LLC,
414 S.C. 255, 777 S.E.2d 418 (Ct. App. 2015).....7

D.A. Constr. Co., Inc. v. Palmetto Props., Inc.,
281 S.C. 415, 315 S.E.2d 370 (1984)5

Ecclesiastes Production Ministries v. Outparcel Associates, LLC,
374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007).....5

Ellis v. Taylor,
316 S.C. 245, 449 S.E.2d 487 (1994)7

Eubank v. Eubank,
347 S.C. 367, 555 S.E.2d 413 (Ct. App. 2001).....2

First Sav. Bank v. McClean,
314 S.C. 361, 444 S.E.2d 513 (1994)8

Greenville Bistro, LLC v. Greenville County,
435 S.C. 146, 866 S.E.2d 562 (2021)2

Herron v. Century BMW,
395 S.C. 461, 719 S.E.2d 640 (2011)2

Holmes v. Haynsworth, Sinkler & Boyd, P.A.,
408 S.C. 620, 760 S.E.2d 399 (2014)8

Howard v. Holiday Inns, Inc.,
271 S.C. 238, 246 S.E.2d 880 (1978)8, 9

Island Car Wash, Inc. v. Norris,
292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987).....12

<i>Jamison v. Morris</i> , 385 S.C. 215, 684 S.E.2d 168 (2009)	10
<i>Jeter v. South Carolina Dept. of Transp.</i> , 369 S.C. 433, 633 S.E.2d 143 (2006)	11
<i>Johnson v. Roberts</i> , 422 S.C. 406, 812 S.E.2d 207 (Ct. App. 2012).....	2
<i>Laser Supply & Servs., Inc. v. Orchard Park Assoc.</i> , 382 S.C. 326, 676 S.E.2d 139 (Ct. App. 2009).....	7
<i>Mathis v. Brown & Brown of S.C., Inc.</i> , 389 S.C. 299, 698 S.E.2d 773 (2010)	7
<i>Myrtle Beach Lumbar Co. v. Willoughby</i> , 276 S.C. 3, 274 S.E.2d 423 (1981)	7
<i>North American Rescue Products, Inc. v. Richardson</i> , 411 S.C. 371, 769 S.E.2d 237 (2015)	5
<i>Paradis v. Charleston Cty. Sch. Dist.</i> , 433 S.C. 562, 861 S.E.2d 774 (2021)	12
<i>Purex Corp. v. Walker</i> , 278 S.C. 388, 390, 296 S.E.2d 868, 869 (1982)	8, 9
<i>Renney v. Dobbs House, Inc.</i> , 275 S.C. 562, 274 S.E.2d 290 (1981)	8, 9
<i>Rogers v. Rogers</i> , 432 S.C. 168, 851 S.E.2d 447 (Ct. App. 2020).....	8
<i>Sardis v. Overhead Door Corp.</i> , 10 F.4th 268 (4th Cir. 2021)	11
<i>Saro Investments v. Ocean Holiday Partnership</i> , 314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994).....	14, 15
<i>Smith v. Fedor</i> , 422 S.C. 118, 809 S.E.2d 612 (Ct. App. 2017).....	14
<i>State v. Byers</i> , 592 S.C. 438, 710 S.E.2d 55 (2011)	11

<i>State v. Council</i> , 335 S.C. 1, 515 S.E.2d 508 (1999)	11, 12
<i>State v. Lytchfield</i> , 230 S.C. 405, 95 S.E.2d 857 (1957)	8
<i>State v. White</i> , 382 S.C. 265, 676 S.E.2d 684 (2009)	10
<i>Sundown Operating Co., Inc. v. Intedge Industries, Inc.</i> , 383 S.C. 601, 681 S.E.2d 885 (2009)	<i>passim</i>
<i>Superior Auto. Ins. Co. v. Maners</i> , 261 S.C. 257, 199 S.E.2d 719 (1973)	5
<i>Watson v. Ford Motor Co.</i> , 389 S.C. 434, 699 S.E.2d 169 (2010)	10
<i>Wayne Smith Const., Co. v. Wolman, Duberstein, and Thompson</i> , 294 S.C. 140, 363 S.E.2d 115 (1987)	9
<i>Wilder Corp. v. Wilke</i> , 330 S.C. 71, 497 S.E.2d 731 (1998)	1
<i>Williams v. Bordon's, Inc.</i> , 274 S.C. 275, 262 S.E.2d 881 (1980)	8
RULES	
Rule 221, SCACR	3
Rule 55, SCRCF	3
Rule 60, SCRCF	<i>passim</i>
Rule 103, SCRE	11
Rule 403, SCRE	11
Rule 702, SCRE	10, 11, 12
MISCELLANEOUS	
18 S.C. Jur. <i>Release</i> § 2 (2003)	5
32 C.J.S. <i>Evidence</i> § 695 (Mar. 2022 update)	12

47 Am. Jur. 2d *Judgments* § 785 (2d ed. 2022 update)14

Flanagan et al. *South Carolina Civil Procedure* § 60.G (4th ed. 2020)14

INTRODUCTION

Respondent accuses Petitioner DeClemente of presenting “a multitude of issues to the Court ... in hopes of distracting the Court from the simple, straightforward issues in this case.” (Resp. Br. 10). To the contrary, each of the issues Petitioner presents to this Court stems from clear abuses of discretion which are firmly grounded in error of fact and/or law. Respondent, on the other hand, attempts to distract this Court from the reversible errors below through unsupported, untrue, malicious attacks on Petitioner’s character – such as inflammatory allegations of illicit drug use, infidelity, and acts of violence – which have *nothing* to do with the contested rulings. (Resp. Br. 3 n.3, 27). This case raises important issues that arose at different stages of litigation in the circuit court, and which now require this Court’s correction. In addition to the arguments made in his initial Brief, Petitioner offers this Reply to address arguments made in the *Brief of Respondent*.

ARGUMENT IN REPLY

I. Petitioner’s arguments concerning proper *Sundown* analysis for relief from default entry are preserved for this Court’s consideration.

In its *Brief of Respondent*, ATMES asserts that the rules of issue preservation place this Court in a straitjacket. (Resp. Br. 17-18). Specifically, Respondent argues that because Petitioner did not quote *Sundown* verbatim in his briefing to the lower courts, this Court is precluded from correcting clear errors of fact and law. (*Id.*) Respondent’s argument is meritless and, in practice, would deprive litigants of appellate review more frequently than intended.

Rules of issue preservation prevent consideration of issues raised for the first time on appeal. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). But, as stated by former Chief Justice Toal, “an over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and business community of this State by settling disputes and promoting justice.” *Atl. Coast Builders & Contractors, LLC v.*

Lewis, 398 S.C. 325, 332, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring in result in part and dissenting in part). Rules of issue preservation are not to be applied in the “rigid, hyper-technical manner” suggested by Respondent. *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011). For instance, parties are “not required to use the exact name of a legal doctrine in order to preserve the issue” for appellate review. *Id* at 466, 719 S.E.2d at 644.

Our appellate courts consider issues where they are *reasonably clear* from an appellant’s arguments. *Id* at 466, 719 S.E.2d at 640; *see Eubank v. Eubank*, 347 S.C. 367, 555 S.E.2d 413 (Ct. App. 2001) (finding the statement of issues, when read in conjunction with the argument, sufficiently raised the issue to the court); *Greenville Bistro, LLC v. Greenville County*, 435 S.C. 146, 170-71, 866 S.E.2d 562, 575 (2021) (rejecting issue preservation argument where the County’s brief sufficiently ensured the court would not have to “grope in the dark” to ascertain the point at issue). “[W]here the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.” *Atl. Coast Builders*, at 333, 780 S.E.2d at 287 (Toal, C.J., concurring in result in part and dissenting in part); *Johnson v. Roberts*, 422 S.C. 406, 411-12, 812 S.E.2d 207, 210 (Ct. App. 2012) (ruling in favor of preservation where it could not be said that the appellant’s arguments were “clearly preserved,” but it also could not be said that they were “clearly unpreserved”).

Throughout this litigation, Petitioner has consistently argued that he should be permitted to respond to ATMES’ Complaint as a matter of equity, in the interests of justice. *See, e.g.*, (Appx. 248-49) (arguing that Respondent’s suit was brought in violation of contract and initiated while owing Petitioner more than \$150,000.00); *see also*, (Appx. 23 n. 5) (Order of Judgment finding that Petitioner “has persistently argued at every hearing in this matter that he should be allowed to argue against the substantive merits of [Respondent’s] causes of action” and that “any issues raised

previously have been preserved for appropriate appellate review.”). Petitioner’s Appellate Briefs address the inequitable consequences of the lower courts’ rulings. Relieving a party of its contractual obligations based solely upon a procedural technicality does not promote the interests of justice. *See* (Appx. 736-738, 778). Rule 221(a), SCACR allows a party to clarify arguments overlooked or misapprehended by the appellate court. Petitioner did so in *Appellant’s Petition for Rehearing*, wherein his previous arguments were re-organized, and the interests of justice analysis required by *Sundown* clarified, for the appellate court’s convenience. *See* (Appx. 789-799).

Petitioner’s arguments in this Court are the same as those made below—the lower courts’ relief from default entry and relief from default judgment analyses were erroneous. Petitioner’s arguments to this Court are not “still evolving” and they do not “[fly] in the face of preservation rules.” (Resp. Br. 18). The arguments made in Section I of Petitioner’s Brief (Pet. Br. 10-20) are preserved, and the importance of the issues requires this Court’s disposition on the merits.

II. Respondent has provided this Court with no reason to affirm the lower courts’ denial of Petitioner’s Motions for Relief from Default.

The lower courts’ denial of Petitioner’s Motion for Relief from Entry of Default conflicts with *Sundown* Rule 55(c) analysis in two important ways: (1) the lower courts failed to consider the compelling reasons why vacation of default would serve the interests of justice; and (2) the lower courts failed to properly consider Petitioner’s showing of Rule 60(b) factors. (Pet. Br. 12-20). Both arguments establishing the lower courts’ errors are fully supported by the record and controlling legal precedent.

Respondent argues that the lower court’s default ruling was justified solely on the basis of Petitioner’s delay in seeking formal relief and, therefore, proper under *Sundown*. (Resp. Br. 14-16). This argument is inconsequential, as this Court is asked to determine whether isolated focus on the *timing* of Petitioner’s formal Motion for Relief from Default Entry is in drastic conflict with

the Court's holding in *Sundown*. (Pet. Br. 12-15). Respondent's alternative argument, based in issue preservation, is equally without merit. *See* (Section I, *supra*).

Respondent also argues that Petitioner's Rule 60(b) arguments are unsupported by the record. *See* (Resp. Br. 18) ("There was no 'bar' to Respondent's lawsuit ... There was no 'misconduct' by Respondent using 'stolen documents.'").¹ Respondent's arguments make no reference to the record before this Court, nor the evidence cited in Petitioner's Brief. First, as discussed in Section III, *infra*, the Full and Final Release operates as a complete bar to Respondent's frivolous lawsuit. Respondent's lawsuit directly violates the parties' Release Agreement. Second, Respondent relied on a misappropriated, confidential draft valuation report in support of its lawsuit. *See* (Appx. 42, ¶ 19, 57, ¶ 8). The document is stamped "Confidential" throughout, and was prepared for the sole use of those who paid for its preparation, Petitioner Declemente and his former Abacare co-owners, Dorothy and James Connelly. (Appx. 157, 159). Respondent refuses to disclose its method of obtaining the document, but admits that it has always known that Respondent's possession of the report is seriously improper. *See* (Appx. 195, Tr. 98-99); (Appx. 200, Tr. 152-, 201, Tr. 153); (Appx. 203, Tr. 168); (Appx. 208, Tr. 196); (Appx. 209, Tr. 197-198); and (Appx. 404-406). This lawsuit is in clear and direct violation of the parties' Release Agreement, and Respondent's prosecution of the suit is founded upon a misappropriated document. Reasonable minds agree that these facts constitute party misconduct.

This case involves a company defaulting on its promissory note, suing a former, psychiatrically impaired owner in violation of the parties' binding Full and Final Release Agreement, and then obtaining an erroneous default judgment in order to avoid paying the money owed to its victim. (Pet. Br. 13-14). It is the ideal vehicle for this Court to further address the legal

¹ The *Brief of Respondent* does not address the existence of "mistake, inadvertence, surprise, or excusable neglect" under Rule 60(b)(1), SCRCF. *See* (Pet. Br. 18-19) (citing evidence of these factors).

analysis presented in *Sundown*. The Court should not be misled by Respondent’s meritless attempts to distract from the important issues at bar.

III. The Full and Final Release Agreement *does* apply to this litigation.

Without analyzing, or even referencing, the Release Agreement’s plain, unambiguous language, Respondent summarily states that “the Full and Final Release is plainly not applicable to this litigation.” (Resp. Br. 26-27, 30). This statement is quite obviously false.

The lower courts failed to review the Full and Final Release Agreement to determine Petitioner’s immunity from Respondent’s contractually prohibited lawsuit and to determine Respondent’s contractual obligation to satisfy the erroneous damages judgment. Despite the lower courts’ unwillingness to address and enforce the parties’ Release Agreement, this State’s controlling principles of contract law apply in this case just as they do in any other. *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007); *see* 18 S.C. Jur. *Release* § 2 (2003) (“Because a release is a contract, principles of law applicable to contracts generally are also applicable to releases.”). In construing a contract, the court’s primary objective is to ascertain and give effect to the parties’ intentions. *E.g., D.A. Constr. Co., Inc. v. Palmetto Props., Inc.*, 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984). “To discover the intention of a contract, **the court first must look to its language** – if the language is perfectly plain and capable of legal construction, it alone determines the document’s force and effect.” *Ecclesiastes*, at 498, 649 S.E.2d at 501 (citing *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973)) (emphasis added); *see also, North American Rescue Products, Inc. v. Richardson*, 411 S.C. 371, 378, 769 S.E.2d 237, 240 (2015) (“If a contract’s language is unambiguous, the plain language determines the contract’s force and effect.”).

In this case, the language of the Full and Final Release Agreement is perfectly plain and capable of legal construction. The Release Agreement’s unambiguous language prohibits Respondent’s frivolous lawsuit and requires that Respondent satisfy the resulting damages judgment.

The Release governs all “claims, actions, causes of action, demands, rights, damages, cost, loss of services, expenses and compensation” in any way related to the following: (1) Petitioner’s ownership interest in ATMES and its associated companies, Abacare and Reliable;² (2) Petitioner’s employment in or with ATMES and its associated companies; (3) Petitioner’s business relationships with ATMES, its associated companies, and other ATMES partners (Murrell Smith, Jeff Reed, and Kimberly Cuce);³ and (4) any negotiations, contracts and documents related to Petitioner’s sale of his ownership interest in ATMES, Abacare and Reliable. (Appx. 97). The Release Agreement is *not* confined, as Respondent falsely claims, to “Petitioner’s alleged actions taken while he was a partner at ATMES.” (Resp. Br. 27). The Agreement was broadly drafted by Respondent’s attorney to encompass Petitioner’s actions while an Abacare owner, including the false allegations made in Respondent’s lawsuit against him. Stated differently, the Full and Final Release Agreement both releases Petitioner from any and all liability in any way related to ATMES, Abacare, and Reliable, *and* discharges Petitioner from any and all damages judgments related to the same.⁴

² The Full and Final Release Agreement’s third paragraph refers to the assignment of Petitioner’s “interest in ATMES and his interest in all other associated Companies.” (Appx. 97). The associated companies, as defined in the Bill of Sale executed contemporaneously with the Release Agreement, includes both Abacare and Reliable. *See* (Appx. 93, ¶ 3). Therefore, by definition, the Release Agreement’s reference to any of the “Companies,” “entities,” or “businesses” that are “referenced above” includes both Abacare and Reliable. (Appx. 97) (emphasis added).

³ (Appx. 97, 98).

⁴ According to the plain language of the Release Agreement, this includes liability and damages “which the undersigned now has, or which may have hereinafter accrued,” “whether known or unknown” and “foreseen or unforeseen” at the time of the Agreement’s execution. (Appx. 97).

Respondent's self-serving, after-the-fact interpretation of the parties' contract is disingenuous and wholly unsupported by the Release Agreement's plain language. *See Laser Supply & Servs., Inc. v. Orchard Park Assoc.*, 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009) (Contract interpretation is not governed by the "subjective, after-the-fact meaning one party assigns to it."); *Blakeley v. Rabon*, 266 S.C. 68, 72, 221 S.E.2d 767, 769 (1976) ("Words cannot be read into a contract which impart intent wholly unexpressed when the contract was executed.").⁵ The Full and Final Release is unambiguous and plainly governs this litigation. Thus, "[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). In ruling on the merits of Petitioner's arguments, this Court should be guided by precedent, the Full and Final Release Agreement's plain language, and the application of fundamental contract law.

IV. The circuit court's denial of Petitioner's motion to continue the damages hearing constituted abuse of discretion, and supplementation of the record failed to cure this decision's resulting prejudice.

Respondent's attempt to justify the circuit court's denial of Petitioner's Motion for Continuance of the damages hearing largely misses the point. Petitioner will address Respondent's several arguments in turn.

⁵ *Arguendo*, even if the Full and Final Release Agreement were susceptible to doubt as to its scope, our courts "construe any doubts and ambiguities in an agreement against the drafter of the agreement." *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010). If ATMES intended to narrow the Agreement's scope of application to the interpretation it now champions, it was obligated to make its intent clear when it drafted the document. Because ATMES failed to do so, any issue concerning the Agreement's scope of application is construed in Petitioner's favor. *See Canal Ins. Co. v. Natl. House Movers, LLC*, 414 S.C. 255, 265-66, 777 S.E.2d 418, 424 (Ct. App. 2015) (ambiguities in insurance policy construed in favor of the insured, as the non-drafting party); *Myrtle Beach Lumbar Co. v. Willoughby*, 276 S.C. 3, 274 S.E.2d 423 (1981) (language used in form contract was ambiguous and construed against the drafting party).

Respondent argues that a reversal based upon an erroneous denial of a continuance motion is an extraordinarily rare and drastic remedy. *See* (Resp. Br. 19) (“A reversal based upon the denial of a motion for continuance is about as rare as ‘the proverbial hens teeth.’”) (quoting *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957)). Respondent’s portrayal ignores the purpose of continuances in civil proceedings. The court’s authority to grant continuances “carries with it the inherent power to control the order of its business *to safeguard the rights of litigants.*” *Williams v. Bordon’s, Inc.*, 274 S.C. 275, 280, 262 S.E.2d 881, 883 (1980) (emphasis added). The circuit court clearly failed to protect Petitioner’s rights in this case.

Moreover, the facts and circumstances surrounding Petitioner’s absence from the damages hearing are indeed “rare” in comparison to those typically presented in cases where the appellate courts have affirmed denial of continuance motions. *Compare*, (Pet. Br. 6-7, 21-22) *with, First Sav. Bank v. McClean*, 314 S.C. 361, 362-63, 444 S.E.2d 513, 514 (1994) (denial of continuance affirmed where Appellant consciously chose not to attend foreclosure hearing, but go on a business trip instead); *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 639-641, 760 S.E.2d 399, 409-410 (2014) (denial of continuance based upon failure to secure counsel affirmed where appellant had previously requested continuances on this same basis numerous times); *Rogers v. Rogers*, 432 S.C. 168, 183, 851 S.E.2d 447, 455 (Ct. App. 2020) (denial of continuance on second day of final hearing where wife’s hospitalization “was a ruse designed to delay the proceedings”). Motions for continuances are decided based upon the facts existing at the time the motion is made. *Purex Corp. v. Walker*, 278 S.C. 388, 390, 296 S.E.2d 868, 869 (1982). The facts before the lower court compelled a continuance to allow Petitioner’s attendance at the damages hearing.

Respondent also argues that Petitioner’s reliance on the holdings in *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) is misplaced. (Resp. Br. 21-22). While these cases are not identical to this one, they both confirm the critical importance of defaulting parties' participation in damages hearings and the inequitable consequences that arise when the defaulting party is unable to do so. *Renney*, at 567-568, 274 S.E.2d at 293; *Howard*, at 241-242, 246 S.E.2d at 882. The fundamental principle of the above-referenced holdings – that defaulting parties are entitled to participate in their defense at damages hearings to avoid inequitable damages judgments – only further demonstrates that the circuit court's denial of Petitioner's Motion for Continuance constituted abuse of discretion under the standard set forth by this Court. *C.f. Wayne Smith Const., Co. v. Wolman, Duberstein, and Thompson*, 294 S.C. 140, 143, 363 S.E.2d 115, 117 (1987) (“[A]n application for a continuance based on a party's alleged ill health must ordinarily show that the party had some particular contribution to make to the trial, as a material witness or otherwise.”).

Finally, Respondent argues that defense counsel's participation in the hearing, as well as the circuit court's decision to keep the record open following the hearing, cured the prejudice caused by Petitioner's absence. (Resp. Br. 21-23).⁶ But reconvening the damages hearing did not cure Petitioner's inability to provide information essential to defense counsel's ability to make fact-specific objections to Mr. Bradham's testimony, to interpret and digest Mr. Bradham's expert report (which was provided for the first time during his testimony), and to fully cross-examine the witnesses. (Pet. Br. 22); (Appx. 400-404). Given the complex, personal nature of this case, Petitioner's participation during the first damages hearing was essential to his defense. The circuit court's after-the-fact attempt to correct its clear abuse of discretion could not undo what had already been done.

⁶ Again, the circuit court's determination is based upon the facts before it the time the motion is made. *Purex Corp.*, at 390, 296 S.E.2d at 869. The premise that our courts should be permitted to commit an abuse of discretion *first*, and then attempt deal with its resulting consequence *second* is, as demonstrated in this case, unsound practice.

V. Allowing Arthur Bradham to testify as an expert witness in this case was an abuse of discretion, regardless of his skill, experience and knowledge.

In an effort to justify his qualification as an expert witness in this case, Respondent's Brief emphasizes Mr. Bradham's knowledge, skill and experience as an accountant. (Resp. Br. 23-24). To be clear, Petitioner has never argued that Bradham does not possess the experience, knowledge and skill required to provide expert testimony. Petitioner has always argued that Bradham is unqualified to provide expert testimony *in this case* due to his conflicts of interest and deep involvement as a fact witness. These issues, *inter alia*, render Bradham's expert opinion testimony inherently unreliable and prejudicial.

Respondent's argument - that Petitioner's objections to Bradham's court qualification go only to the weight and credibility, not the admissibility of his testimony - fails to fully acknowledge the circuit court's gatekeeping function. (Resp. Br. 25). As this Court has stated, "[t]he familiar evidentiary mantra that a challenge goes to 'weight, not admissibility' may be invoked *only after* the trial court has vetted the matters of qualifications and reliability and admitted the evidence." *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009) (emphasis added).

Admission of expert testimony under Rule 702, SCRE, is not solely dependent upon the knowledge, experience and skill of the proposed expert witness. Rule 702 analysis requires the circuit court to find that: (1) the subject matter of the testimony is beyond the average knowledge of the jury; (2) the proffered expert possesses the requisite knowledge, experience, or skill to qualify as an expert on that subject matter; and (3) the substance of the expert testimony is reliable. *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). Regardless of their experience, "[a]ll experts must meet [the] reliability threshold under Rule 702, SCRE, which imposes an affirmative and meaningful gatekeeper function on the trial judge." *Jamison v. Morris*, 385 S.C. 215, 228, 684 S.E.2d 168, 175 (2009). Even if the proffered testimony meets Rule 702's

requirements, the trial court is still required to determine if the proffered testimony’s “probative value is outweighed by its prejudicial effect” and therefore inadmissible under Rule 403, SCRE. *State v. Council*, 335 S.C. 1, 20-21, 515 S.E.2d 508, 518 (1999).

At the November 1, 2016 damages hearing, the circuit court limited its Rule 702 analysis to Mr. Bradham’s experience, knowledge and skill. *See* (Appx. 392). The court swiftly overruled defense counsel’s attempt to more fully and specifically object on grounds unrelated to this single factor. (*Id.*)⁷ The court failed to consider the obvious inherent unreliability of Bradham’s proffered testimony, and the prejudice to Petitioner, prior to qualifying him as an expert witness. Rather, the court erroneously assumed reliability and lack of prejudice. *C.f. Sardis v. Overhead Door Corp.*, 10 F.4th 268, 282 (4th Cir. 2021) (finding that the district court erroneously abandoned its Rule 702 gatekeeping role by ruling reliability and relevance arguments went to weight and were concerns solely for cross-examination).

As Petitioner has argued throughout this litigation, the circuit court should have excluded Mr. Bradham’s expert testimony through proper exercise of its gatekeeping function. Bradham’s testimony and “expert” report were based upon a stolen draft of a confidential valuation of Abacare

⁷ Respondent argues that Petitioner’s objection was insufficient to preserve the arguments for appellate review. (Resp. Br. 24). Specifically, Respondent focuses on an objection made during the circuit court’s Rule 702, SCRE, inquiry wherein counsel does not explicitly state the specific ground. *See (Id)* (citing Appx. 391-92). As noted by this Court, “[i]t is possible ... that the context of the proceeding may make the specific ground for the objection sufficiently apparent to the trial court so that a general statement such as ‘objection’ is enough to preserve an argument for appeal.” *Busillo v. City of North Charleston*, 404 S.C. 604, 608, 745 S.E.2d 142, 145 (2013); *see also, State v. Byers*, 592 S.C. 438, 446, 710 S.E.2d 55, 59 (2011) (stating “to be preserved, the objection must include a specific ground ‘if the specific ground was not apparent from the context’” (quoting Rule 103(a)(1), SCRE) (emphasis added)).

Here, the context made clear that defense counsel’s objection was to the admission of Mr. Bradham’s testimony as an expert witness on grounds *other than* experience, knowledge and skill. The only remaining grounds for objection are reliability and prejudice which, if not already apparent from the context of the proceeding, are brought to issue at a later point. *See* (Appx. 397) (defense counsel renewing his objection in an attempt to question reliability and prejudice, but being told that this would be reserved for cross-examination). Petitioner’s arguments are properly preserved for this Court. Additionally, because this issue is likely to arise on remand for trial, the court is permitted to consider this issue in the interest of judicial economy. *Jeter v. South Carolina Dept. of Transp.*, 369 S.C. 433, 633, S.E.2d 143, 147 n. 6 (2006).

that was prepared for an entirely different purpose and for the exclusive use of Petitioner and his Abacare business partners. (Appx. 157, 159); (Appx. 187, Tr. 25); (Appx. 195, Tr. 99-100); (Appx. 201, Tr. 152-, 202, Tr. 153); (Appx. 203, Tr. 168); (Appx. 208, Tr. 196-, 209, Tr. 197-198); (Appx. 404-406). Reliability and prejudice are also clearly implicated by the fact that Bradham is an important fact witness in this case, since he was hired by Smith and Reed to investigate the transaction at issue and advise them on future profitability. (Appx. 198, Tr. 134-135). The circuit court allowed expert testimony without complying with the required quality control procedure that ensures the reliability envisioned under Rule 702's analysis. *Council*, at 19, 515 S.E.2d at 517 (stating that courts should consider "the quality control procedures used to ensure reliability" in assessing whether an expert's testimony is reliable).

Mr. Bradham's testimony was directly averse to the interests of his former client, Mr. DeClemente, and was extremely prejudicial. (Pet. Br. 23); (Appx. 750-753). The circuit court allowed Bradham's breach of his fiduciary duty and ethical obligations by qualifying him to testify as a retained expert in this case. *See Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987) (stating "it is a well settled equitable rule that anyone acting in a fiduciary relationship shall not be permitted to make use of that relationship to his own personal interests"), *overruled on other grounds by, Paradis v. Charleston Cty. Sch. Dist.*, 433 S.C. 562, 861 S.E.2d 774 (2021); 32 C.J.S. *Evidence* § 695 (Mar. 2022 update) (The court has the authority to disqualify an expert witness "where it is shown that retention of the witness creates a conflict of interest."). Bradham's conflict of interest significantly outweighs the probative value of his testimony.

Although Mr. Bradham has the requisite knowledge, skill and experience to provide expert testimony in the field of accounting, the circuit court erred in allowing him to testify in this case.

VI. The merits of Petitioner’s Rule 60(b)(5) Motion are not controlled by the circuit court’s erroneous default judgment.

In Section V of ATMES’ Response Brief, Respondent attempts to conflate several different issues in an effort to persuade this Court that Judge Jefferson’s denial of Petitioner’s Rule 60(b)(5) Motion for Relief from Damages Judgment, which is based upon the Release Agreement’s damages satisfaction provision, constitutes proper exercise of judicial discretion. (Resp. Br. 28-30). None of Respondent’s arguments are factually or legally accurate.

Respondent argues that Judge Nicholson’s denials of Petitioner’s motions for relief from default entry and from default judgment constituted a ruling on the enforceability of the *entire* Full and Final Release Agreement. (Resp. Br. 29). Respondent’s contention is false. Judge Nicholson’s order makes no mention of the Full and Final Release Agreement, and the court does not purport to rule on the Release’s effect on either liability or damages.⁸ (Appx. 7-11). Judge Nicholson never considered, nor even had an opportunity to consider, whether the Full and Final Release requires Respondent to satisfy Judge Jefferson’s damages judgment.

Respondent argues that Judge Jefferson “determined at the damages hearing that Petitioner was not discharged from paying damages to Respondent,” and correctly relied upon Judge Nicholson’s prior ruling as disposing of Petitioner’s Rule 60(b)(5) argument. (Resp. Br. 29). Respondent is again incorrect. Judge Jefferson refused to consider the Full and Final Release Agreement’s damages satisfaction provision because she erroneously believed it was irrelevant to her damages judgment in light of Judge Nicholson’s prior judgment of liability by default. (Appx. 511-512). Judge Jefferson’s order denying Petitioner’s Motion to Amend Judgment in accordance

⁸ Judge Nicholson’s default judgment was entirely premised upon the timing of Petitioner’s formal motion for relief from default, and without regard to the equitable interest of justice considerations which compel relief. (Pet. Br. 12-17). Judge Nicholson’s only, brief, consideration of the Agreement was during the default hearing. (Appx. 227-230, 240-241). At that time Respondent’s counsel conceded that the Release is a meritorious defense to Respondent’s lawsuit. (Appx. 241). This, however, does not constitute a formal ruling on the force and effect of the Agreement.

with the Full and Final Release’s damages satisfaction provision confirms the court’s error. (Appx. 32-35). The order fails to make any attempt to rule on the Full and Final Release’s enforceability as it pertains to satisfaction of the damages judgment. Judge Nicholson’s default judgment was not, and by definition could not, be dispositive of the damages satisfaction issue.

Respondent again argues that the Full and Final Release is inapplicable⁹ to this litigation and that Petitioner failed to meet the standards for relief from default judgment set forth by Rule 60(b), SCRCP. (Resp. Br. 30). As a matter of law, Rule 60(b)(5) operates to relieve a party from final judgment where “the judgment has been satisfied, released, or discharged ...” Rule 60(b)(5), SCRCP. The rule has nothing to do with Petitioner’s objections to the circuit court’s finding of liability by default. *See* James F. Flanagan et al., *South Carolina Civil Procedure* § 60.G (4th ed. 2020) (“Relief when the judgment has been satisfied, released, or discharged is self-explanatory.”).

Rule 60(b)(5) motions are not based upon defenses raised over the course of litigation, but rather upon the equitable nature of final judgment. *See generally, Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 121, 441 S.E.2d 835, 838 (Ct. App. 1994) A Rule 60(b)(5) motion, unlike the underlying suit upon which judgment is based, “addresses the right of the trial court to modify the final judgment ... based on the historical power of a court of equity to modify its decree in light of subsequent conditions that make it inequitable that the judgment should have prospective application.”). Parties commonly invoke Rule 60(b)(5) to obtain relief from a damages judgment while still acknowledging the underlying liability judgment. *C.f. Smith v. Fedor*, 422 S.C. 118, 809 S.E.2d 612 (Ct. App. 2017) (Post-judgment Rule 60(b)(5) Motion submitting proof that Confession of Judgment had been satisfied); *see also*, 47 Am.Jur.2d *Judgments* § 785 (2d ed. 2022 update) (“A judgment may be satisfied or discharged by the giving of a valid release that is

⁹ Again, this argument is baseless. *See* (Section III *supra*).

supported by valuable consideration.”). The circuit court abused its discretion in refusing to consider whether the Full and Final Release Agreement required that damages be marked as satisfied, pursuant to Rule 60(b)(5), SCRCP. *See Saro Investments*, at 121-25, 441 S.E.2d at 839-840.

The parties’ Full and Final Release Agreement discharges Petitioner from the court’s damages judgment. (Pet. Br. 27-29); *see also* (Pet. Br. 24-26) (discussing the lower courts’ refusal to consider the Release Agreement’s damages satisfaction provision). By basing her denial of Petitioner’s Rule 60(b)(5) Motion solely upon Judge Nicholson’s default judgment, and refusing to consider the Release’s damages satisfaction provision, Judge Jefferson abused the court’s discretion.

CONCLUSION

Petitioner respectfully requests that this Court reverse the lower courts’ decisions and remand this case for trial.

Respectfully submitted,

s/ Cameron L. Marshall

Cameron L. Marshall (#64192)
7 Gamecock Avenue, Suite 707
Charleston, South Carolina 29407
(843) 795-2298
(843) 795-5081 (*facsimile*)
cameron@attorneymarshall.com
Attorney for Petitioner,
Phillip DeClemente

April 22, 2022
Charleston, South Carolina