

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2011-CP-10-8011

73391  
**RECEIVED**  
AUG 25 2014  
**SC Court of Appeals**

Assistive Technology Medical  
Equipment Services, ..... Respondent,

v.

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

of whom

Phillip DeClemente is the ..... Appellant.

**MOTION TO DISMISS**

This motion is filed pursuant to Rule 240 of the South Carolina Appellate Court Rules, which governs motions and petitions generally. This is an appeal from an order that denies a motion to file a late answer and to set aside default. The Court should dismiss this appeal because such an order is not immediately appealable.

**BACKGROUND**

The plaintiff started this lawsuit by filing a summons and complaint on October 31, 2011. (**Attachment A**).

On March 30, 2012, counsel for the plaintiff filed an affidavit indicating that although the appellant had been served with the lawsuit, he had failed to respond. (**Attachment B**).

On August 10, 2012, the appellant filed a motion to enlarge the time for filing his answer. (**Attachment C**). This motion referenced Rule 6, SCRPC, and Rule 60, SCRPC. The reference to Rule 60 appears to be a clerical error. Rule 60 controls relief from a judgment, but no judgment has been entered in his case.

The circuit court conducted a hearing concerning this motion (and three other motions) on December 16, 2012. The court denied the motion and entered a default “judgment” in an order that was signed April 24, 2014 and filed April 30, 2014. (**Attachment D**). Although the court used the words “default judgment,” the order is *not* a judgment. The order is instead an “entry of default,” and the order provides that a further hearing on damages is required in order for a judgment to be entered.

The appellant filed a timely motion to reconsider which the circuit court denied. The appellant then served and filed a timely notice of appeal.

#### ARGUMENT

The issue that the parties argued to the circuit court was whether there was “good cause” to set aside the entry of default. The circuit court held that the appellant had not demonstrated good cause; thus, the circuit court denied the motion, entered default, and set a damages hearing for the next term of court.

This order is not immediately appealable. A request to file a late answer or to extend the time for filing an answer is governed by Rule 6 of the South Carolina Rules of Civil Procedure. A request to set aside default is governed by Rule 55. An order that denies either

of these motions is not immediately appealable. This was the holding in *Jefferson by Johnson v. Gene's Used Cars*. See 295 S.C. 317, 317-18, 368 S.E.2d 456 (1988).

The reason for this holding is that the right to appeal is governed by statute. For an order to be immediately appealable, the relevant statute requires the order to be a final judgment, to involve the merits, to affect a substantial right (in one of three ways), or to deal with an injunction or a receiver. See S.C. Code Ann. § 14-3-330. An order that denies relief under Rule 6 or Rule 55 does not meet any of these categories. Thus, this order is not immediately appealable.

*First*, such an order is (obviously) not a final judgment. A final judgment determines all of the issues between the parties and leaves nothing to be done but to enforce the order by execution. *Link v. Sch. Dist. of Pickens County*, 302 S.C. 1, 5 n.3, 393 S.E.2d 176, 178 n.3 (1990). Denying a motion to set aside default is not the end of the road. There will not be a final judgment until *after* the parties have participated in a damages hearing.

*Second*, such an order does not involve the merits. This is because a judge that denies a motion under these rules is not expressing *any* opinion on the merits. See *Jefferson*, 295 S.C. at 317, 368 S.E.2d at 456. The question of “good cause” does not involve examining the substance of a defendant’s case. Instead, “good cause” deals with the question whether the moving party has shown good cause for why he should be allowed to file late.

*Finally*, this sort of order does not affect a substantial right. An order will be immediately appealable if it strikes all or part of a party’s answer, see § 14-3-330(2)(c), but this sort of order does not *strike* the defaulting party’s answer, it refuses to allow the answer to be filed. *Johnson*, 295 S.C. at 318, 368 S.E.2d at 456.

The circuit court's order gives voice to these points. See (**Attachment D**). At no point does the order express any views on the substance of the suit or the allegations of the appellant's pleading. Instead, the order focuses on the appellant's claim that his delay should be excused because he was hospitalized after he was served. The judge did not look at the details of anyone's claim or defense. Just as the law compelled the *Jefferson* court to dismiss the appeal, so too is dismissal the appropriate result here.

#### CONCLUSION

The Court should dismiss this appeal. Controlling precedent establishes that these rulings — the denial of a motion to file a later answer, the denial of a motion to set aside default, and the entry of default — are not immediately appealable.

Respectfully submitted,

August 25, 2014



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Attorneys for Respondent

# Attachment A

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
IN THE NINTH JUDICIAL CIRCUIT

Assistive Technology Medical Equipment )  
Services, Inc., )  
 )  
Plaintiff, )

Civil Action No.: 2011-CP-40-<sup>10</sup> 2011

vs. )

**COMPLAINT**  
(Jury Trial Requested)

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

FILED  
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JULIE J. ARMSTRONG  
CLERK OF COURT  
BY \_\_\_\_\_

The Plaintiff, Assistive Technology Medical Equipment Services, LLC (hereinafter ATMES), hereby asserts the following Complaint against Defendants, Hood & Selander, CPAS PA, Donna C. Cash, as Personal Representative of the Estate of Dorothy A. Connelly, W.E. Applegate, III, as Personal Representative of the Estate of James B. Connelly, Kimberly Cuce and Phillip DeClemente and avers as follows:

**PARTIES**

1. The Plaintiff, ATMES, is a corporation incorporated under the laws of South Carolina and has its principal place of business located in Sumter County, State of South Carolina.

2. Upon information and belief, Hood & Selander, CPAS, LLC (hereinafter: Hood and Selander) is a corporation incorporated under the laws of South Carolina and has its principal place of business located in Charleston County, State of South Carolina.

3. Upon information and belief, the Defendant Donna C. Cash, as Personal Representative of the Estate of Dorothy A. Connelly is a citizen and resident of Charleston County, State of South Carolina.

4. Upon information and belief, the Defendant W.E. Applegate, III, as Personal Representative of the Estate of James B. Connelly is a citizen and resident of Charleston County, State of South Carolina.

5. Upon information and belief, the Defendant Kimberly Cuce's was last known to reside in Sumter County, and therefore Ms. Cuce is a citizen and resident of Sumter County, State of South Carolina.

6. Upon information and belief, the Defendant Phillip DeClemente is a citizen and resident of Charleston County, State of South Carolina.

7. This Court has personal jurisdiction over the parties and subject matter jurisdiction over this action.

8. Venue in this action is proper in this Court.

#### **GENERAL ALLEGATIONS**

9. Plaintiff realleges paragraphs 1 through 8 as if fully stated herein.

10. A Stock Purchase and Assignment Agreement (the "Agreement") for the remaining shares of common stock of Abacare Home Medical, Inc. (the "Corporation") was executed November 7, 2008 by and between the Estate of Dorothy A. Connelly (the "Seller"), Phillip L. DeClemente ("Assignor"), and Assistive Technology Medical Equipment Services, LLC, (the "Purchaser").

11. At the time the Agreement was executed, the Seller owned one hundred four (104) shares of the Corporation's outstanding common stock (the "Stock").

12. The purchase price for the Stock paid by the Plaintiff ATMES at closing was Eight Hundred Nine Thousand, Five Hundred and No/100 (\$809,500.00) Dollars (the "Purchase Price").

13. The purchase price for the Stock paid by the Plaintiff was based on a host of considerations, including Corporation's profitability, assets and liabilities.

14. Paragraph Four (4)(e) of the November 7, 2008 Agreement, Material Omissions or Nondisclosure provides in pertinent part:

"Seller's representations and warranties, and all statements, certificates, schedules, documents or other information furnished or to be furnished by the Seller to the Purchaser pursuant to this Agreement are true, **correct and complete in all material respects**, and neither contain nor will contain any untrue statement of a material fact or omit nor will omit to state any material facts necessary to make the statements contained therein not misleading." (emphasis added).

15. Unbeknownst to the Plaintiff, Abacare Home Medical, Inc. had been consistently understating to the South Carolina Department of Revenue sales taxes at the time the Agreement was executed on November 7, 2008.

16. A Shareholder Meeting of Abacare Home Medical, Inc. was held on July 24, 2007 for the purposes of discussing: "the bookkeeping, financial health of the company and various other company issues."<sup>1</sup> Dorothy A. Connelly, Phillip DeClemente and David E. Selander were in attendance of the July 24, 2007 Shareholder Meeting.

17. According to the minutes of the July 24, 2007 Shareholder Meeting, the attendees devoted significant time and attention to the issue of Sales Taxes. In fact, "Sales Taxes" was one of the eight topics of discussion appearing in bold type in the minutes of the meeting.

18. The minutes provide in pertinent part:

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<sup>1</sup> July 31, 2007 Memo of written minutes of the Abacare Home Medical Shareholder Meeting prepared by Hood & Selander, CPAS PA (Attached hereto as Exhibit A)

“David noted that the taxable sales reported on the June sales tax forms appeared **significantly understated**. David stressed the importance to report as accurately as possible the taxable sales on the monthly forms...David advised that Abacare should set aside a reserve in case of an audit. If an audit determines the company should use sales rather than collections, then Abacare could owe a substantial amount of tax, penalties and interest. David **noted last meeting, and repeated this meeting**, that a system needs to be set up as soon as possible that will support the gross sales number posted on the sales tax returns. This information will be needed in case of an audit. Finally, David noted that a couple of sales tax returns since the last shareholder meeting were filed and paid late. There is a penalty up to 25% of the tax for late filing and payment.”<sup>2</sup> (emphasis added.)

19. Defendants failed to disclose to the Plaintiff at the time of the sale unpaid sales taxes to the South Carolina Department of Revenue in the amount One Hundred Thousand Three Hundred Twenty and 41/100 (\$100,320.41) Dollars.

20. The Defendants failed to disclose the above-mentioned tax liability prior to the execution of the Stock Purchase Agreement on November 7, 2008.

21. The above-mentioned tax debt owed to the South Carolina Department of Revenue is and was material to the Stock Purchase and Assignment Agreement.

22. These debts were incurred by the Seller, the Estate of Dorothy Connelly, prior to the execution of the Stock Purchase Agreement.

23. The Seller Represented and Warranted to the Purchaser that the documents and information furnished to the Purchaser was “correct and complete in all material respects”. This was not the case.

24. The debt to the South Carolina Department of Revenue was incurred by the Seller, not the Purchaser. Therefore, the Seller must pay the debt owed.

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<sup>2</sup> July 31, 2007 Memo of written minutes of the Abacare Home Medical Shareholder Meeting under the heading Sales Taxes.

25. Furthermore, the tax liability was not contemplated by the business valuation, which occurred prior to the execution of the Stock Purchase and Assignment Agreement.

26. If the tax liability had been included in the valuation of the business, the purchase price would have been drastically lower than Eight Hundred Nine Thousand, Five Hundred and No/100 (\$809,500.00) Dollars.

27. Upon information and belief, the Defendants negligently and recklessly prevented the Plaintiff from learning about the tax liability, thereby keeping the purchase price artificially high.

28. Subsequent the execution of the Stock Purchase and Assignment Agreement November 7, 2008, W.E. Applegate, III, as Personal Representative of the Estate of James B. Connelly, agreed to a plan for repayment of the unpaid sales taxes owed to the South Carolina Department of Revenue in the amount One Hundred Thousand Three Hundred Twenty and 41/100 (\$100,320.41) Dollars.

29. W.E. Applegate, III failed to pay the moneys owed.

**FOR A FIRST CAUSE OF ACTION**

(Breach of Contract as to Donna C. Cash,  
Personal Representative of the Estate of Dorothy A. Connelly)

30. Paragraphs 1 through 29 are incorporated by reference as if set forth verbatim.

31. The Defendant Donna C. Cash, as Personal Representative of the Estate of Dorothy A. Connelly, executed the November 7, 2008 Stock Purchase and Assignment Agreement wherein as "Seller" she warranted and represented to the Plaintiff "Purchaser": "all statements, certificates, schedules, documents or other information furnished or to be furnished

by the Seller to the Purchaser pursuant to this Agreement are true, correct and complete in all material respects...”

32. The Defendant failed to disclose the above-mentioned indebtedness for unpaid sales taxes to the South Carolina Department of Revenue in the amount One Hundred Thousand Three Hundred Twenty and 41/100 (\$100,320.41) Dollars.

33. Pursuant to the terms of the November 7, 2008 Stock Purchase And Assignment Agreement, Defendant’s failure to disclose this information amounts to a Material Omission or Nondisclosure.

34. Plaintiff is informed the Defendant’s material omission or nondisclosure constitutes a breach of the Agreement, and thereby is in Default pursuant to the contract, including paragraph 9 of the Agreement.

35. In the event of Default, Paragraph 9 and Paragraph 11 of the Agreement provide the following:

**“9. Default.** If either of the parties hereto fails to meet his or her obligations hereunder, he or she, as the case may be, shall be deemed in default and the non defaulting party shall have the right to seek damages and/or specific performance or such other legal remedies as may be allowed by law.”

**“11. Attorneys’ Fees.** If either party brings or commences any legal action or proceeding to enforce any of the terms of this Agreement (or for damages by reason of an alleged breach of this Agreement), the prevailing party, if any, in such action shall be entitled to recover from the non-prevailing party all reasonable attorneys’ fees that may have been incurred, including any and all costs and expenses incurred in enforcing, perfecting and executing such judgment, and including all costs of appeal.”

36. As a direct and proximate result of the Defendant’s wrongful breach of contract, Plaintiff has incurred and will incur damages to be determined by the trier of fact.

37. Plaintiff was deprived of the benefit of the bargain and has suffered damages directly flowing from the breach of the kind to arise and flow from such a breach.

38. The Plaintiff is, therefore, entitled to judgment against the Defendant and reasonable attorney's fees and costs pursuant to the Agreement.

**FOR A SECOND CAUSE OF ACTION**

(Breach of Contract as to W.E. Applegate, III,  
Personal Representative of the Estate of James B. Connelly)

39. Paragraphs 1 through 38 are incorporated by reference as if set forth verbatim.

40. Subsequent the execution of the Stock Purchase and Assignment Agreement November 7, 2008, W.E. Applegate, III, as Personal Representative of the Estate of James B. Connelly, agreed to a plan for repayment of the unpaid sales taxes owed to the South Carolina Department of Revenue in the amount One Hundred Thousand Three Hundred Twenty and 41/100 (\$100,320.41) Dollars.

41. W.E. Applegate, III failed to pay the moneys owed.

42. As a direct and proximate result of the Defendant's wrongful breach of contract, Plaintiff has incurred and will incur damages to be determined by the trier of fact.

43. Plaintiff was deprived of the benefit of the bargain and has suffered damages directly flowing from the breach of the kind to arise and flow from such a breach.

44. The Plaintiff is, therefore, entitled to judgment against the Defendant and reasonable attorney's fees and costs pursuant to the Agreement.

**FOR A THIRD CAUSE OF ACTION**

(Fraud and Deceit as to All Defendants)

45. Paragraphs 1 through 44 are incorporated by reference as if set forth herein verbatim.

46. The Defendants represented in writing, and by their words and acts, that they had furnished accurate and complete information to the Plaintiff, information which

Defendants claimed was not misleading regarding the company's profitability, assets and liabilities.

47. The representations made by the Defendants to the Plaintiff regarding Abacare Home Medical, Inc.'s profitability, assets and liabilities were false.

48. The representations made by the Defendants were material; the representations influenced the Plaintiff in making the decision to enter into the agreement with the Defendants.

49. The Defendants either knew that the representations were false, or the Defendants made the representations with a reckless disregard of its truth or falsity, as evidenced by the minutes of the July 24, 2007 Shareholder Meeting:

"David noted that the taxable sales reported on the June sales tax forms appeared **significantly understated**. David stressed the importance to report as accurately as possible the taxable sales on the monthly forms...David advised that Abacare should set aside a reserve in case of an audit. If an audit determines the company should use sales rather than collections, then Abacare could a substantial amount of tax, penalties and interest. David **noted last meeting, and repeated this meeting**, that a system needs to be set up as soon as possible that will support the gross sales number posted on the sales tax returns. This information will be needed in case of an audit. Finally, David noted that a couple of sales tax returns since the last shareholder meeting were filed and paid late. There is a penalty up to 25% of the tax for late filing and payment."<sup>3</sup> (emphasis added.)

50. The Defendants intended for the Plaintiff to act on the Defendants' representation.

51. The Plaintiff did not know that Defendants had failed to disclose a sales tax liability in the amount of One Hundred Thousand Three Hundred Twenty and 41/100 (\$100,320.41) Dollars, information the Plaintiff could not have known through its own due diligence. Plaintiffs relied upon the terms of the Agreement whereby the Defendants warranted

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<sup>3</sup> July 31, 2007 Memo of written minutes of the Abacare Home Medical Shareholder Meeting under the heading Sales Taxes.

that all of the information furnished to the Plaintiff for the purpose of evaluating the profitability of the Abacare Home Medical Inc., was complete, accurate and not misleading.

52. The plaintiff suffered monetary losses as a direct and proximate result of the Plaintiff's reliance on the Defendants' misrepresentation to be determined by the trier of fact.

**FOR A FOURTH CAUSE OF ACTION**

(Negligence as to All Defendants)

53. Paragraphs 1 through 52 are incorporated by reference as if set forth herein verbatim.

54. Defendants owed a duty of care to the Plaintiff to provide the Plaintiff with accurate, and complete information in connection with the Agreement.

55. While the Plaintiff and Defendants were in the midst of evaluating the Corporation and negotiating its purchase price, the Defendants breached their duty owed to the Plaintiff by departing from professional standards of care, were thereby negligent, careless, grossly negligent, reckless and acted in violation of the duties owed to the Plaintiff in that they committed any or all of the following, which were departure from the prevailing professional standards of care.

a) In failing to provide the Plaintiff with accurate and complete accounting information in connection with the Agreement;

b) In failing to disclose the Defendants' tax liability to the Plaintiff for unpaid sales taxes owed to the South Carolina Department of Revenue in the amount One Hundred Thousand Three Hundred Twenty and 41/100 (\$100,320.41) Dollars;

c) In failing to accurately evaluate the profitability, assets and liabilities of Abacare Home Medical, Inc., contemplated by the Agreement;

d) In failing to accurately state the profitability, assets and liabilities of Abacare Home Medical, Inc.;

e) In failing to take reasonable measures to address the tax liability, known to the Defendants long before the execution of the Agreement, including the Defendants' failure to arrange a repayment plan with the South Carolina Department of Revenue;

f) In such other particulars as may be ascertained through discovery procedures undertaken pursuant to the South Carolina Rules of Civil Procedure.

56. As a direct and proximate result of the negligence, carelessness, gross negligence, recklessness and departure from the professional standards of care by Defendants, Plaintiff has suffered and will continue to suffer monetary losses to be determined by the trier of fact.

**FOR A FIFTH CAUSE OF ACTION**

(Professional Negligence as to Hood & Selander, CPAS, LLC)

57. Paragraphs 1 through 56 are incorporated by reference as if set forth herein verbatim.

58. Defendant owed a duty of care to the Plaintiff to provide the Plaintiff with accurate and complete information in connection with the Agreement.

While the Plaintiff and Defendant were in the midst of evaluating the Corporation and negotiating its purchase price, the Defendant breached its duty owed to the Plaintiff by departing from professional standards of care, was thereby negligent, careless, grossly negligent, reckless and acted in violation of the duties owed to the Plaintiff in that it committed any of the following, which were departure from the prevailing professional standards of care. Under the accounting industry's standards, a Certified Public Accountant party to a transaction such as the one at issue in this case has a duty to:

a) prepare and sign off on tax returns that are accurate, complete and reflect the true financial status of the company. A CPA should not and normally would not sign a return that he or she knew to be incorrect;

b) to disclose to the Purchaser known tax liabilities of the company; to accurately report the gross and net income of the company;

c) disclose accurate and complete information necessary for a true and accurate business valuation based on accounting industry's standard practice and procedures;

d) prepare accurate and complete financial statements based on the accounting industry's standard practices and procedures;

59. David E. Selander of Hood & Selander, CPAS, LLC breached each of the above-described duties owed to the Plaintiff.

60. David E. Selander violated the accounting industry's standard practice and procedures by failing to prepare accurate and complete tax returns on behalf of Abacare Home Medical, Inc., tax returns that in part formed the basis of the Plaintiff's decision to purchase the business from the Defendants.

61. Mr. Selander knew or should have known that the documents he prepared related to Abacare Home Medical, Inc., and the information he provided, or failed to provide to Burkett Burkett & Burkett CPAs, LLC, would be relied upon by the Plaintiff regarding the purchase of the business.

62. Mr. Selander's failure to provide the proper information to Burkett Burkett & Burkett, and Mr. Selander's failure to report the overstatement of gross income and net income and properly disclose a significant tax liability on Abacare Home Medical, Inc.'s tax returns, amounts to professional negligence.

63. Mr. Selander's breach of the standard of care resulted in significant damage to the Plaintiff. The negligent misrepresentations of Mr. Selander, including his failure to disclose the overstatement of gross income and net income and the understatement of sales tax liability, created the appearance that the business was profitable when it was not.

64. As a direct and proximate result of the negligence, carelessness, gross negligence, recklessness and departure from the professional standards of care by the Defendant, Plaintiff has suffered and will continue to suffer monetary losses to be determined by the trier of fact.

**FOR A SIXTH CAUSE OF ACTION**  
(Negligent Misrepresentation as to All Defendants)

65. Paragraphs 1 through 64 are incorporated by reference as if set forth herein verbatim.

66. Defendants falsely represented to the Plaintiff that they had in fact provided accurate and complete information that was not misleading regarding the company's profitability, assets and liabilities.

67. Defendants had a monetary interest in making these false statements to the Plaintiff for a host of reasons. By failing to disclose the above-mentioned indebtedness for unpaid sales taxes to the South Carolina Department of Revenue in the amount of One Hundred Thousand Three Hundred Twenty and 41/100 (\$100,320.41) Dollars, the Defendants were able to grossly overstate the corporation's profitability thereby artificially inflating the purchase price.

68. Defendants owed a duty to the Plaintiff to provide the Plaintiff with accurate, and complete information in connection with the Agreement.

69. Defendants possessed expertise and special knowledge that would ordinarily make it reasonable for another person to rely on the Defendants' judgment with regard to the corporation's profitability, assets, and liabilities.

70. The Plaintiff justifiably relied upon the Defendants' misrepresentations.

71. The Plaintiff suffered monetary losses as a direct and proximate result of the Plaintiff's reliance on the Defendants' misrepresentation to be determined by the trier of fact.

**FOR A SEVENTH CAUSE OF ACTION**  
(Promissory Estoppel as To All Defendants)

72. Paragraphs 1 through 71 are incorporated by reference as if set forth herein verbatim.

73. The Defendants promised, represented and assured the Plaintiff that all statements, documents and other information furnished for the purpose of completing the Stock Purchase and Assignment Agreement were true, correct, complete and not misleading.

74. The Defendants represented and assured the Plaintiff that they had not misled the Plaintiff by omitting material facts in the documents furnished for the purpose of completing the Stock Purchase and Assignment Agreement.

75. Defendants intended that the Plaintiff would act in response to the Defendants promises, and, in fact Plaintiff did act in response to the Defendants' promises by accepting the terms of the Stock Purchase Assignment Agreement, including the purchase price, based on the representations and warranties given by the Defendants.

76. The Plaintiff suffered monetary losses as a direct and proximate result of the Plaintiff's reliance on the Defendants' acts and representations in an amount to be determined by the trier of fact.

**FOR A EIGHTH CAUSE OF ACTION**

(Violation of S.C. Unfair Trade Practices Act as to Hood and Selander CPAS, LLC)

77. Paragraphs 1 through 76 are incorporated by reference as if set forth herein verbatim.

78. The acts and omissions of Hood and Selander represent unfair business practices, offend public policy, are immoral, unethical and oppressive.

79. Hood and Selander's acts impaired trade and commerce and directly and indirectly affect the people of this state.

80. Hood and Selander's acts are capable of repetition in the accounting industry and in other areas where Hood and Selander participates in business valuation, mergers and acquisitions.

81. Upon information and belief, repetition of the above-mentioned unfair acts has already occurred and the potential for repetition exists as Hood and Selander has refused to act on information of its failure to disclose the tax liability mentioned above.

82. As a direct and proximate result of Hood and Selander's actions, Plaintiff has suffered proximate and consequential damages in an amount to be determined by the trier of fact. Furthermore, Hood and Selander's unfair trade acts require treble damages and attorney's fees.

**FOR AN NINTH CAUSE OF ACTION**  
(Civil Conspiracy - § 16-17-410 as to All Defendants)

83. Paragraphs 1 through 82 are incorporated by reference as if set forth herein verbatim.

84. Defendants maliciously conspired to harm the Plaintiff without legal justification or excuse and performed acts with the intent of injuring the Plaintiff for their benefit.

85. The natural and necessary consequence of the acts of all Defendants resulted in the harm and oppression of the Plaintiff as described above.

86. All Defendants had knowledge of the objective and purpose of the conspiracy to harm the Plaintiff and of the illegal and unfair nature of their own action and the actions of their co-conspirator. Moreover, each Defendant agreed to the commission of these wrongs with the intention to share in the fruits of the fraud.

87. David E. Selander of Hood & Selander provided incomplete information as a result of non-disclosure to Burkett Burkett & Burkett, Certified Public Accounts, P.A. (please see Exhibit A attached)

88. The Defendants knew that Abacare Home Medical, Inc. had overstated their sales as a result of understating their sales tax and that Abacare Home Medical, Inc. was indebted to the South Carolina Department of Revenue.

89. David E. Selander of Hood & Selander derived Abacare's net income from the company's sales figures, dismissing the sales tax liability.

90. All Defendants had knowledge of the objective and purpose of the conspiracy.

91. The Defendants among themselves conspired to injure the Plaintiff causing special damages. In this case, the Plaintiff relied upon the Defendants' portrayal of the company's financial well-being and purchased the corporation based on the scheme devised by the Defendants. In so doing, the Plaintiff unwittingly incurred the debt owed to the South Carolina Department of Revenue and suffered other significant financial hardship and damage.

92. As a direct and proximate result of this conspiracy, Plaintiff has incurred special damages as described herein, including financial losses, mental suffering, worry, and is entitled to recover from the Defendants, for the joint and several liability of this conspiracy, the precise amount of which is presently unknown and will be proved at trial.

#### **JOINT AND SEVERAL LIABILITY**

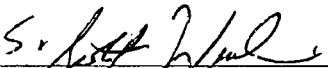
93. The Defendants are jointly and severally liable to the Plaintiff for all injuries and damages alleged herein and the Defendants are jointly and severally obligated to pay any judgment rendered for the Plaintiff in this action.

WHEREFORE, having fully set forth in its Complaint, Plaintiff respectfully prays for the following relief:

- A. Judgment against the Defendants for damages in the full amount allowed by law;
- B. Plaintiff recovers the costs of this suit, including but not limited to, any expert witness fees, together with reasonable attorneys' fees;
- C. For such other and further relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED,

JAMES E. SMITH, JR., P.A.

By: 

James E. Smith, Jr  
Dylan W. Goff  
E. Scott Winburn.  
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(803) 933-9800

Attorneys for Plaintiff

Columbia, South Carolina  
October 31, 2011

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
IN THE NINTH JUDICIAL CIRCUIT

Assistive Technology Medical Equipment )  
Services, LLC, )  
Plaintiff, )

Civil Action No.: 2011-CP- 40-

vs. )

**AFFIDAVIT OF**

Hood & Selander, CPAS, LLC, Donna C. )  
Cash, as Personal Representative of the )  
Estate of Dorothy A. Connelly, W.E. )  
Applegate, III, as Personal Representative )  
of the Estate of James B. Connelly, )  
Defendants. )

ART BRADHAM

I, Art Bradham, being duly sworn under oath, declare that I am an adult person over the age of 18 years and that if called as a witness, I would competently testify to the following:

1. Unless otherwise noted, the statements in this affidavit are based upon my personal knowledge and experience.

2. I am competent to testify to the contents and details related in this affidavit.

3. I am a CPA with a Master of Taxation from Florida Atlantic University. I am also a Certified Valuation Analyst (CVA) and Enrolled Agent. My professional associations include the AICPA, SCACPA's, National Association of Tax Practitioners, National and SC Association of Enrolled Agents and I am admitted to practice before the US Tax Court.

4. I own my own CPA firm, *Art Bradham CPA PC*, located at 2 Law Range, Sumter, SC 29150.

5. From my education, experience and training, I am familiar with the accounting industry's standard practices and procedures relating to the valuation of businesses for the purposes of sale, and the duties owed by accountants to their clients and to third-parties in their conduct of business.

6. A Stock Purchase and Assignment Agreement for the remaining shares of common stock of Abacare Home Medical, Inc. was executed November 7, 2008 by and between the Estate of Dorothy A. Connelly (the "Seller"), Phillip L. DeClemente ("Assignor"), and Assistive Technology Medical Equipment Services, LLC, (the "Purchaser").

7. The purchase price for the Stock paid by the Plaintiff was based on a host of considerations including Abacare Home Medical's profitability, assets and liabilities.

8. Prior to the purchase of the business by the Plaintiff, the above-captioned Defendants, including David E. Selander of Hood & Selander, CPA, LLC, provided incomplete information as a result of non-disclosure to Burkett Burkett & Burkett, Certified Public Accountants, P.A. For example, the above-named Defendants knew that Abacare Home Medical, Inc. had overstated their sales as a result of understating their sales tax and was indebted to the South Carolina Department of Revenue. Subsequent examination by the SCDOR determined that the sales tax owed was some amount in excess of \$100,000. I did not handle the sales tax examination so I am not sure of the exact amounts. The reason this is important is that Burkett et al used net income, which was overstated, as the primary means of valuing Abacare Home Medical Inc.

9. Furthermore, David E. Selander of Hood & Selander, CPA, LLC, derived Abacare's net income from the company's sales figures, dismissing the sales tax liability and other considerations which would have dramatically lowered the net income figure relied upon by the Plaintiff.

10. Under the accounting industry's standards, a Certified Public Accountant party to a transaction such as the one at issue in this case has a duty to:

a. prepare and sign off on tax returns that are accurate, complete and reflect the true financial status of the company. A CPA should not and normally would not sign a return that he or she knew to be incorrect.

b. to disclose to the Purchaser known tax liabilities of the company; to accurately report the gross and net income of the company

c. disclose accurate and complete information necessary for a true and accurate business valuation based on accounting industry's standard practice and procedures;

d. prepare accurate and complete financial statements based on the accounting industry's standard practice and procedures;

11. From my review of the facts in this case, I believe David E. Selander breached each of the above-described duties owed to the Plaintiff.

12. From my review of the fact in this case, I believe that David E. Selander violated the accounting industry's standard practice and procedures by failing to prepare accurate and complete tax returns on behalf of Abacare, tax returns which in part formed the basis of the Plaintiffs decision to purchase the business from the Defendants.

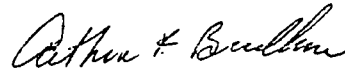
13. Mr. Selander knew or should have known that the documents he prepared related to Abacare, and the information he provided, or failed to provide to Burkett Burkett & Burkett CPAs, LLC, would be relied upon by the Plaintiff regarding the purchase of the business.

14. Mr. Selander's failure to provide the proper information to the Burkett Burkett & Burkett, and Mr. Selander's failure to report the overstatement of gross income and net income and properly disclose a significant tax liability on Abacare's tax returns, amounts to professional negligence, or negligent misrepresentation.

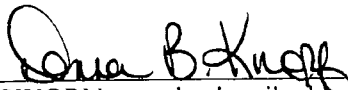
15. Mr. Selander's breach of the standard of care resulted in significant damage to the Plaintiff. The negligent misrepresentations of Mr. Selander, including his failure to disclose the overstatement of gross income and net income and his known the understatement of sales tax liability, created the appearance that the business was profitable when it was not. The Plaintiff relied upon Mr. Selander's portrayal of the company's financial well-being and purchased the corporation according to the negligent misrepresentations of Mr. Selander.

FURTHER AFFIANT SAYETH NOT.

Executed on August 4\_\_\_\_, 2011



Art Bradham



SWORN to and subscribed before me

this 26<sup>th</sup> day of September, 2011

My commission expires: 4/23/2012

# Attachment B

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
IN THE NINTH JUDICIAL CIRCUIT

Assistive Technology Medical Equipment )  
Services, Inc., )  
 )  
Plaintiff, )

Civil Action No.: 2011-CP- ~~10~~ 8011

vs. )

**AFFIDAVIT OF DEFAULT**

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

FILED  
2012 MAR 30 PM 12:19  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY \_\_\_\_\_

PERSONALLY APPEARED BEFORE ME, the undersigned attorney, who, being first  
duly sworn, deposes and says that:

1. James E. Smith, Jr., P.A. is the law firm representing the Plaintiff in the  
above-captioned action.

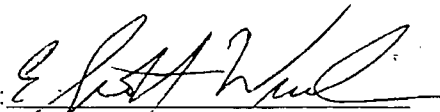
2. More than thirty (30) days have elapsed since the legal service upon the  
Defendant Phillip DeClemente of the Civil Action Coversheet, Summons and Complaint herein.  
The original Certificate of Service is on file in the office of the clerk of court for Charleston  
County. No Notice of Appearance, Answer, Motion to Dismiss or any other appearance of any  
kind has been subsequently served or filed, and the Defendant is in default.

3. Pursuant to the provisions of the Soldiers and Sailors Relief Act, a  
reasonable investigation has been made to determine military status of the Defendant, and, upon  
information and belief Defendant is not a member of the military service of the United States.

The Plaintiff, therefore, moves the Court for an Order judging the Defendant to be in  
default for want of appearance in this action, and, requests that the clerk schedule a hearing to

ascertain damages pursuant to the provisions of Rule 55 of the South Carolina Rules of Civil Procedure for a judgment for Plaintiff against the Defendant in such an amount as may be properly found due.

JAMES E. SMITH, JR., PA

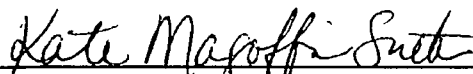
By: 

James E. Smith, Jr.  
E. Scott Winburn  
Dylan W. Goff  
1422 Laurel Street  
Columbia, SC 29201  
803-933-9800

Attorney for the Plaintiff

Columbia, South Carolina  
March 28, 2011

SWORN to and subscribed before me  
this 28<sup>th</sup> day of March, 2011.

  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: 3/2/22

# Attachment C

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CIVIL ACTION NO.: 200T-CP-10-8011  
2011

ASSISTIVE TECHNOLOGY MEDICAL )  
EQUIPMENT SERVICES, LLC, )  
 )  
Plaintiff, )

v. )

**MOTION FOR ENLARGEMENT  
OF TIME IN WHICH TO  
FILE ANSWER**

HOOD & SELANDER, CPAS, LLC, )  
DONNA C. CASH, AS )  
REPRESENTATIVE OF THE ESTATE )  
F DOROTHY CONNELLY, W.E. )  
APPLEGATE, III, AS PERSONAL )  
REPRESENTATIVE OF THE ESTATE )  
OF JAMES B. CONNELLY, KIMBERLY )  
CUCE, PHILLIP DECLEMENTE, )  
 )  
Defendants. )

FILED  
2012 AUG 10 PM 1:36  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY \_\_\_\_\_

Pursuant to S.C.R.C.P. 6(b) and 60(b)(1) Defendant, Phillip DeClemente, by and through his undersigned counsel, moves this Court for an enlargement of time in which to file his Answer.

The basis for this Motion is as follows:

Plaintiff has moved for a default judgment against Defendant Phillip DeClemente based upon Mr. DeClemente's failure to file an Answer within thirty days of being served with the Summons and Complaint.

Plaintiff filed a Summons and Complaint in this matter on October 31, 2011. Plaintiff served a copy of the Summons and Complaint on Mr. DeClemente through a process server on January 6, 2012. Mr. DeClemente's Answer was therefore due by February 6, 2012.

On February 2, 2012 Mr. DeClemente was involuntarily committed to the Medical University of South Carolina's psychiatric unit, where he was allowed very limited contact with

anyone other than his caregivers. He remained hospitalized until his release on March 5, 2012.

The date by which an answer was due lapsed during Mr. DeClemente's hospitalization.

S.C.R.C.P. 6(b) provides that the time in which to file an answer may be extended upon motion made after the expiration of the specified period for "good cause shown."

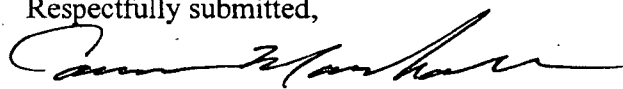
S.C.R.P. 60(b)(1) provides that on motion and upon such terms as are just, the court may relieve a party from a final judgment, order or proceeding because of "mistake, inadvertence, surprise, or excusable neglect."

Plaintiff's Motion for Default Judgment should be denied for good cause shown and due to excusable neglect. Mr. DeClemente was unable to answer Plaintiff's Complaint within thirty days due to sudden involuntary hospitalization. On February 2, 2012, five days before an answer was due, Defendant was hospitalized by City of Charleston Police officials.

Additionally, Plaintiff has no fewer than nine meritorious defenses which are set forth in Mr. DeClemente's Answer and Counterclaim.

Defendant submits that these facts constitute good cause shown for enlargement of the time in which to answer and requests that the Court accept Mr. DeClemente's Answer, filed herewith. Defendant further submits that these facts constitute excusable neglect, and requests that the Court not enter a default judgment against him.

Respectfully submitted,



Cameron L. Marshall  
7 Gamecock Avenue, Suite 707  
Charleston, SC 29407  
(843) 795-2298  
(843) 795-5081 (Fax)

Charleston, South Carolina  
This 8 day of August, 2012

*Attorney for Defendant Phillip DeClemente*

# Attachment D

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )  
ASSISTIVE TECHNOLOGY MEDICAL )  
EQUIPMENT SERVICES, INC., )  
Plaintiff, )  
vs. )  
HOOD & SELANDER, CPAS, LLC, )  
DONNA C. CASH, AS PERSONAL )  
REPRESENTATIVE OF THE ESTATE )  
OF DOROTHY A. CONNELLY, W.E. )  
APPLEGATE, III, AS PERSONAL )  
REPRESENTATIVE OF JAMES B. )  
CONNELLY, KIMBERLY CUCE, )  
PHILLIP DECLEMENTE, )  
Defendants. )

IN THE COURT OF COMMON PLEAS  
IN THE NINTH JUDICIAL CIRCUIT

in  
Civil Action No.: 2011-CP-10-8011

**ORDER** BY  
JULIE J. ANNSTRONG  
CLERK OF COURT  
2014 APR 30 PM 12:21  
**FILED**

*gcm*

THIS MATTER COMES before this Court for a hearing December 16, 2012 on (1) Defendant Donna C. Cash, as Personal Representative of the Estate of Dorothy A Connelly, Motion to Amend Answer to Add Counterclaim; (2) Defendant DeClemente's Motion to Extend Time pursuant to Rule 6 and Rule 60(b)(1) of the South Carolina Rules of Civil Procedure; (3) Defendant DeClemente's Motion for Default Judgment against Plaintiff; and (4) Plaintiff Motion for Damages Hearing for scheduling. At the outset of the hearing counsel for Plaintiff indicated Plaintiff's consent to the relief request in Defendant Cash's Motion to Amend Answer to Add Counterclaim. As such, Defendant Cash's Motion to Amend is GRANTED.

Based upon the pleadings, the Court record, memoranda of law, affidavits filed herein, and other such matters before the Court, Defendant DeClemente's Motion to Extend Time and Relief from Default is DENIED and Defendant DeClemente's Motion for Default Judgment against Plaintiff is DENIED. Plaintiff's Motion for Damages is CONTINUED. I make the following findings of fact, conclusions of law, and render judgment as hereinafter provided.

## COURT RECORD

1. On October 31, 2011, Plaintiff commenced this action by filing its Summons and Complaint.
2. On December 1, 2011, the Complaint was properly and duly served upon the Defendant Phillip DeClemente.
3. On March 30, 2012, Plaintiff filed an Affidavit of Default as to Defendant DeClemente more than 120 days after service.
4. Counsel for Plaintiff did not obtain an entry of default from the Clerk of Court or a default judgment from the Circuit Court.
5. On May 14, 2012, Counsel for DeClemente appeared by Letter of Representation filed with the Clerk of Court and asked to be informed of the date of the Plaintiff's motion for Default Judgment, though a motion for Default Judgment had not been scheduled before the Court.
6. On August 10, 2012, Defendant DeClemente filed a Motion to Extend Time pursuant to SCRCP 6 and 60(b)(1) to which at this hearing I granted Defendant DeClemente's request to include a request for relief from entry of default pursuant to SCRCP 55(c).
7. On August 10, 2012, Defendant DeClemente filed an Answer, Counterclaims and Cross Claims.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has personal jurisdiction over the parties and subject matter jurisdiction over this litigation. Venue is proper. The Court permitted Defendant DeClemente to amend his

Motion to Enlarge Time pursuant to SCRC P 6 and 60(b) to include Rule 55(c) for relief from default.

SCRC P Rule 55 permits a party to move to set aside the entry of default. The standard for granting relief from an entry of default under Rule 55(c) is "good cause." See SCRC P 55(c). 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 Operating Company Inc. v. Intedge Industries Inc., 383 S.C. 601, 681 S.E.2d 885 (2009). 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. Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989). 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. [Emphasis Added.] Dixon v. Besco Engineering, Inc., 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct. App. 1995). A motion under Rule 55(c) is addressed to the sound discretion of the trial court. Williams v. Stalnaker, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994). See also, Sundown Operating Company Inc. v. Intedge Industries Inc., 383 S.C. 601, 681 S.E.2d 885 (2009).

Defendant DeClemente submitted a memorandum in support of his Motions which the Court has reviewed and considered along with argument of counsel at the hearing. DeClemente's counsel advised the Court that DeClemente was suffering from a psychiatric illness and was hospitalized approximately two weeks from February 2, 2012 through February 16, 2012. DeClemente advised the Court that he knew he had been served and was required to

answer the Complaint. Additionally, at the Court hearing DeClemente's counsel mentioned that DeClemente had other counsel assisting him in this matter prior to present counsel. At the hearing, the Court permitted the parties to submit supplemental affidavits addressing the issues raised at the hearing and relevant to the Rule 55(c) standard and the Court would take the matter under advisement.

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, 2012. 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 the Defendant's Motion to Enlarge Time and Answer and Counterclaims on August 10, 2012. I find that the timing of motion for relief was not prompt.<sup>1</sup> Defendant DeClemente's Motion to Extend Time and/or Relief from Default pursuant to Rule 55(c) is DENIED.

Defendant DeClemente is in default for failure to timely file an Answer to the Complaint. DeClemente filed his Answer, Counterclaims and Cross Claims on August 10, 2012. At that time, Plaintiff had no obligation to respond to Defendant DeClemente's Counterclaims unless and until DeClemente was relieved from default and permitted to enter his Answer,

<sup>1</sup> "Although the presence of other factors, in the totality of the circumstances, may amount to a showing of "good cause," a defendant may not be relieved from the entry of default *solely* because it relied to its detriment on a negligent insurance agent." See, Sundown Operating Company Inc. v. Intedge Industries Inc., 383 S.C. 601, 681 S.E.2d 885 (2009).

Counterclaims and Cross Claims. I find that because Defendant DeClemente is not relieved from default, he cannot enter his Answer, Counterclaims and Cross Claims and cannot pursue default judgment against the Plaintiff for counterclaims that have never been permitted to be asserted. Defendant DeClemente's Motion for Default Judgment against Plaintiff is DENIED and Defendant's Answer and Counterclaims are STRICKEN.

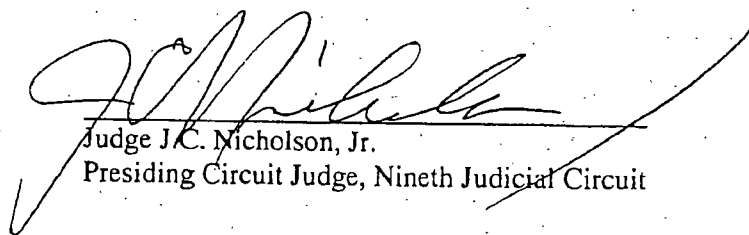
Default judgment is entered as to Defendant DeClemente and a hearing shall be scheduled on Plaintiff's Motion for Damages as to Defendant DeClemente.

**NOW, THEREFORE**, based upon the foregoing,

**IT IS ORDERED**, that Defendant Cash's Motion to Amend is GRANTED.

**IT IS FURTHER ORDERED**, that Defendant DeClemente's Motion to Extend Time and/or Relief from Default is DENIED and Defendant DeClemente's Motion for Default Judgment against Plaintiff is DENIED. Default judgment is entered as to Defendant DeClemente and Plaintiff's Motion for Damages is CONTINUED and a hearing to ascertain damages shall be set for the next term of this Court.

**AND IT IS SO ORDERED.**

  
Judge J.C. Nicholson, Jr.  
Presiding Circuit Judge, Ninth Judicial Circuit

Columbia, South Carolina

4/24, 2014