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
Deadra L. Jefferson, Circuit Court Judge

Case No. 2011-CP-10-08011
Appellate Case No. 2018-000460

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

v.

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

Of whom Phillip DeClemente is the ..... Appellant.

INITIAL BRIEF OF RESPONDENT

James E. Smith, Jr. # 8733
JAMES E. SMITH JR., PA
1422 Laurel Street
Columbia, SC 29201
(803) 933-9800
(803) 933-9801 (facsimile)
james@jamessmithpa.com

Blake A. Hewitt # 73674
BLUESTEIN THOMPSON SULLIVAN LLC
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
blake@bluesteinattorneys.com

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Other Authorities

STATEMENT OF ISSUE ON APPEAL

Respondent believes the issues can be consolidated and re-stated as:

Whether the circuit court abused its discretion in finding Appellant did not establish good cause to set aside default or sufficient grounds for relief from the default judgment.

STATEMENT OF THE CASE

Parts of this case are complicated but the legal issue is simple: The appellant failed to timely answer the summons and complaint filed against him. One circuit court judge denied appellant's request that he be let out of default. A second circuit court judge denied appellant's request for relief from a default judgment. The question in this appeal is whether either decision was an abuse of discretion.

A. General Factual Background

This case involves a business acquisition/expansion that quickly went south.

Reliable Medical Equipment of South Carolina is a Sumter business started in 1998 by two individuals; Murrell Smith and Jeff Reed. (Smith Depo.p.80, lines 16-24). In 2008, they began investigating, and ultimately acquired, an ownership interest in a Charleston business; Abacare Home Medical, Inc. (Smith Depo.p.79, line 22 - p.80, line 12).

Assistive Technology Medical Equipment Solutions—ATEMS—was created to accomplish this acquisition because Reliable and Abacare were already ongoing businesses with existing Medicare provider numbers. (Smith Depo., p.13, line 14 - p.14, line 10). Eighty percent (80%) of Abacare's stock was owned by the Estate of Dorothy Connelly. (Smith Aff. filed 12/8/15 p.1, ¶4). Phillip DeClemente—the appellant—owned the other 20%. *Id.* DeClemente assigned his rights in Abacare to ATEMS and ATEMS bought the

Connelly Estate's shares in Abacare for $809,500. (Stock Purchase Agmt.p.1, ¶2 & ¶3(b)). The agreement for this transaction was executed November 7, 2008. *Id.*

There was deposition testimony that problems began immediately afterwards. ATEMS originally had four owners: Smith, Reed, DeClemente, and Kim Cuce. (Smith Depo.p.108, lines 16-21). DeClemente was to run the Charleston operation and Cuce was to run the business in Sumter, (Id.p.110, line 9 - p.111, line 15), but shortly after ATEMS was created and acquired Abacare, Smith and Reed learned DeClemente and Cuce were having an affair. *Id.* DeClemente also tested positive for marijuana and got into a fistfight with his brother. (11/1/16 Tr.p.113, line 12 - p.114, line 12). In June of 2009, less than a year after ATMES acquired Abacare, DeClemente sold his 25% interest in ATEMS back to the company. (Bill of Sale, p.1).

B. Summary of Litigation

This lawsuit began in November of 2011, a little over two years after DeClemente left ATEMS. ATEMS sued an accounting firm (Hood & Selander), the personal representatives of both Connellys' Estates, DeClemente, and Cuce, claiming Abacare's purchase price had been artificially inflated. The suit alleged each of the defendants had known about and failed to disclose a $100,000 sales tax liability to the South Carolina Department of Revenue and had falsely represented Abacare's profitably in advance of its purchase by ATEMS. (Compl. p.8, ¶¶47 & 51).

Two proofs of service were filed as to DeClemente. The first was a return receipt for service by mail executed on December 1, 2011. (Ret. Receipt). The second was an affidavit from a process server showing personal service on January 6, 2012. (Aff.).

Months later—on March 30, 2012—ATEMS filed an affidavit that DeClemente was in default. (Affidavit of Default).

In May of 2012, a lawyer sent the court a letter noting his representation of DeClemente and requesting notice of any hearing on a default judgment. (Ltr. filed 5/14/12).

In August of 2012, three months after the letter, DeClemente (through counsel) filed a motion requesting enlargement of the time to file an answer. (Motion). As grounds for the motion, DeClemente explained he had been involuntarily committed to MUSC's psychiatric unit from February 2, 2012 to March 5, 2012, and that he had been unable to file a timely answer because of his involuntary hospitalization. (Motion, pp.1-2). He also claimed he had meritorious defenses to the suit. *Id.*

Judge Nicholson heard DeClemente's motion for relief from default on December 16, 2013. (12/16/13 Tr.p.1). He denied the motion in a written order filed April 30, 2014, finding DeClemente had good cause for not answering the suit during his hospitalization from February to March but that DeClemente did not have good cause for failing to answer the suit from May—the date he said he retained counsel—until August. (4/30/14 Or.p.4).

A different judge—Judge Jefferson—conducted the damages hearing. This hearing was conducted over two days. The first was November 1, 2016. (1/1/16 Tr.p.1). The second was January 5, 2017. (1/5/17 Tr.p.1).

Two weeks after the damages hearing concluded, DeClemente filed a motion asking the court to consider additional evidence including testimony from an expert. (1/24/17 Mot.p.1). The court considered this expert's deposition without conducting any further hearings. (12/21/17 Or.pp.1-2).

Judge Jefferson entered a default judgment of roughly $875,000 in a written order filed December 21, 2017. (12/21/17 Or.p.13). The court noted ATEMS had offered an expert's opinion on the value of its damages and found the expert to be credible. (Id.p.12).

DeClemente filed a motion to reconsider and sought relief from the default judgment. (1/8/18 Mot.p.1). There, as here, he presented various arguments including an argument that this suit against him was foreclosed by a release that had been executed as part of the series of agreements terminating his relationship with ATEMS in 2009. *Id.*

The circuit court denied DeClemente's motion in a written order filed January 26, 2018, explaining DeClemente was presenting the same arguments Judge Nicholson had rejected in denying DeClemente's request to have default set aside. (1/26/18 Or.pp.1, 4).

STANDARD OF REVIEW

Rule 55(c), SCRCP governs motions to set aside default. Rule 60, SCRCP governs relief from a default judgment. This Court applies the abuse of discretion standard to its review of requests for relief from default or default judgment. *Sundown Operating Co. v. Intedge Indus.*, 383 S.C. 601, 606-607, 681 S.E.2d 885, 888 (2009).

ARGUMENT

The circuit court's reasoning was grounded in the controlling law and in the record. A party must first give a good explanation for being in default. Default may then be set aside after considering the timing of the motion for relief as well as other factors. The circuit court found there was not a good explanation for the default and that the motion for relief from default was not made promptly. Those findings were sound. DeClemente cannot show an abuse of discretion.

DeClemente's various arguments for reversal are either foreclosed by the fact that he has admitted the allegations against him by virtue of his default or waived because they were not properly presented to the circuit court. Though the Court need not go further, it is worth noting DeClemente's arguments are also wrong. This Court should affirm.

A. The circuit court correctly found there was not a good explanation for DeClemente's default and that the motion to set default aside was not timely.

Rule 55(c), SCRCP allows a circuit court to set aside default "[f]or good cause shown." The circuit court is to consider the timing of the motion for relief, whether the defaulting party has a meritorious defense, and the degree of prejudice to the opposing party, but the court is only required to consider those factors after the defaulting party has given a satisfactory explanation for the default. *Sundown Operating Co.*, 383 S.C. at 607-608, 681 S.E.2d at 888. As previously noted, the decision to grant or deny relief under the rule rests in the circuit court's discretion. *Id.* at 607-608, 681 S.E.2d at 888.

DeClemente cannot demonstrate an abuse of the circuit court's discretion. The circuit court did not make any errors of law. It cited Rule 55(c). (4/30/14 Or.p.3). It quoted the "good cause" standard and it correctly listed the factors the court was required to consider in determining "good cause." *Id.* Nothing about the court's legal analysis was incorrect.

The same is true of the circuit court's factual analysis. The key part of that analysis appears on page four of the order. The court found DeClemente demonstrated "good cause" during his hospitalization, but the court also found DeClemente did not have good cause for failing to answer or otherwise defend the suit from May of 2012 to August of 2012. (Id.p.4). That finding is sensible.

It is difficult to understand why there was not an immediate motion to have default set aside in May on the basis of DeClemente's hospitalization. An answer with a general denial could easily have been attached to that motion along with an explanation that further defenses would be forthcoming after time for an adequate investigation. Yet, nothing was filed from May to August. The circuit court did not abuse its discretion in finding there was no good reason why DeClemente did not defend the suit for three months.

It may be instructive to consider another part of the circuit court's order, because although the circuit court's analysis was grounded in the lack of a good reason for the delay in action from May of 2012 to August, the circuit court's order also explains other facts came to light during the hearing on DeClemente's request for relief from default.

Specifically, the hearing disclosed another lawyer had been assisting DeClemente before his hospitalization and before he retained his present counsel. (12/16/13 Tr.p.15, lines 21-23). DeClemente said he had a different law firm "working on this issue" and that he did not realize he had to answer the suit. *Id.* The court noted at the hearing that the language on the summons was clear, and the court ultimately found DeClemente knew he had to answer the complaint and that he had the benefit of counsel around the time he was served with the complaint. (4/30/14 Or.p.4). Those findings are not challenged and are the law of the case.

The circuit court's decision fits well with existing precedent. Multiple cases confirm a circuit court has the discretion to let default stand when the default results from inattentiveness or neglect. *Regions Bank v. Owens*, 402 S.C. 642, 648-649, 741 S.E.2d 51, 54-55 (Ct. App. 2013) (some evidence supported the circuit court's finding that a party did not take adequate steps to protect himself); *Dixon v. Besco Eng'g*, 320 S.C. 174, 463 S.E.2d

636 (Ct. App. 1995) (default upheld when lawyer mistakenly believed he had been granted an unlimited extension to answer); *Williams v. Vanvolkenburg*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994) (lawyer's negligence in failing to answer is imputed to client); *Mitchell Supply Co. v. Gaffney*, 297 S.C. 160, 164-165, 375 S.E.2d 321, 324 (Ct. App. 1988) (same). Indeed, it would be difficult to reconcile a decision reversing the circuit court with precedent. When construing the statutory predecessor to Rule 55, the Supreme Court said the discretionary power to grant relief from default:

> is vested in the trial, not the appellate, court. In an appeal from such an order of the circuit court it is not our function, nor is it within our power, to substitute our judgment for that of the circuit judge simply because we might have reached a different conclusion had we been in his place.

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

The circuit court did not abuse its discretion in finding no good cause for DeClemente's delay in answering this lawsuit and that his request for relief was untimely. This Court should affirm.

B. Those findings foreclosed DeClemente's motion under the more stringent standard applicable for relief from a default judgment under Rule 60.

A request for relief from a default judgment under Rule 60(b) requires a stronger showing than a request to set aside default under Rule 55(c). Relief under Rule 55 requires a showing of good cause. Relief under Rule 60 requires a showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or "other misconduct of an adverse party." *Sundown Operating Co.*, 383 S.C. at 608, 681 S.E.2d at 888 (citing Rule 60(b), SCRCP).

As with the trial court's decision to grant or deny relief under Rule 55, the trial court's decision with respect to a Rule 60 motion is reviewed under the abuse of discretion standard. *Id.* at 606, 681 S.E.2d at 888.

The circuit court denied DeClemente's request for relief from the default judgment finding his arguments for relief were the same arguments he had presented when he sought to have default set aside under Rule 55. (1/26/18 Or.pp.2-3). That finding is accurately represented the record. DeClemente's chief argument to have the judgment set aside was that a release barred the lawsuit. (1/8/18 Mot.). He pointed to the same release as his meritorious defense when he sought leave to file a late answer. (12/16/13 Tr.p.7, lines 4-13; p.18, line 8 - p.19, line 13).

The circuit court's reasoning is also sound logically. The standard for relief under Rule 60 is "more rigorous" than the standard for relief under Rule 55. *Sundown*, 383 S.C. at 608, 681 S.E.2d at 888. If DeClemente was denied relief under Rule 55, it stands to reason he should be denied relief under Rule 60 if he offered the same arguments as before.

It may be worth noting that much of DeClemente's strategy throughout the life of this case was to keep attacking the case on liability even though his motion for relief from default had been denied. ATEMS, Reliable, and Abacare were in the durable medical equipment business. DeClemente believed that Abacare's $100,000 liability to the Department of Revenue was the result of a 2009 Supreme Court decision that established everyone in the DME business had been under-reporting sales. (1/5/17 Tr.pp.50-51).

In addition to pressing the release at every stage of this litigation, DeClemente consistently argued Reliable had experienced the same problem with sales tax following the

Supreme Court ruling. This was the sole thrust of his expert testimony at the damages hearing. His expert explained certain tax issues in the durable medical equipment business were known or should have been known before ATEMS purchased Abacare and that if ATEMS purchased Abacare with that knowledge, the roughly $800,000 purchase price reflected fair market value. (Burkett Depo.p.18, lines 13-25).

The problem with that argument was that it was inconsistent with DeClemente being in default. The complaint alleged an accountant had alerted Abacare's shareholders to significant understatements in Abacare's sales back in 2007 and that DeClemente made false representations about Abacare's profits, liabilities, and assets as part of inducing ATEMS to acquire Abacare. (Compl.p.8, ¶¶47-51). These allegations were admitted because "[i]t is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability." *Roche v. Young Bros.*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998).

There were factual problems with DeClemente's argument too. There was ample testimony that Abacare's financial problems were not typical of other businesses. Various parts of the record describe how an internal audit of Abacare following the Supreme Court's ruling disclosed problems with how Abacare recorded sales and represented its income. (Smith Depo.p.26, line 13 - p.28, line 3; p.44, line 3 - p.45, line 15; p.86, line 4 - p.87, line 8); (Reed Depo.p.210, line 14 - p.211, line 5; p.235, line 2 - p.236, line 18); (11/1/16 Tr.p.84, line 15 - p.85, line 13; p.110, line 24 - p.111, line 18). The conflict between this testimony and DeClemente's testimony would normally present a factual dispute, but it did not do so here. Again, liability had been conclusively established because DeClemente was in default.

The circuit court did not abuse its discretion in denying DeClemente relief from the default judgment. DeClemente's chief aim was to challenge liability and he presented the same arguments that had been denied under Rule 55. This Court should affirm.

C. DeClemente's arguments for reversal are foreclosed for procedural reasons and are also wrong on the merits.

DeClemente presents several arguments for reversal. All of these are foreclosed for procedural reasons. Though the court need go no further, they are also wrong on the merits.

His first issue on appeal argues the suit is foreclosed by the release. As explained above, that argument is foreclosed by his being in default. A release would be a defense to liability, but because DeClemente is in default, he has admitted the truth of the allegations against him and is deemed to have admitted liability. *Roche*, 332 S.C. at 81, 504 S.E.2d at 314. It is also worth noting that the release related to DeClemente's buyout and departure from ATEMS in 2009. This lawsuit concerns misrepresentations occurring prior to the formation of ATEMS in 2008. See (Smith Aff. filed 1/9/14 p.2, ¶8).

DeClemente's third issue on appeal is that the circuit court denied him due process by conducting the first day of the damages hearing in his absence and by allowing an accountant to testify "against his former client." Both of these arguments are foreclosed because DeClemente did not present them as grounds in his motion for relief from the default judgment. (1/8/18 Mot.pp.1-2). Both arguments are also wrong. The accountant explained DeClemente was not a former client, (11/1/16 Tr.p.74, lines 5-10), and the sole reason the circuit court conducted a second day of the damages hearing was so DeClemente could be present and testify. (11/1/16 Tr.p.123, lines 1-11). There is no reason to think DeClemente

did not have ample opportunity to rebut anything said during the first day of the damages hearing, and DeClemente was later allowed to submit the affidavit of an expert. DeClemente does not cite any authority supporting the proposition that he was denied due process. Respondent is not aware of any such authority.

DeClemente's fourth issue on appeal is that the circuit court erred in finding service was accomplished in December of 2011 rather than January of 2012. As above, this was not raised as a ground in his motion for relief from the default judgment. It is also difficult to understand why this distinction matters. The circuit court's reasoning was tied to Declemente's inaction from May 2012 to August. As counsel for ATEMS noted below, the distinction between December and January is not material. (12/16/13 Tr.p.24, ll. 12-16).

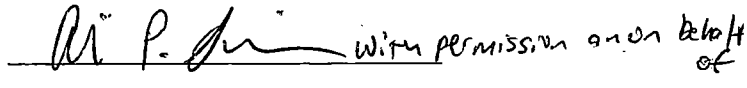
DeClemente's final issue asks for sanctions under the Frivolous Civil Proceedings Sanctions Act. No such request was made below. Issues may not be raised for the first time on appeal. *Pye v. Estate of Fox*, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006).

CONCLUSION

For the foregoing reasons this Court should affirm.

Respectfully submitted,

October 17, 2018



James E. Smith, Jr. # 8733
JAMES E. SMITH JR., PA
1422 Laurel Street
Columbia, SC 29201
(803) 933-9800
(803) 933-9801 (facsimile)
james@jamessmithpa.com

Blake A. Hewitt
BLUESTEIN THOMPSON SULLIVAN LLC
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
blake@bluesteinattorneys.com

Attorneys for Respondent

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
Deadra L. Jefferson, Circuit Court Judge

Case No. 2011-CP-10-08011
Appellate Case No. 2018-000460

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

v.

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

Of whom Phillip DeClemente is the ..... Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Appellant with a copy of the *Initial Brief of Respondent and Designation of Matter to be Included in the Record* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

Cameron L. Marshall
7 Gamecock Ave, Ste 707
Charleston, SC 29407-3379

Erin Bridges

October 17, 2018

Erin Bridges

BLUESTEIN ATTORNEYS

BLUESTEIN THOMPSON SULLIVAN, LLC
BLUESTEINATTORNEYS.COM

October 17, 2018

VIA HAND DELIVERY
The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Assistive Technology Medical v. Phillip DeClemente
Case Tracking No. 2018-000460

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of the Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal in regards to this matter. I have also enclosed a Proof of Service upon counsel for the Appellant. Please return the additional filed copies to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges
Paralegal to Blake A. Hewitt
Bluestein Thompson Sullivan, LLC

/emb
Enclosures
cc: James E. Smith, Jr., Esquire
Cameron L. Marshall, Esquire