

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

Appellate Case No. 2018-000460

RECEIVED

DEC 03 2018

SC Court of Appeals

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.

RECORD ON APPEAL
Volume 1 of 2, Pages 1 – 461

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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

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

ORDER

2014 APR 30 PM 12:21
JULIE J. MASTRONG
CLERK OF COURT

FILED

gm
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 SCRCP 6 and 60(b) to include Rule 55(c) for relief from default.

SCRCP 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 SCRCP 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.¹ 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,

¹ "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.

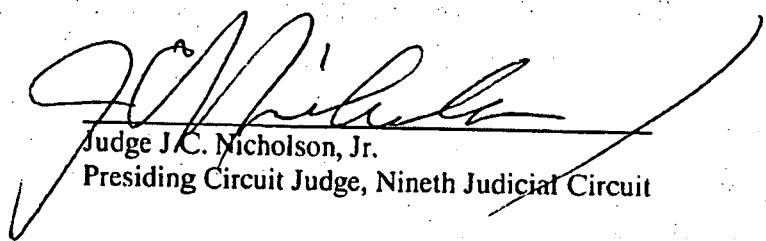
Default judgment is entered as to Defendant DeClemente and a hearing shall be scheduled on Plaintiff's Motion for Damages as to Defendant DeClemente.

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



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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COLUMBIA, SOUTH CAROLINA 29201
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November 13, 2014

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: Assistive Technology v. Hood & Selander, CPAs
Lower Court Case No. 2011CP1008011
Appellate Case No. 2014-001213

FILED
2014 NOV 17 PM 5:06
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

Handwritten signature of Jenny Abbott Kitchings, Clerk of the South Carolina Court of Appeals.
CLERK

Enclosure

cc: James Emerson Smith, Jr., Esquire
Cameron Lee Marshall, Esquire
Blake Alexander Hewitt, Esquire
John S. Nichols, Esquire

2011-CP-10-8011

The South Carolina Court of Appeals

Assistive Technology Medical Equipment Services, Inc.,
Respondent,

v.

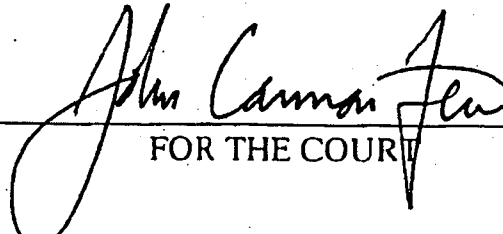
Hood & Selander, CPAs, LLC, Donna C. Cash, as
Personal Representative of the Estate of Dorothy A.
Connelly, W.E. applegate, III as Personal Representative
of James B. Connelly, Kimberly Cuce, and Phillip
DeClemente, Defendants,

Of Whom Phillip DeClemente is the Appellant.

Appellate Case No. 2014-001213

ORDER

This is an appeal from the circuit court's order that purports to enter a default "judgment" against Appellant. The order also denied the Appellant relief from default under Rule 55(c), SCRCP. Respondent filed a motion to dismiss, asserting the circuit court's order is not immediately appealable. Because the circuit court has not yet made an award of damages, whatever "judgment" was entered was not final. Therefore the circuit court's order is not immediately appealable. See S.C. Code Ann. § 14-3-330 (1977 & Supp. 2013). Respondent's motion to dismiss is granted.


FOR THE COURT

Columbia, South Carolina

FILED

10/17/14

cc: James Emerson Smith, Jr., Esquire
Cameron Lee Marshall, Esquire
Blake Alexander Hewitt, Esquire
John S. Nichols, Esquire

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
ASSISTIVE TECHNOLOGY MEDICAL
EQUIPMENT SERVICES

Plaintiff,

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.

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

ORDER ALLOWING TRAVEL
INTO SOUTH CAROLINA

FILED
2016 OCT 27 PM 4:18
CLERK OF COURT

As a condition of his probation, Phillip DeClemente has been prohibited from entering the state of South Carolina for purposes other than attending court proceedings pursuant to his sentence in warrant numbers 93528GG and K740215. Mr. DeClemente's presence will be required in court in South Carolina for a hearing in civil case number 2011-CP-10-8011 on October 31, 2016 in Charleston, SC.

Therefore, IT IS HEREBY ORDERED that Phillip DeClemente be allowed to enter the State of South Carolina for this hearing on October 31, 2016.

AND IT IS SO ORDERED this 27th day of Oct., 2016 in Charleston,
South Carolina.

Chief Administrative Judge
Ninth Circuit

FORM 4**STATE OF SOUTH CAROLINA**

COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

Assistive Technology Medical
Equipment Services, Inc.,

PLAINTIFF

v.

**JUDGMENT IN A CIVIL
CASE**

CASE NO. 2011-CP-10-08011

Hood & Selander, CPAS, LLC,
et al,

DEFENDANT

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

BOX:

- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE)**
- ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☐ See attached order. (Formal order to follow)
- ☒ Statement of Judgment by the Court:

On July 27, 2017, a status conference was conducted by telephone with Counsel¹ to address Defendant DeClemente's Motion to Consider Evidence of Damages, Adopt Proposed Order, and Reconvene Damages Hearing, filed January 24, 2017.² Counsel for Plaintiff, Attorney James Smith, Jr., was given the opportunity to respond and did so by filing a Memorandum in Opposition to the motion, filed February 9, 2017. Defendant DeClemente's Motion requests the Court to adopt the Proposed Order of Damages Judgment, reconvene the damages hearing to allow the Court to rule on the outstanding Motions to Compel and Quash, determine settlement amounts paid by co-defendants, and hear expert testimony from a certified public accountant. All

¹ Counsel consented to this matter being disposed of by telephone to avoid any further delay in the disposition of Defendant's request for relief.

² Pursuant to S.C. Code Ann. § 2-1-150 and Administrative Order 2017-05-19-01 issued by the Supreme Court of South Carolina, this hearing was delayed to accommodate Representative James E. Smith, Jr.'s legislative obligations.

outstanding motions in this matter were disposed of during the proceedings held on November 14, 2016 and January 5, 2017. The November 14, 2016 hearing was a full damages hearing on the merits of the case. The January 5, 2017 hearing was held to accommodate the Defendant DeClemente's request to supplement the record with additional testimony. The Court contemplated that to be the final hearing in this matter as the Defendant DeClemente was given more than ample opportunity to make a full presentation regarding the damages in this case. The Defendant DeClemente now makes an additional belated request to re-open the record and allow the Court to consider the expert testimony from a certified public accountant recently procured in this matter. While the Court is reticent to allow this matter to be protracted any further, out of an abundance of caution the Court will allow the additional testimony of this witness. The Court Orders as follows: The Defendant DeClemente is to provide the Plaintiff with the name, CV and contact information of the expert certified public accountant on or before Friday, July 28, 2017. On or before August 4, 2017 the Defendant DeClemente will provide the Plaintiff with the following information: all of the experts opinions, the basis for any opinions to be rendered, all reports or computations relied on in rendering the experts opinion and any written documents that will be utilized in rendering the opinion including but not limited to the experts written report(s). At the Plaintiff's request the parties will schedule the deposition of the expert at a mutually agreeable time on or before August 31, 2017. Due to the six (6) year pendency of this case and the delayed nature of this request, the Defendant DeClemente will bear the reasonable deposition cost of his expert certified public accountant. At the conclusion of this additional discovery the Court will schedule a hearing in this matter. However, the Court will take all reasonable efforts to accommodate Mr. Marshall's Federal Court obligations should that case proceed to trial.³

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

³ Mr. Marshall is scheduled for jury selection on August 17, 2017 and trial the week of August 21-25, 2017 in the Federal Court.

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.

OK J. J. J. J. J.
Circuit Court Judge

2128
Judge Code

7/27/17
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

James E. Smith, Jr., Esq.

Cameron L. Marshall, Esq.

PLAINTIFF

ATTORNEY FOR DEFENDANT

CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ASSISTIVE TECHNOLOGY MEDICAL
EQUIPMENT SERVICES, LLC,

Plaintiff,

v.

PHILLIP DECLEMENTE,

Defendant.

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

ORDER OF JUDGMENT

Presiding Judge:
Counsel for Plaintiff:
Counsel for Defendant:
Date of Hearing:

Court Reporter:

Hon. Deadra L. Jefferson
James Smith, Esq.
Cameron Marshall, Esq.
November 1, 2016
January 5, 2017
Joyce Rueger

2011 DEC 21 AM 9:55
JULIE A. BRIDGEMAN
CLERK OF COURT

FILED

This matter came before this Court on November 1, 2016 and January 5, 2017 for a hearing on Plaintiff's Motion to Set Damages as to the Defendant Phillip DeClemente, filed September 19, 2016.¹ Plaintiff was represented by James Smith, Esquire at both hearings. Defendant DeClemente was represented by Cameron Marshall, Esquire, at both hearings.² The Court gave both parties ample opportunity to make a full presentation of the damages in this case at the scheduled hearings. The Court also disposed of all outstanding motions during these proceedings. Defendant DeClemente nevertheless filed a supplemental, contested Motion to Consider Evidence of Damages, Adopt Proposed Order, and Reconvene Damages Hearing on January 24, 2017.³ In this

¹ The November 1, 2016 hearing was a full damages hearing on the merits of the case. The January 5, 2017 hearing was held to accommodate Defendant's request to supplement the record with the additional testimony of the Defendant Phillip DeClemente.

² Defendant DeClemente was the only remaining Defendant at the time of the hearings.

³ Plaintiff filed a Memorandum in Opposition to Plaintiff's Motion to Consider Evidence of Damages, Adopt

18/13
[Signature]

motion, Defendant asked the Court to re-open the record and consider the expert testimony of a certified public accountant recently procured by him. This Court granted Defendant's motion in part, allowing Defendant DeClemente to obtain the testimony of his expert witness via Order dated and filed July 27, 2017. The deposition of Defendant's expert, Ronald H. Burkett, was subsequently taken on September 14, 2017.⁴ The deposition of Ronald H. Burkett was provided to the Court on October 11, 2017. Subsequently the Court held a conference call with counsel on October 17, 2017. As a result, the parties advised the Court that no additional testimony would be necessary and consented to the Court ruling on this matter with benefit of the deposition and no further hearings in this matter. Having provided both parties with significant time in which to present evidence on damages, the Court now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter commenced with the filing of the Summons and Complaint on October 31, 2011 wherein Plaintiff set forth nine (9) causes of action against the following defendants: Hood & Selander, CPAS, LLC; Donna C. Cash as Personal Representative of the Estate of Dorothy Connelly; W.E. Applegate, III, as Personal Representative of the Estate of James B. Connelly; Kimberly Cuce; and Phillip DeClemente. In the Complaint, Plaintiff alleges that Assistive Technology Medical Services, LLC ("ATMES") entered into a stock purchase and assignment agreement with the Defendant Dorothy A. Connelly (the Seller) and Defendant DeClemente (the Assignor) on November 7, 2008 for the purchase of common stock of Abacare Home Medical, Inc. See Compl. ¶ 10. The purchase price paid by ATMES for the stock at closing was Eight Hundred Nine Thousand, Five Hundred and No/100 dollars (\$809,500.00).! Id. ¶ 10. Plaintiff

Proposed Order, and Reconvene Damages hearing on February 9, 2017.

⁴ This Court issued its Order on July 27, 2017 requiring the parties to schedule the deposition of Defendant's expert on or before August 31, 2017.

contends that the Defendants were aware that Abacare "significantly understated" its sales tax to the South Carolina Department of Revenue, but failed to disclose the sales tax liability owed by Abacare prior to its purchase by ATMES. *Id.* ¶¶ 19-20. As a result, ATMES alleges that it overpaid for the Abacare stock. *Id.* ¶ 52. Plaintiff further contends that subsequent to the execution of the Stock Purchase and Assignment Agreement, Defendant James B. Connelly agreed to a plan for repayment of the unpaid sales taxes owed by Abacare to the South Carolina Department of Revenue, but failed to do so. *Id.* ¶¶ 28-29.

This case has been litigated by the above-named parties since the filing of the Complaint in October of 2011. However, as of the date of this Order, Defendant DeClemente is the only active defendant in the case. Defendants W.E. Applegate as Personal Representative of the Estate of James B. Connelly was dismissed from the case on September 28, 2012 by Order of the Honorable Roger M. Young. Defendants Hood & Selander, CPAS, LLC and Donna Cash as Personal Representative of the Estate of Donna Connelly were likewise dismissed from the case by consent Order on November 7, 2016 and November 21, 2016, respectively. Defendant Kimberly Cuce has yet to answer or appear matter despite being properly served with the Summons and Complaint on February 21, 2012. Plaintiff has not sought a formal Entry of Default against Defendant Cuce or otherwise pursued its claims against her as of the date of this Order. Thus, the only remaining claims are those against Defendant DeClemente for fraud, negligence, negligent misrepresentation, promissory estoppel, and civil conspiracy. Accordingly, this Order is on the damages dispute between Plaintiff ATMES and Defendant DeClemente.

The Court finds that Defendant DeClemente was properly served with the Summons and Complaint via certified mail, return receipt requested, and restricted delivery on December 1, 2011. Defendant did not answer or otherwise respond to the Complaint within thirty (30) days of service

3 of 13
ATG

as required by South Carolina Rule of Civil Procedure 12(a). Accordingly, Plaintiff filed an Affidavit of Default with the Charleston County Clerk of Court on March 30, 2012. Plaintiff did not, however, simultaneously obtain an Entry of Default from the Clerk of Court or a Default Judgment from the Circuit Court. On May 14, 2012, Counsel for Defendant DeClemente, Cameron Marshall, Esq., filed a Letter of Representation with the Clerk of Court. On August 10, 2012, Defendant DeClemente filed a Motion for Enlargement of Time in which to File Answer pursuant to Rules 6 and 60(b) of the South Carolina Rules of Civil Procedure. This motion was later amended to include a request for relief from entry of default pursuant to South Carolina Rule of Civil Procedure 55(c). Defendant DeClemente simultaneously filed an Answer, Counterclaim, and Crossclaims. Defendant DeClemente thereafter filed an Amended Answer, Counterclaim, and Crossclaims on August 21, 2012.

On or about September 11, 2012, Plaintiff ATMES filed a Motion for a Damages hearing. Defendant DeClemente responded on October 15, 2012 by filing a counter-Motion for Default against Plaintiff ATMES. In this Motion, Defendant DeClemente argues that ATMES is likewise in default for failing to answer Defendant DeClemente's counterclaims. Both Plaintiff and Defendant's Motions for Default came before the Honorable J.C. Nicholson, Jr. on December 16, 2012. Judge Nicholson also heard Defendant DeClemente's Motion for Enlargement of Time at the December 16, 2012 hearing.

On April 24, 2014, Judge Nicholson issued an Order denying Defendant DeClemente's Motion for Enlargement of Time to Answer on the basis that Defendant did not demonstrate "good cause" for his delay in answering the Complaint as he retained counsel in May of 2012 but did not file his Answer until August of 2012. Judge Nicholson further denied Defendant's request for relief from default judgment pursuant to South Carolina Rule of Civil Procedure 55(c), and placed

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Defendant DeClemente in default for failure to timely file an Answer to Plaintiff's Complaint. Judge Nicholson also struck Defendant DeClemente's Answer, Counterclaims, and Crossclaims from the record, and denied Defendant DeClemente's Motion for Default Judgment against Plaintiff ATMES on the basis that Plaintiff has no obligation to respond to Defendant DeClemente's Counterclaims unless and until Defendant DeClemente is relieved from default and permitted to enter his Answer, Counterclaims, and Crossclaims.

Defendant DeClemente thereafter filed a Motion for Reconsideration of Judge Nicholson's April 24, 2014 Order. Defendant's Motion for Reconsideration was denied by Order dated May 3, 2014. Defendant DeClemente then filed an appeal with the Court of Appeals to challenge Judge Nicholson's ruling on May 30, 2014. The South Carolina Court of Appeals denied Defendant DeClemente's appeal by written order dated November 13, 2014 on the basis that Judge Nicholson's order is not immediately appealable because the "circuit court has not yet made an award of damages."⁵ The Remittitur was also issued on November 13, 2014.

On September 19, 2016, Plaintiff filed a Motion for Hearing on Damages in order to ascertain the judgment amount to be entered against the defaulting defendant, Phillip DeClemente. This matter was subsequently set for a hearing before this Court on November 1, 2016 to determine damages. Plaintiff's counsel, James Smith, Esq. was present at the November 1, 2016 hearing. Defendant DeClemente was not present, but his attorney, Cameron Marshall, was in attendance. At the outset of the hearing, Attorney Marshall raised objections to moving forward with the hearing (1) without his client present and (2) without certain documents that he had requested. He

⁵ This Court notes that the Defendant DeClemente has persistently argued at every hearing in this matter that he should be allowed to argue against the substantive merits of the Plaintiff's causes of action thus negating the default posture of this case. The Court has reinforced that this Court and Judge Nicholson possess concurrent jurisdiction, that this Court has no ability to overturn Judge Nicholson's Order of April 30, 2014, and that any issues raised previously have been preserved for the appropriate appellate review. See, e.g., Enoree Baptist Church v. Fletcher, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) ("One Circuit Court Judge does not have the authority to set aside the order of another.").

further asserted that there was some confusion regarding Plaintiff seeking a jury trial on the issue of damages. However, it is clear from the record that the Plaintiff abandoned any request for a jury trial via its request and notice of damages hearing filed with the court on September 19, 2016. Further, Defendant and his counsel were clearly advised by the Clerk's office as well as the administrative staff that the hearing on damages was going forward as scheduled. After hearing extensive argument from both parties, the Court found that proper notice of the hearing was provided to Defendant DeClemente on October 4, 2016 and October 25, 2016. Further, there was no discernable reason for the Defendant DeClemente's absence from the proceedings. Moreover, the Court found that Defendant DeClemente, by and through his counsel, was afforded significant time in which to pursue discovery on damages. Defendant DeClemente also had the opportunity to elicit deposition testimony from Plaintiff's damages witnesses, namely G. Murrell Smith and Art Brabham, and did, in fact, depose both of these individuals prior to the hearing. In light of these facts, the Court proceeded with the damages hearing on November 1, 2016 by hearing testimony from witnesses for the Plaintiff, Art Brabham and G. Murrell Smith. The Court did, however, in an abundance of caution offer the Defendant the opportunity to supplement the record and request to reconvene the hearing at a later date so that Defendant DeClemente could attend and present any additional evidence. The Defendant was given five (5) days from the date of the hearing to advise the Court of his desire to supplement the record with any additional witnesses so that the matter could be reconvened, if necessary.

The first witness called by Plaintiff on November 1, 2016 was Art Brabham, CPA. Mr. Brabham testified as to his education, training, experience and certification as a Certified Valuation Analyst and Enrolled Agent as well as his experience as an expert witness on economic damages in South Carolina. Mr. Brabham then testified as to his knowledge of the Plaintiff's losses in this

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action and detailed how he completed his economic analysis of Plaintiff's losses. Plaintiff's counsel thereafter sought to qualify Art Brabham, CPA as an expert on the calculation and valuation of the damages suffered by the Plaintiff. Defense counsel was afforded the opportunity to cross-examine Mr. Brabham on his qualifications and knowledge of Plaintiff's losses. The Court then heard arguments from counsel. After hearing these arguments and considering the qualifications and experience of Art Brabham, the Court qualified Art Brabham as a Certified Valuation Analyst and an Economic expert witness for the purpose of rendering an expert opinion as to the damages suffered by the Plaintiff.

Plaintiff's counsel thereafter elicited testimony from Mr. Brabham. The Court was provided with a detailed written report and a summary of Mr. Brabham's opinions and conclusions.⁶ Mr. Brabham testified as to the three separate methods he employed to calculate the economic loss suffered by Plaintiff: (1) capitalization of net cash flow to equity holders; (2) direct valuation of equity by discounted cash flows method; and (3) market value comparison. Mr. Brabham ultimately came to the conclusion that Plaintiff sustained a total loss of \$875,144.00. This amount is comprised of the valuation of the loss suffered by omission of the sales tax liability owed on the purchase date (\$100,644.00) and the valuation of the loss suffered by the overstatement of the value of the business (\$774,500.00). Moreover, Mr. Brabham testified that Plaintiff sustained actual loss as Plaintiff paid the South Carolina Department of Revenue the sales tax liability (\$100,644.00) owed by the business after purchase. Mr. Brabham also testified that Plaintiff showed a loss of over \$900,000.00 on their tax returns as a result of the overstatement of the value of the business. Lastly, Mr. Brabham testified that the damages suffered by Plaintiff were the result of the Defendant's conduct. Defense counsel was then given the opportunity to cross

⁶ The report drafted by Plaintiff's expert, Art Brabham, was admitted into evidence at the November 1, 2016 hearing as Plaintiff's Exhibit No. 1.

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examine Mr. Brabham on his opinions and conclusions and did so. Mr. Brabham further testified on cross examination that the Plaintiffs were "losing their shirts" on the Charleston operation because they "overpaid" for the business due to the Defendant's misrepresentation of the business valuation and underrepresentation of the outstanding tax liabilities. Defense counsel also elicited testimony from Mr. Brabham about past services provided to Plaintiff. The Court finds the testimony of Mr. Brabham credible and persuasive on the issue of damages.

Plaintiff's counsel then called Murrell Smith, owner of ATMES, to the stand to testify on behalf of ATMES. Mr. Smith testified as to his position in the ATMES Company. Mr. Smith further testified regarding the purchase of Abacare stocks from Defendant DeClemente. Mr. Smith stated that he and his business partner are still making payments on the \$650,000.00 note they signed to purchase Abacare. Mr. Smith further requested that the Court enter an Order of Judgment in the amount of \$875,144.00 in favor of the Plaintiff and against Defendant DeClemente. Defense counsel was then given an opportunity to cross-examine Mr. Smith and did, in fact, do so. On cross examination, defense counsel elicited testimony from Mr. Smith that Plaintiff sold Abacare's assets to Long's Medical on December 30, 2009 for "somewhere between \$560,000 and \$600,000." The Court finds the testimony of Mr. Smith credible and persuasive.

At the conclusion of Mr. Smith's testimony, Plaintiff's counsel advised the Court that they had no further witnesses or documents to submit. Plaintiff requested that the Court enter an Order of Judgment in the amount of \$875,144.00 in favor of the Plaintiff and against Defendant DeClemente. The Court adjourned the hearing upon the conclusion of Plaintiff's case to accommodate Defendant's request to supplement the record with additional testimony at a later date, if necessary.

The damages hearing reconvened on January 5, 2017. Plaintiff's counsel, James Smith,

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Esq., was present at the hearing. Defendant DeClemente and his counsel, Cameron Marshall, Esq., were also present. At the outset of the hearing, Defense counsel once again objected to moving forward with the damages hearing on the basis that Plaintiff's counsel had not provided Defendant with subpoenaed documents requested from Art Branham. In response, Plaintiff's counsel notified the Court of its pending Motion to Quash the Subpoena and for Protective Order, filed December 28, 2016. This motion asks the Court to quash the subpoena issued by Defendant DeClemente to Art Brabham and protect the materials sought by Defendant. Defendant subsequently filed a Motion to Compel Subpoena Compliance on December 29, 2016. Neither of these motions were scheduled for hearing on January 5, 2017 or thereafter. Nor did the parties request a hearing on these motions prior to the January 5 damages hearing. The Court then inquired as to the nature of the documents and their relevance for the damages hearing. After considering the arguments of counsel, the Court resolved the motions and proceeded with the continuation of the damages hearing as scheduled and noticed.

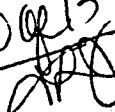
The first defense witness was Defendant DeClemente who testified and was cross-examined regarding his case on damages. Mr. DeClemente testified that he has twenty-two (22) years of experience owning and managing durable medical equipment operations and that no damages calculation in excess of Abacare's tax debt and interest (totaling \$100, 643.00) is defensible by a person possessing ordinary business knowledge and common sense. Defendant DeClemente further testified that he is entitled to a credit or "set-off" against damages as to any settlement amounts paid to Plaintiff by his Co-Defendants under the South Carolina Uniform Contribution Among Tortfeasors Act. However, Defendant DeClemente has failed to provide this Court with any calculations or figures setting forth the amount he believes he is entitled to as a set-off under the Act. In fact, Defendant DeClemente has failed to offer this Court even a scintilla of

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evidence that a monetary settlement was tendered to the Plaintiff by any of the parties dismissed by Consent Order. The Court is unable to ascertain, based upon the record and evidence presented by Defendant, the reason why Defendants, Hood & Selander, LLC and Donna E. Cash as Personal Representative of the Estate of Dorothy Connelly, were dismissed by consent.⁷ In any event, Defendant DeClemente would not be entitled to a set-off pursuant to Section 15-38-50 of the Uniform Contribution Among Tortfeasors Act. See S.C. Code Ann. § 15-38-50 ("When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death, it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor."). Moreover, the purpose of a default damages hearing is to determine the amount of liability of the defaulting defendant. Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC, 408 S.C. 87, 90, 757 S.E.2d 557, 558 (Ct. App. 2014). The Circuit Court does not have the authority to determine the amount of liability or "percentage of fault" of any non-defaulting defendants who appeared in the lawsuit and resolved the claims against them. See S.C. Code Ann. § 15-38-15. The remainder of Mr. DeClemente's testimony was not relevant to the issue of Plaintiff's damages. The Court finds that nothing testified to by Mr. DeClemente provided a credible dispute or challenge to the testimony and evidence submitted by Plaintiff's expert, Art Brabham.

Defense counsel then called Jeff Reed, co-owner of the ATMES Company, to the stand. Mr. Reed testified that he relied upon the assessment conducted by Art Brabham to identify the total loss suffered by the Plaintiff. He also testified that he personally continues to make payments on the \$650,000.00 note used to purchase Abacarc. Mr. Reed further testified that the ATMES Company sustained a loss of \$875,144.00 as a result of its transaction with Defendant. The

⁷ Defendant W.E. Applegate, III as Personal Representative of the Estate of James B. Connelly was dismissed from the case by Judge Nicholson for lack of subject matter jurisdiction via written Order dated September 28, 2012.

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Defendant concluded his case on damages at the end of Mr. Reed's testimony. At that time, the Court adjourned the hearing and took Plaintiff's Motion to Set Damages under advisement.

However, on January 24, 2017, Defendant filed a supplemental Motion to Consider Evidence of Damages, Adopt Proposed Order, and Reconvene Damages Hearing. In this motion, Defendant asks the Court to reconvene the damages hearing, determine settlement amounts paid by the co-defendants, adopt his proposed order on damages, and hear expert testimony from its Certified Public Accountant. Plaintiff filed a Memorandum in Opposition to Defendant's Motion on February 9, 2017, arguing that the motion is untimely, prejudicial, and without merit. On July 27, 2017, the Court conducted a hearing with counsel by telephone to address Defendant's Motion to Reconsider Evidence of Damages, Adopted Proposed Order, and Reconvene Damages Hearing.⁸ The Court noted the belated nature of Defendant's request during the status conference and in the Form 4 Order issued on July 27, 2017. But, in an abundance of caution, allowed for the additional, expert testimony of Defendant's expert witness. The Court further ordered the parties to schedule the deposition of the expert at a mutually agreeable time on or before August 31, 2017.

On August 23, 2017, the Defendant filed an affidavit from its expert, Ronald H. Burkett, CPA, CVA. The parties took the deposition of Defendant's expert on September 14, 2017. The Court was provided with a copy of the deposition transcript on October 11, 2017. The Court has reviewed both the affidavit and deposition of Ronald H. Burkett, and finds that Mr. Burkett prepared a draft valuation of the common stock of Abacare for use by Defendant DeClemente on or about July 14, 2008. See Aff. Ronald Burkett. At his deposition, Mr. Burkett was asked to testify regarding his opinion as to the damage, if any, suffered by ATMES as a result of the stock purchase and assignment agreement entered into with Defendant DeClemente. Mr. Burkett

⁸ Counsel consented to resolving the motion by telephone conference.

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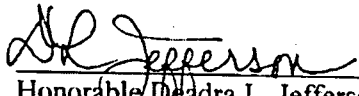
testified that if ATMES had knowledge that there was a potential sales tax issue with Abacare at the time of purchase (as Mr. Burkett opines they had or should have had), then ATMES paid fair market value for Abacare and did not sustain damage. Burkett Dep. 17:21-18:8, September 14, 2017. However, Mr. Burkett admitted that his opinion is based on the potential liability of Defendant DeClemente and is subject to change if ATMES did not, in fact, have knowledge of the sales tax liability. Burkett Dep. 18:19-25. Moreover, Mr. Burkett testified he does not have an opinion as to whether or not ATMES suffered damages in this case, nor has he made a damages calculation. Burkett Dep. 22:21 - 23:1; 59:1-4. In light of these statements, the Court does not find the testimony of Mr. Burkett to be relevant or persuasive on the issue of damages.

The Court has fully and carefully considered the testimony of all of the witnesses presented, the arguments of counsel, and all documents and exhibits submitted to the Court. Upon careful and deliberate consideration of the evidence, the Court finds Defendant DeClemente to be in default as a result of Judge Nicholson's Order filed April 30, 2014. As a result of his default, Defendant DeClemente is deemed to have admitted the substantive allegations of the Complaint. The only remaining issue before this Court is the amount of damages to be awarded to the Plaintiff. The Court further finds the testimony and conclusions reached by Plaintiff's damages expert, Art Brabham, to be persuasive, credible and reliable. Moreover, the Court finds that Defendant DeClemente has failed to adequately challenge the testimony presented by Plaintiff. Defendant's expert, Ronald H. Burkett, testified that he does not have an opinion as to the damages in this case, nor does he have an opinion as to the damages calculation reached by Plaintiff's expert, Art Brabham. Burkett Dep. 30:17-31:9. In fact, the only evidence offered by Defendant DeClemente to contradict the Plaintiff's damages calculation is his own testimony that the Plaintiff's damages calculation is simply not defensible by a person possessing ordinary business knowledge and

common sense. The Court declines to rely solely upon the testimony of Defendant DeClemente as it is inherently self-serving and, more importantly, unsupported by the numerical evidence before the Court. The Court instead relies upon the damages calculation presented by Plaintiff's expert, Art Brabham. Accordingly, the Court awards Plaintiff Eight Hundred Seventy-Five Thousand One Hundred Forty-Four and 00/100 (\$875,144.00) dollars in actual damages.

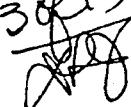
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff is entitled to recover actual damages as Defendant DeClemente is in default. Plaintiff is therefore entitled to an award of Eight Hundred Seventy-Five Thousand One Hundred Forty-Four and 00/100 (\$875,144.00) dollars in actual damages against Defendant DeClemente in the name of all his aliases to include Phillip DeClemente, Alec Rocford, and Phillip Goodpastor.

AND IT IS SO ORDERED!



Honorable Dandra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

December 20, 2017
Charleston, SC

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Assistive Technology Medical
Medical Equipment Services, LLC,

Plaintiff,

v.

Phillip DeClemente,

Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
Case No.: 2011-CP-10-08011

ORDER DENYING DEFENDANT
MOTION TO AMEND JUDGMENT

2017 JAN 26 PM 3:04

FILED

Presiding Judge:
Counsel for Plaintiff:
Counsel for Defendant:
Date of Hearing:

Hon. Deadra L. Jefferson
James E. Smith, Esq.
Cameron L. Marshall, Esq.
November 1, 2016
January 5, 2017
Joyce Rueger

Court Reporter:

THIS MATTER is before the Court on Defendant Phillip DeClemente's Motion to Amend Judgment and be Relieved from Judgment pursuant to Rules 59 and 60 of the South Carolina Rules of Civil Procedure. This case initially came before the Court on November 1, 2016 and January 5, 2017, respectively, for a hearing on Plaintiff's Motion to Set Damages as to Defendant Phillip DeClemente. On December 21, 2017, the Court issued an Order of Judgment in favor of Plaintiff. Defendant was ordered to pay Eight Hundred Seventy-Five Thousand One Hundred Forty-Four and 00/100 (\$875,144.00) dollars in actual damages. Defendant filed the instant Motion to Amend Judgment and be Relieved from Judgment on January 8, 2018.¹ Plaintiff filed a Response in

¹ The Order of Judgment was mailed to the parties on December 28, 2017 and received by Defendant on January 2, 2018. Defendant's Motion to Amend Judgment was thus timely filed and served upon Plaintiff. See Rule 59, SCRPC ("A motion to alter or amend the judgment shall be served no later than 10 days after receipt of written notice of the order.").

opposition to Defendant's Motion to Amend on January 22, 2018. Having considered the Defendant's Motion to Amend as well as the various interests balanced by the Court at the time of the ruling, the Defendant's Motion to Amend is hereby denied in accordance with Rules 59 and 60 of the South Carolina Rules of Civil Procedure.

Rule 59(e) of the South Carolina Rules of Civil Procedure states that "(a) motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of entry of the order." Rule 59(e), SCRCP. The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to allow the parties liberal opportunity to move for the trial judge to reconsider matters properly encompassed in a decision on the merits, regardless of whether the issues and arguments have been previously presented. "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original). "A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." Anderson Memorial Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E. 2d 399, 400 (Ct. App. 1994) (citing C.A.H. v. L.H., 315 S.C. 389, 434 S.E. 2d 268 (1993)). See Arnold v. State, 309 S.C. 157, 172-73, 420 S.E.2d 834, 842 (1992).

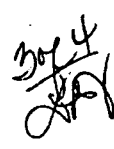
Defendant asks the Court to amend its Order of Judgment under Rule 59, SCRCP on the basis that the judgment entered against him was previously satisfied by a Full and Final Release executed between the parties on July 10, 2009. However, the Defendant has not presented any novel facts, arguments, or theories in support of this request. Nor has Defendant highlighted any portion of the record that this Court may have misunderstood, failed to fully consider, or failed to

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rule on. To the contrary, the Court has considered and ruled upon this very argument by Defendant on multiple occasions. Indeed, the Defendant has contested the default posture of this case since his initial filing on August 10, 2012 wherein he attached the Full and Final Release in support of his defense. Judge Nicholson considered the arguments as to default, including the Full and Final Release, and nevertheless entered default judgment against Defendant on April 24, 2014.² The Defendant has since continued to argue against default judgment at every hearing before the Court. The instant Motion to Amend Judgment is merely the latest effort by Defendant to have the entry of default against him vacated. In response, this Court once again reiterates that it does not have the jurisdiction to overturn the default decision rendered by Judge Nicholson on April 24, 2014. See, e.g., Enoree Baptist Church v. Fletcher, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) ("One Circuit Court Judge does not have the authority to set aside the order of another."). Defendant is therefore not eligible for relief from judgment under Rule 59, SCRCP.

Alternatively, the Defendant asks the Court to relieve him from its Order of Judgment pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure. Rule 60(b) allows the Court to relieve a party from a final judgment, order, or proceeding on the basis of mistake, inadvertence, surprise, or excusable neglect and/or fraud, misrepresentation or other misconduct of an adverse party. Rule 60(b) also provides for relief when the judgment had been satisfied or is void. Defendant argues that Rule 60(b) is applicable to his case because the Order of Judgment was

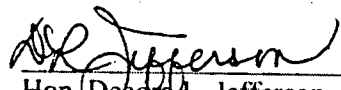
² Defendant DeClemente filed a Motion for Reconsideration of Judge Nicholson's April 24, 2014 Order. Defendant's Motion for Reconsideration was denied by Order dated May 3, 2014. Defendant DeClemente then filed an appeal with the Court of Appeals to challenge Judge Nicholson's May 30, 2014 ruling. The South Carolina Court of Appeals denied Defendant DeClemente's appeal by written order dated November 13, 2014 on the basis that Judge Nicholson's order is not immediately appealable because the "circuit court has not yet made an award of damages." The Remittitur was issued on November 13, 2014.



rendered as a result of mistake, inadvertence, fraud, and/or excusable neglect. However, Defendant made these very same arguments under Rule 60(b) before Judge Nicholson at a December 16, 2012 hearing and in corresponding motions and briefs. Judge Nicholson issued a ruling April 24, 2014 whereby he expressly rejected these arguments and held Defendant in default for failing to timely answer the Complaint. The present Motion to Amend is another attempt by Defendant to rehash the same arguments previously considered and ruled upon by Judge Nicholson. As aforementioned, this Court lacks the authority to reverse or modify Judge Nicholson's findings. See State ex. Rel. Medlock v. Love Shop, LTD, 286 S.C. 486, 334 S.E.2d 528, 529 (Ct. App. 1985). Defendant thus cannot obtain relief under South Carolina Rule of Civil Procedure 60(b) either.

For the foregoing reasons, the Court hereby denies Defendant's Motion to Amend Judgment and be Relieved from Judgment.

IT IS SO ORDERED.



Hon. Deandra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

January 25, 2018
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENT SERVICES,
LLC

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

Plaintiff(s)

vs.

2011-CP - 10 - 8011

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

Defendant(s)

(Please Print)

Submitted By: E. Scott Winburn

Address: 1422 Laurel Street, Columbia, SC 29201

SC Bar #: 76392

Telephone #: (803) 933-9800

Fax #: (803) 933-9801

Other:

E-mail: scott@jamesmithpa.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☐ Breach of Contract (140) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20-CP- ☐ Notice/ File Med Mal (230) ☒ Other (299)	Torts - Personal Injury ☐ Assault/Slander/Libel (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
Inmate Petitions ☐ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Other (799)	Administrative Law/Relief ☐ Reinstate Driver's License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899)	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Commission (990) ☐ Employment Security Comm (991) ☐ Other (999)
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Sexual Predator (510)		

Submitting Party Signature: E. Scott Winburn

Date: 10/31/11

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

SCCA / 234 (01/2011)

Page 1 of 2

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA,
COUNTY OF CHARLESTON
ASSISTIVE TECHNOLOGY MEDICAL
EQUIPMENT SERVICES, LLC

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 THE ESTATE OF
JAMES B. CONNELLY, KIMBERLY CUCE,
PHILLIP DECLEMENTE,

Defendants.

IN THE COURT OF COMMON PLEAS

SUMMONS

FILE NO. 2011-CP-10-8011

2011 OCT 31 PM 3:51
JULIE J. ARMSTRONG
CLERK OF COURT

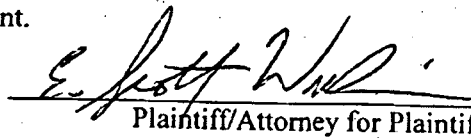
FILED

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Columbia, South Carolina

Dated: October 31, 2011



Plaintiff/Attorney for Plaintiff

Address: 1422 Laurel Street, Columbia, SC 29201

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,

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 the Estate of James B. Connelly,
Kimberly Cuce, Phillip DeClemente,

Defendants.

Civil Action No.: 2011-CP-40-¹⁰ 2011

COMPLAINT
(Jury Trial Requested)

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JULIE J. ARMSTRONG
CLERK OF COURT

FILED

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."¹ 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:

¹ 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."² (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.

² 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."³ (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

³ 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.
1422 Laurel Street
Columbia, South Carolina 29201
(803) 933-9800

Attorneys for Plaintiff

Columbia, South Carolina
October 31, 2011

EXHIBIT A

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

Arthur F. Bradham

Art Bradham

Dora B. Knapp

SWORN to and subscribed before me

this 26th day of September, 2011

My commission expires: 4/23/2012

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Assistive Technology Medical
Equipment Services,
Plaintiff,

Vs.

Hood & Selander, CPAS, LLC, et al,
Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 11-CP-10-8011

AFFIDAVIT OF SERVICE

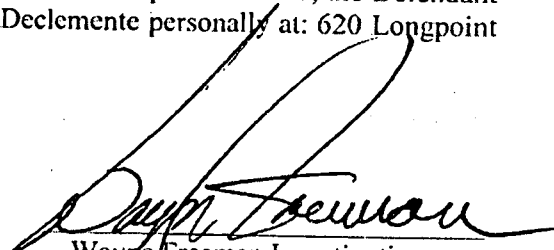
BY AB
JULIE A. ARMSTRONG
CLERK OF COURT

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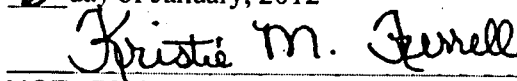
WAYNE P. FREEMAN personally appeared before me, a duly appointed Notary Public for the State of South Carolina. The undersigned deponent, upon being duly sworn says that on the 6th day of January, 2012 at 1:00 P.M. he served a certified true copy of a Civil Action Coversheet, Summons and Complaint on Phillip Declemente, the Defendant herein, by leaving a copy of same with Phillip Declemente personally at: 620 Longpoint Road, Mt. Pleasant, South Carolina 29464.

That Deponent is not a party to this action.


Wayne Freeman Investigations
S.L.E.D. License No. 1340
General Investigations
Legal Process Service

SWORN to before me this

6 day of January, 2012


NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 12-18-18



JAMES E. SMITH, JR., P.A.
ATTORNEYS AT LAW

JAMES E. SMITH, JR. *†
E. SCOTT WINBURN
DYLAN W. GOFF

1422 LAUREL STREET
COLUMBIA, SOUTH CAROLINA 29201

SHANNON S. STUCKEY
(1969-2000)

TELEPHONE:
(803) 933-9800
FACSIMILE:
(803) 933-9801

OF COUNSEL:
NINA NELSON SMITH

*ALSO ADMITTED IN NC
†ALSO ADMITTED IN GA

EMAIL:
FIRM@JAMESSMITHPA.COM
WEBPAGE:
www.JamesSmithPA.com

January 12, 2012

VIA FIRST CLASS U.S. MAIL

The Honorable Julie J. Armstrong
100 Broad Street Suite 106
Charleston, SC 29401-2210

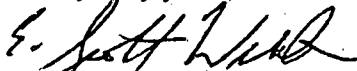
Re: Assistive Technology Medical Equipment Services vs. Hood & Selander,
CPAS, LLC, et al
Civil Action No. 2011-CP-10-8011
JESPA File No. 11-0049

Dear Ms. Armstrong:

I have enclosed one original and two copies of the Affidavit of Service that certifies that the Defendant Phillip Declemente was served personally with a copy of the Civil Action Coversheet, Summons and Complaint. I would appreciate your office filing the original and returning the clocked copy in the postage prepaid envelope. If you have any questions or need anything further, please do not hesitate to contact me.

With kind regards, I am,

Very truly yours,


E. Scott Winburn

ESW:da
Enclosures (as referenced)



Service Disabled Veteran-Owned Small Business

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,)

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 the Estate of James B. Connelly,)
Kimberly Cuce, Phillip DeClemente,)

Defendants.)

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

AFFIDAVIT OF DEFAULT

2012 MAR 30 PM 12:19
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

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.

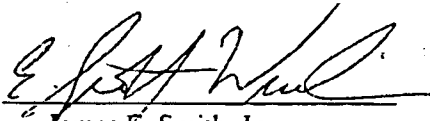
2. More than thirty (30) days have elapsed since the legal service upon the Defendant Phillip DeClemente of the Civil Action Coversheet, Summons and Complaint herein. The original Certificate of Service is on file in the office of the clerk of court for Charleston County. No Notice of Appearance, Answer, 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: 

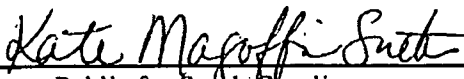
James E. Smith, Jr.
E. Scott Winburn
Dylan W. Goff
1422 Laurel Street
Columbia, SC 29201
803-933-9800

Attorney for the Plaintiff

Columbia, South Carolina

March 28, 2011

SWORN to and subscribed before me
this 28th day of March, 2011.


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

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.)

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2012 AUG 10 PM 1:36

FILED

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."

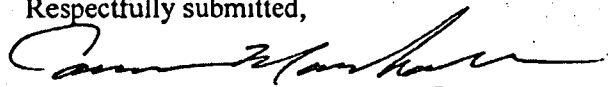
S.C.R.P. 60(b)(1) provides that on motion and upon such terms as are just, the court may relieve a party from a final judgment, order or proceeding because of "mistake, inadvertence, surprise, or excusable neglect."

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

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

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

ASSISTIVE TECHNOLOGY MEDICAL
EQUIPMENT SERVICES, LLC,

Plaintiff,

v.

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

Defendants.

AMENDED ANSWER, COUNTERCLAIM
AND CROSS-CLAIMS
OF DEFENDANT
PHILLIP DECLEMENTE

2012 AUG 22 PM 1:48
JULIE J. ARSTRONG
CLERK OF COURT

FILED

Defendant, Phillip DeClemente, by and through his undersigned counsel, files this Amended Answer, Counterclaim and Cross-Claims to Defendants Hood & Selander, CPAS, LLC, Donna C. Cash, as Personal Representative of the Estate of Dorothy Connelly and W.E. Applegate, III, as Personal Representative of the Estate of James B. Connelly as follows:

1. Defendant denies each and every allegation of the Complaint not hereinafter specifically admitted.
2. Defendant admits paragraph 1.
3. Defendant, upon information and belief, admits the allegations contained in paragraphs 2, 3, 4, 5, 6, 7 and 8 of the Complaint.
4. Answering paragraph 9, Defendant realleges his answers to paragraphs 1 through 8.

5. Defendant, upon information and belief, admits the allegations contained in paragraphs 10, 11, 12, 13 and 14 of the Complaint.
6. Defendant denies paragraph 15.
7. Defendant, upon information and belief, admits paragraphs 16, 17 and 18.
8. Defendant denies paragraphs 19, 20 and 21.
9. Defendant lacks sufficient information to admit or deny the allegations contained in paragraph 22.
10. Defendant, upon information and belief, admits the first sentence of paragraph 23 and denies the second sentence.
11. Defendant lacks sufficient information to admit or deny the first sentence of paragraph 24. The second sentence of paragraph 24 is denied.
12. Defendant denies the allegations contained in paragraphs 25, 26 and 27.
13. Defendant lacks sufficient information to admit or deny the allegations contained in paragraphs 28 and 29.
14. As to the first and second causes of action, stated in paragraphs 30-44, they do not pertain to Mr. DeClemente, and as such no response is required.

AS TO THE THIRD CAUSE OF ACTION

15. Answering paragraph 45 of the Complaint, Defendant realleges his answers to paragraphs 1 through 44.
16. Defendant admits the allegations contained in paragraph 46 of the Complaint as they pertain to himself, but lacks sufficient information to answer on behalf of the co-defendants.
17. Defendant denies paragraphs 47, 48, 49, 50, 51 and 52.

AS TO THE FOURTH CAUSE OF ACTION

18. Answering paragraph 53 of the Complaint, Defendant realleges his answers to paragraphs 1 through 52 of the Complaint as if fully set forth verbatim.
19. Defendant admits paragraph 54.
20. Defendant denies paragraphs 55 and 56.

AS TO THE FIFTH CAUSE OF ACTION

21. The allegations contained in the Fifth Cause of Action as found in paragraphs 57 through 64 of the Complaint do not pertain to this Defendant and therefore no response is required. To the extent paragraphs 57 through 64 of the Complaint may be construed to apply to this Defendant, those allegations are denied.

AS TO THE SIXTH CAUSE OF ACTION

22. Answering paragraph 65 of the Complaint, Defendant realleges his answers to paragraphs 1 through 64 of the Complaint as if fully set forth verbatim.
23. Defendant denies paragraphs 66 and 67.
24. Paragraph 68 contains a legal conclusion which Defendant is not required to admit or deny.
25. Defendant denies paragraphs 69, 70 and 71.

AS TO THE SEVENTH CAUSE OF ACTION

26. Answering paragraph 72 of the Complaint, Defendant realleges his answers to paragraphs 1 through 71 of the Complaint as if fully set forth verbatim.

27. Answering paragraphs 73 and 74 of the Complaint, Defendant seeks reference to the Purchase Agreement and denies any allegations which are inconsistent with the document.

28. Defendant denies paragraphs 75 and 76.

AS TO THE EIGHTH CAUSE OF ACTION

29. The allegations contained in the Eighth Cause of Action as found in paragraphs 77 through 82 of the Complaint do not pertain to this Defendant and therefore no response is required. To the extent any allegations contained in paragraphs 77 through 82 of the Complaint may be construed to apply to this Defendant, those allegations are denied.

AS TO THE NINTH CAUSE OF ACTION

30. Answering paragraph 83 of the Complaint, Defendant realleges his answers to paragraphs 1 through 82 of the Complaint as if fully set forth verbatim.

31. Defendant denies paragraphs 84, 85 and 86.

32. Defendant lacks sufficient information to admit or deny paragraph 87.

33. Defendant denies paragraph 88.

34. Defendant lacks sufficient information to admit or deny paragraph 89.

35. Defendant denies paragraphs 90, 91 and 92.

AS TO THE ALLEGATION OF JOINT AND SEVERAL LIABILITY

36. As to paragraph 93, Defendant denies any liability to Plaintiff.

37. Defendant denies the remaining allegations of the Complaint.

**FURTHER ANSWERING THE COMPLAINT AND
AS A FIRST AFFIRMATIVE DEFENSE**

38. Plaintiff is not entitled to judgment as a matter of law because on July 10, 2009 Plaintiff executed a Full and Final Release (attached as Exhibit 1) which provides, in relevant part:

[t]he undersigned do intend to and do hereby individually and for their heirs, executors, administrators, successors and assigns, release, acquit and forever discharge Phillip L. DeClemente as well as his agents, servants, successors, heirs, executors, administrators, personal representatives and all other persons, firms, corporations and associations or partnerships of and from any and all claims, actions, causes of action, demands, rights, damages, cost, loss of services, expenses and compensation whatsoever which the undersigned now has or which may have hereinafter accrue on account of or in any way growing out of any and all ownership interest or employment in any of the entities set forth above whether known or unknown, foreseen or unforeseen and any consequences thereof, resulting or to result from ownership of any of the Companies referenced-above, employment in or with any of the entities referenced-above, business relationship with any of the businesses or individuals referenced-above as well as any negotiation contracts or documents executed as a result of the sale of the business as referenced herein.

**FURTHER ANSWERING THE COMPLAINT AND
AS A SECOND AFFIRMATIVE DEFENSE**

39. Prior to entering the Purchase Agreement Plaintiff knew or should have known of any tax liability complained of and therefore is barred from recovery.

**FURTHER ANSWERING THE COMPLAINT AND
AS A THIRD AFFIRMATIVE DEFENSE**

40. Plaintiff had a due diligence duty prior to entering the Purchase Agreement and if the tax liability of which Plaintiff complains did exist at the time of the Purchase Agreement then Plaintiff should reasonably have discovered it at that time.

**FURTHER ANSWERING THE COMPLAINT AND
AS A FOURTH AFFIRMATIVE DEFENSE**

41. The following relevant portions of the Purchase Agreement bar any recovery by Plaintiff:

"Representations and Warranties of Purchaser. Purchaser represents and warrants to the Seller the following facts with the knowledge that Seller is selling the Stock in full reliance thereon: ...

(d) Knowledge of Risk. Purchaser is aware of the substantial risks that he is accepting by his investment in the Stock. The Purchaser is aware that the Corporation is a small privately held company with an illiquid market for its shares and with no guaranteed return on its shares outstanding either through dividends, distributions, etc.

(e) Financial Conditions. Purchaser is fully familiar with the financial conditions of the Corporation and has been provided with and has reviewed the financial statements, including but not limited to, balance sheets and income statements of the Corporation since inception of the Corporation including interim statements as well as the tax returns for the Corporation since its inception."

**FURTHER ANSWERING THE COMPLAINT AND
AS A FIFTH AFFIRMATIVE DEFENSE**

42. As party to a purchase contract with Mr. DeClemente, any tort claims brought against DeClemente should be dismissed pursuant to the Economic Loss Doctrine.

**FURTHER ANSWERING THE COMPLAINT AND
AS A SIXTH AFFIRMATIVE DEFENSE**

43. The Complaint fails to state a cause of action upon which relief can be granted and therefore should be dismissed pursuant to S.C.R.C.P. 12(b)(6).

**FURTHER ANSWERING THE COMPLAINT AND
AS A SEVENTH AFFIRMATIVE DEFENSE**

44. Plaintiff is barred from recovery by the law of comparative negligence. If Plaintiff suffered any damages, which DeClemente denies, Plaintiff is more than fifty percent at fault in causing its own damages.

**FURTHER ANSWERING THE COMPLAINT AND
AS AN EIGHTH AFFIRMATIVE DEFENSE**

45. If Plaintiff suffered any damages, which DeClemente denies, the damages were proximately caused by the actions of some other party or by circumstances beyond Mr. DeClemente's control.

**FURTHER ANSWERING THE COMPLAINT AND
AS A NINTH AFFIRMATIVE DEFENSE
TO THE NINTH CAUSE OF ACTION - CIVIL CONSPIRACY**

46. Plaintiff is barred from recovering for a wrongful act while simultaneously recovering for conspiracy to commit the wrongful act.

**FURTHER ANSWERING THE COMPLAINT
AND BY WAY OF COUNTERCLAIM
AGAINST ASSISTIVE TECHNOLOGY MEDICAL
EQUIPMENT SERVICES, LLC**

47. Mr. DeClemente is a resident of Charleston County, South Carolina.

48. Assistive Technology Medical Equipment Services, LLC is a South Carolina Corporation conducting substantial business in Charleston County, South Carolina.

49. This court has personal and subject matter jurisdiction over the parties, and venue is appropriate.

**FOR A FIRST COUNTERCLAIM
(Breach of Contract)**

50. On June 30, 2009 Assistive Technology Medical Equipment Services, LLC (hereinafter A.T.M.E.S.) and Phillip DeClemente executed a Bill of Sale and Promissory Note in favor of Mr. D. DeClemente in the amount of Two Hundred Sixty-Five Thousand dollars (\$265,000.00), plus interest at a yearly rate of twelve percent (12%). (See Exhibits 2 and 3)

51. At the time the Promissory Note was executed the total amount owed Mr. DeClemente pursuant to the payment amortization schedule was \$330,382.59.

52. Valuable consideration was provided by each party.

53. The referenced documents constitute a contract between the parties.

54. The monthly payment agreed upon in the contract is in the amount of Seven Thousand Three Hundred Forty-One dollars and Eighty Four cents (\$7,341.84).

55. The first payment was due Mr. DeClemente on July 30, 2009.

56. The maturity date of the Promissory Note is March 1, 2013.

57. As of the date of this filing, A.T.M.E.S. has not made a payment since October 2011.

58. A.T.M.E.S. is in default on the Promissory Note.

59. Counterclaimant has been damaged as a proximate result of A.T.M.E.S.'s contractual breach.

60. Mr. DeClemente has given written notice of Plaintiff's default in compliance with paragraph six of the Promissory Note.

61. At the time of this filing, A.T.M.E.S. is currently ten payments in arrears, for a total of Seventy-Three Thousand Four Hundred Eighteen dollars and Forty cents (\$73,418.40).

62. Late fees on the delinquent payments, as of the time of this filing, total Three Thousand Six Hundred Seventy dollars and Ninety-Two cents (\$3,670.92).

63. At the time of this filing, there are seven future monthly payments due under the terms of the Promissory Note.

64. Those payments are for the months September, 2012 through March, 2013.

65. Paragraph 6(B) of the Promissory Note provides for the acceleration of the entire amount due on the note in the event of A.T.M.E.S.'s default.

66. The accelerated amount due, at the time of this filing, is \$51,392.88.

67. Paragraph 4 of the Bill of Sale contract between A.T.M.E.S. and Mr. DeClemente requires A.T.M.E.S. to provide Mr. DeClemente with use of a truck.

68. The referenced truck is a 2008 Chevrolet Silverado 2500HD.

69. Mr. DeClemente's money was used to make all payments on the truck.

70. In October 2011 A.T.M.E.S. disposed of the referenced truck in violation of its contract with Mr. DeClemente.

71. At the time of the truck's disposition, there was at least Ten Thousand dollars (\$10,000.00) equity in the vehicle.

72. Mr. DeClemente is entitled to recover no less than Ten Thousand dollars (\$10,00.00) for his lost equity in the truck.

72. As of the date of this filing, and subject to recalculation with the passage of time, Mr. DeClemente asks the court to award him Seventy-Three Thousand Four Hundred Eighteen dollars and Forty cents (\$73,418.40) in arrearage, Three Thousand Six Hundred Seventy dollars and Ninety-Two cents (\$3,670.92) in late fees, Fifty-One Thousand Three Hundred Ninety-Two dollars and Eighty-Eight cents (\$51,392.88) for the balance of the amount due under the Promissory Note, Ten Thousand dollars (\$10,000.00) for lost equity in the referenced truck, and all attorney's fees and costs associated with collection as provided in paragraph 6(D) of the Promissory Note.

**FOR A SECOND COUNTERCLAIM
(Breach of Contract)**

73. On July 10, 2009 A.T.M.E.S. executed a document entitled "Full and Final Release." (See Exhibit 1).

74. Mr. DeClemente provided valuable consideration in exchange for the Full and Final Release.

75. The Full and Final Release is a contract between the parties.

76. In the Full and Final Release, A.T.M.E.S. agreed to permanently release Mr. DeClemente from any and all causes of action, both past and future.

77. The Full and Final Release, in part, states the following:

[t]he undersigned do intend to and do hereby individually and for their heirs, executors, administrators, successors and assigns, release, acquit and forever discharge Phillip L. DeClemente as well as his agents, servants, successors, heirs, executors, administrators, personal representatives and all other persons, firms, corporations and associations or partnerships of and from any and all claims, actions, causes of action, demands, rights, damages, cost, loss of services, expenses and compensation whatsoever which the undersigned now has or which may have hereinafter accrue on account of or in any way growing out of any and all ownership

interest or employment in any of the entities set forth above whether known or unknown, foreseen or unforeseen and any consequences thereof, resulting or to result from ownership of any of the Companies referenced-above, employment in or with any of the entities referenced-above, business relationship with any of the businesses or individuals referenced-above as well as any negotiation contracts or documents executed as a result of the sale of the business as referenced herein.

78. Plaintiff has breached its contractual duty by filing suit against Mr. DeClemente in Civil Action No. 2011-CP-10-8011.

79. Counterclaimant DeClemente has been proximately damaged by A.T.M.E.S.'s breach of contract.

80. Mr. DeClemente seeks recovery of all damages, including costs and attorney's fees, proximately incurred as a result of Plaintiff's breach of contract.

**FURTHER ANSWERING THE COMPLAINT
AND BY WAY OF CROSS-CLAIM
AGAINST DEFENDANT HOOD & SELANDER, CPAS, LLC**

81. Mr. DeClemente is a resident of Charleston County, South Carolina.

82. Upon information and belief, Defendant Hood & Selander, CPAS, LLC (hereinafter "Hood & Selander") is a South Carolina Corporation having its principal place of business located in Charleston County, South Carolina.

83. This court has personal and subject matter jurisdiction over the parties, and venue is appropriate.

**FOR A FIRST CROSS-CLAIM
(Indemnity)**

84. Mr. DeClemente realleges the preceding paragraphs as if fully set forth verbatim.

85. Defendant Hood & Selander was hired by Abacare Home Medical, Inc. (later known as "Assistive Technology Medical Equipment Services, LLC" or "A.T.M.E.S.") to prepare accurate and complete tax returns and advise A.T.M.E.S.'s owners on issues of business valuation.

86. A.T.M.E.S. has brought an action against Phillip DeClemente alleging causes of action for breach of contract, fraud, negligence, negligent misrepresentation, promissory estoppel, and conspiracy, and Mr. DeClemente has denied all claims.

87. If A.T.M.E.S. has been damaged in any way, which Mr. DeClemente denies, then A.T.M.E.S.'s damages are the result of Hood & Selander's negligent acts and omissions, and not any fault of Mr. DeClemente.

88. Therefore, in the event Mr. DeClemente is found liable to A.T.M.E.S., Mr. DeClemente is entitled to indemnity from Hood & Selander.

**FURTHER ANSWERING THE COMPLAINT
AND BY WAY OF CROSS-CLAIM
AGAINST DEFENDANT DONNA C. CASH,
AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF DOROTHY A. CONNELLY**

89. Mr. DeClemente is a resident of Charleston County, South Carolina.

90. Upon information and belief, 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.

91. This court has personal and subject matter jurisdiction over the parties, and venue is appropriate.

**FOR A SECOND CROSS-CLAIM
(Indemnity)**

92. Mr. DeClemente realleges the preceding paragraphs as if fully set forth verbatim.

93. Between September 2005 and September 2008, Mr. DeClemente was an employee and agent of Mrs. Dorothy A. Connelly, and performed all of his job-related duties in accordance with her directives.

94. A.T.M.E.S. has brought an action against Phillip DeClemente alleging causes of action for breach of contract, fraud, negligence, negligent misrepresentation, promissory estoppel, and conspiracy, and Mr. DeClemente has denied all claims.

95. If A.T.M.E.S. has been damaged in any way, which Mr. DeClemente denies, then A.T.M.E.S.'s damages are the result of Mrs. Connelly's acts and/or omissions, and not any fault of Mr. DeClemente.

96. Therefore, in the event Mr. DeClemente is found liable to A.T.M.E.S., Mr. DeClemente is entitled to indemnity from The Estate of Dorothy A. Connelly.

**FURTHER ANSWERING THE COMPLAINT
AND BY WAY OF CROSS-CLAIM
AGAINST DEFENDANT W.E. APPLGATE, III,
AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF JAMES B. CONNELLY**

97. Mr. DeClemente is a resident of Charleston County, South Carolina.

98. 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.

99. This court has personal and subject matter jurisdiction over the parties, and venue is appropriate.

**FOR A THIRD CROSS-CLAIM
(Indemnity)**

100. Mr. DeClemente realleges the preceding paragraphs as if fully set forth verbatim.

101. Between September 2005 and March 2007, Mr. DeClemente was an employee and agent of Mr. James B. Connelly, and performed all of his job-related duties in accordance with Mr. Connelly's directives.

102. A.T.M.E.S. has brought an action against Phillip DeClemente alleging causes of action for breach of contract, fraud, negligence, negligent misrepresentation, promissory estoppel, and conspiracy, and Mr. DeClemente has denied all claims.

103. If A.T.M.E.S. has been damaged in any way, which Mr. DeClemente denies, then A.T.M.E.S.'s damages are the result of Mr. Connelly's acts and/or omissions, and not any fault of Mr. DeClemente.

104. Therefore, in the event Mr. DeClemente is found liable to A.T.M.E.S., Mr. DeClemente is entitled to indemnity from The Estate of James B. Connelly.

WHEREFORE, having fully answered the Plaintiff's complaint, Mr. DeClemente requests that the Court dismiss Plaintiff's claims against him, with prejudice; award him attorney's fees and the costs of the defense of this action; and, for such other relief as the Court deems just and proper. Further, Mr. DeClemente requests that the Court grant him judgment on his counterclaims against A.T.M.E.S, and on his cross-claims against Hood & Selander, The Estate of Dorothy A. Connelly and The Estate of James B. Connelly in the event Plaintiff's claims against him are not dismissed.

[SIGNATURE PAGE TO FOLLOW]



Cameron L. Marshall

7 Gamecock Avenue, Suite 707

Charleston, South Carolina 29407

(843) 795-2298

(843) 795-5081 fax

Attorney for Defendant Phillip L. DeClemente

August 21, 2012.

Charleston, South Carolina

COUNTY OF CHARLESTON

ASSISTIVE TECHNOLOGY MEDICAL
EQUIPMENT SERVICES, LLC,

Plaintiff,

v.

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

Defendants.

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

**MEMORANDUM IN SUPPORT OF
CO-DEFENDANT, COUNTERCLAIMANT
& CROSS-CLAIMANT PHILLIP
DECLEMENTE'S MOTION FOR
ENLARGEMENT OF TIME IN WHICH
TO FILE ANSWER & MOTION FOR
DEFAULT JUDGMENT
AGAINST PLAINTIFF**

2013 NOV -5 PM 4:49
JULIE J. ARMISTEAD
CLERK OF COURT

77

By and through his undersigned counsel, Co-Defendant, Counterclaimant and Cross-Claimant Phillip DeClemente submits this Memorandum in support of the referenced motions.

Factual & Procedural History

Assistive Technology Medical Equipment Services ("ATMES") initiated this action by suit filed October 31, 2011. Mr. DeClemente was served with the Complaint on January 6, 2012. On March 30, 2012 Plaintiff filed an Affidavit of Default alleging that Mr. DeClemente was in default for lack of appearance. Mr. DeClemente filed an Answer, Counterclaims, Cross-Claims and Motion for Enlargement of Time in Which to Answer on August 10, 2012, which was served by mail upon Plaintiff the same day. Mr. DeClemente filed an Amended Answer, Counterclaims and Cross-Claims on August 22, 2012 and the amended pleadings were served upon Plaintiff by

mail the same day. Mr. DeClemente's Answer denies Plaintiff's substantive allegations, and asserts nine affirmative defenses. Mr. DeClemente's Counterclaims allege two counts of breach of contract, and the Cross-Claims seek indemnity from each co-defendant. On October 15, 2012, Mr. DeClemente's Motion for Default Judgment was filed. Plaintiff has still never answered Mr. DeClemente's Counterclaims.

In his Motion for Enlargement of Time in Which to Answer, Mr. DeClemente argues that Plaintiff's Motion for Default Judgment should be denied because Mr. DeClemente was involuntarily hospitalized due to psychiatric illness during the time his Answer to the Complaint was due.

Issues

- 1) Should Phillip DeClemente's Motion for Enlargement of Time in Which to Answer be granted pursuant to SCRPC Rule 6(b) due to psychiatric illness and involuntary hospitalization at the time his answer was due?
- 2) Should Phillip DeClemente's Motion for Default Judgment against Plaintiff be granted pursuant to SCRPC Rule 55 due to Plaintiff's unexcused failure to answer Mr. DeClemente's Counterclaims, served upon Plaintiff 430 days ago?

Standard of Review

The decision of whether to allow a reply to be made after the time allowed by the rules is one committed to the sound discretion of the trial court upon a showing of good cause. The Court's decision will not be disturbed unless there is a clear showing of abuse of discretion.

Mauro v. Clabaugh, 299 S.C. 184, 191, 383 S.E.2d 244, 249 (Ct. App. 1989)

Law/Analysis

Over fourteen months ago, Mr. DeClemente brought Counterclaims against Plaintiff for breach of contract. Plaintiff has still made no reply. SCRCP Rule 7(a) provides that "[t]here shall be...a reply to a counterclaim denominated as such...." Plaintiff's shareholder acknowledges his company's contractual breach and indebtedness to Mr. DeClemente (Exhibit #1). But Plaintiff seems to mistakenly believe that Mr. DeClemente has been held in default, and that therefore no answer to Mr. DeClemente's Counterclaims is required. Exhibit #1 appears to further establish that Plaintiff believes no answer to Mr. DeClemente's Counterclaims is necessary because Plaintiff is claiming a setoff of its debt to Mr. DeClemente based upon the denied allegations in its complaint. But the law is quite clear on this issue, and establishes that Plaintiff's position is incorrect.

As stated by the South Carolina Court of Appeals, "[a] belief, without more, that a clearly denominated counterclaim constituted a setoff and therefore warranted no reply does not establish good cause." *Mauro*, supra, at 249. Additionally, Mr. DeClemente has not been judged to be in default. Rather, pursuant to SCRCP Rule 55(a), the clerk has merely noted his late answer on the case calendar. Plaintiff's response to Mr. DeClemente's Counterclaims, on the other hand, is not only noted as late, but still remains unfiled.

Plaintiff has filed no Motion for Enlargement of Time in Which to Answer, admits its liability to Mr. DeClemente, and is further proven liable by the Promissory Note, Bill of Sale and Full and Final Release (Exhibits #2, 3, 4). Plaintiff's failure to file a Motion for Enlargement of Time leaves the Court with no choice but to grant Mr. DeClemente's Motion for Default Judgment.

Mr. DeClemente has filed a Motion for Enlargement of Time in Which to File Answer

based upon severe psychiatric illness and resulting involuntary hospitalization at the time his answer was due (Exhibit #5, 6). If these circumstances don't constitute "good cause" to grant an extension of time under Rule 6(b), then it is hard to imagine any circumstances which ever could. In the unlikely event Mr. DeClemente should need to file a Rule 60(b) motion in the future, it is also noteworthy that Mr. DeClemente's circumstances constitute "excusable neglect," and that he has asserted nine meritorious defenses.

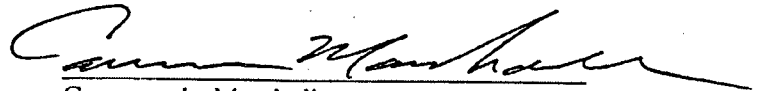
Plaintiff has asserted no meritorious defenses to Mr. DeClemente's Counterclaims, and has in fact admitted liability.

Conclusion

Mr. DeClemente asks the court to grant his Motion for Enlargement of Time in Which to Answer and his Motion for Default Judgment against Plaintiff. Plaintiff will suffer no prejudice if the Motion for Enlargement of Time is granted, as Mr. DeClemente's Answer was filed and served over fourteen months ago. But Mr. DeClemente will suffer severe prejudice if his Motion for Default Judgment is not granted, as Plaintiff has declined to respond to Mr. DeClemente's discovery requests, and consequently has deprived Mr. DeClemente of his right to pursue speedy resolution of his Counterclaims and recovery of the money Plaintiff owes him, which is well in excess of \$150,000.00.

[SIGNATURE BLOCK ON NEXT PAGE]

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Cameron Marshall", written over a horizontal line.

Cameron L. Marshall
7 Gamecock Ave, Suite 707
Charleston, SC 29407
(843) 795-2298
attorneymarshall@gmail.com
Attorney for Plaintiff

Charleston, South Carolina.

November 5, 2013.

Lee, Erter, Wilson, James, Holler & Smith, L.L.C.

Jack W. Erter, Jr.
Harry C. Wilson, Jr.
David C. Holler*
G. Murrell Smith, Jr.
John E. James, III
Sumter, South Carolina 29151

Attorneys at Law

126 North Main Street

Post Office Box 580

Henry B. Richardson, Sr. (1916-1997)
John D. Lee, Jr. (1921-1999)
George C. James (1927-1999)

Telephone: (803) 778-2471
Facsimile: (803) 778-1643

Lucy Grey McIver

E-Mail Address: murrellsmith@leeandmoisc.com

*Licensed in SC, NC & GA

June 12, 2012

Cameron L. Marshall, Esquire
7 Gamecock Avenue
Suite 707
Charleston, SC 29407

Re: Arrearages on Promissory Note dated June 30, 2009

Dear Mr. Marshall:

I received your correspondence dated June 8, 2012 concerning the note to Mr. DeClemente. As you probably know, we have filed suit against Mr. DeClemente and he is now in default. We are awaiting a damages hearing to be scheduled for the Court to set the damages incurred as a result of Mr. DeClemente's numerous breaches.

Once we have our damages set, then we can determine the amount that is owed pursuant to this Promissory Note. We intend to apply a set-off to any amounts awarded by the Court. At that point, we will pay the remaining balance, if any.

It is our position that Mr. DeClemente has damaged us to a much greater extent than the amount left on the Promissory Note. We anticipate Mr. DeClemente owing us money upon the conclusion of the damages hearing.

Lastly, I would point out that the \$30,000.00 compliance bonus has been breached due to the incident on the Ravenel Bridge. I don't think any reasonable Judge and/or jury would find that manner not to be detrimental to the success of any company since it was published in the Post and Courier that he was an owner of ABACARE.

Lastly, I would also point out that Mr. DeClemente turned in his Chevrolet Silverado truck. His truck was also to be deducted the amounts that are owed.

As I believe you know, our company is being represented by James E. Smith, P.A. in Columbia. I would appreciate if you would provide any further communication to Mr. Smith.

If you have any questions, please feel free to contact me.

With kindest regards, I am,

Sincerely,



G. Murrell Smith, Jr.

GMS,jr:mln

cc: James E. Smith, Jr. (via email only)
Jeffrey J. Reed (via email only)

PROMISSORY NOTE

\$265,000.00

**Assistive Technology Medical
Equipment Services, LLC**

June 30, 2009 SUMTER SOUTH CAROLINA

[Date] [City] [State]

126 NORTH MAIN STREET, SUMTER, SC 29150

[Business Address]

1. PROMISE TO PAY

Assistive Technology Medical Equipment Services, LLC, hereinafter "ATMES, LLC", promises to pay U.S. TWO HUNDRED SIXTY-FIVE THOUSAND and 00/100 (\$265,000.00), (this amount is called "Principal"), plus interest, to the order of Phillip L. DeClemente, hereinafter "Note Holder".

ATMES, LLC will make all payments under this Promissory Note in the form of cash, check or money order.

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. ATMES, LLC will pay interest at a yearly rate of Twelve (12.0%) Percent. The interest rate required by this Section 2 is the rate ATMES, LLC will pay both before and after any default described in Section 6(B) of this Promissory Note.

3. PAYMENTS

(A) Time and Place of Payments

ATMES, LLC will pay principal and interest by making a payment every month. ATMES, LLC will make monthly payments beginning Thirty (30) days from the execution of this agreement and will make these payments every month thereafter until all of the principal and interest and any other charges described below are paid in full that ATMES, LLC may owe under this Promissory Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on March 1st 2013, ATMES, LLC still owes amounts under this Promissory Note, ATMES, LLC will pay those amounts in full on that date, which is called the "Maturity Date." ATMES, LLC will make monthly payments at 1342 River Otter Court, Mt. Pleasant, SC 29466, or at a different place if duly notified by the Note Holder.

(B) Amount of Monthly Payments

ATMES, LLC's monthly payment will be in the amount of U.S. SEVEN THOUSAND, THREE HUNDRED, FORTY ONE and 84/100 (\$7,341.84).

4. PREPAYMENT

Should ATMES elect to prepay or accelerate the payments, the Seller shall be entitled to interest based on the amortization schedule regardless of early payment. In other words, there shall be no benefit for early payment.

5. CHARGES

If a law, which applies to this Promissory Note and which sets maximum Promissory Note charges, is finally interpreted so that the interest or other charges collected or to be collected in connection with this Promissory Note exceed the permitted limits, then: (a) any such charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from ATMES, LLC that exceeded permitted limits will be refunded to ATMES, LLC. Note Holder may choose to make this refund by reducing the Principal ATMES, LLC owes under this Promissory Note or by making a direct payment to ATMES, LLC. If a refund reduces Principal amount of this Promissory Note, there will be no changes in the due date or in the amount of ATMES, LLC's monthly payment unless Note Holder agrees in writing to those changes.

6. ATMES, LLC'S FAILURE TO PAY AS REQUIRED

(A) Late Charges for Overdue Payments

If Note Holder has not received the full amount of any monthly payment by the end of Fifteen calendar days after the date it is due, ATMES, LLC will pay a late charge to Note Holder. The amount of the charge will be Five (5%) Percent of ATMES, LLC's overdue payment of principal and interest. ATMES, LLC will pay this late charge promptly but only once on each late payment.

(B) Notice of Default

If ATMES, LLC is in default, Note Holder may send ATMES, LLC a written notice telling ATMES, LLC that if ATMES, LLC does not pay the overdue amount by a certain date, Note Holder may require ATMES, LLC to pay immediately the full amount of Principal which has not been paid and all the interest that ATMES, LLC owes on that amount. That date must be at least Thirty (30) days after the date on which the notice is mailed to ATMES, LLC or delivered by other means.

(C) No Waiver By Note Holder

Even if, at a time when ATMES, LLC is in default, Note Holder does not require ATMES, LLC to pay immediately in full as described above, Note Holder will still have the right to do so if ATMES, LLC is in default at a later time.

(D) Payment of Note Holder's Costs and Expenses

If ATMES, LLC does not pay immediately in full as described above, the Note Holder will have the right to be paid back by ATMES, LLC for all of its costs and expenses in enforcing this Promissory Note to the extent not prohibited by applicable law.

7. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to ATMES, LLC under this Promissory Note will be given by delivering it or by mailing it by first class mail to ATMES, LLC at the Business Address above or at a different address given by ATMES, LLC to the Note Holder. ATMES, LLC must provide Note Holder notice of ATMES, LLC's different address. Any notice that must be given to the Note Holder under this Promissory Note will be given by mailing it by first class mail to

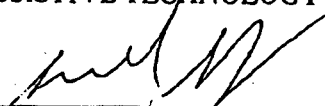
the Note Holder at the address stated in Section 3(A) above or at a different address if Note Holder has given ATMES, LLC notice of a different address.

8. WAIVERS

ATMES, LLC and any other person who has obligations under this Promissory Note waive the rights of Presentment and Notice of Dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

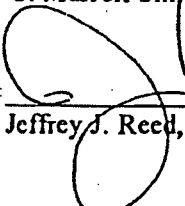
WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENT SERVICES, LLC



G. Murrell Smith, Jr., Member

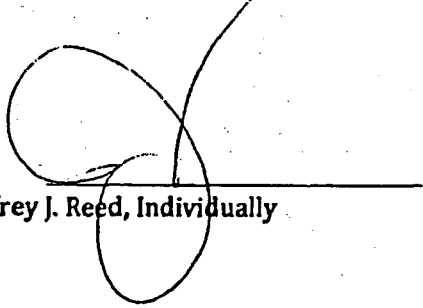
Date: June 30th 2009



Jeffrey J. Reed, Member

PERSONAL GUARANTY

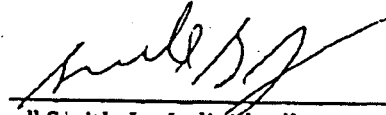
I, Jeffrey J. Reed, hereby personally guarantee payment of the first Twelve (12) payments on the Promissory Note of Assistive Technology Medical Equipment Services, LLC, to Note Holder in the monthly payment amount of SEVEN THOUSAND, THREE HUNDRED FORTY-ONE and 84/100 (\$7,341.84) for the business known as Assistive Technology Medical Equipment Services, LLC, located at 126 North Main Street, Sumter, SC 29150



Jeffrey J. Reed, Individually

PERSONAL GUARANTY

I, G. Murrell Smith, Jr., hereby personally guarantee payment of the first Twelve (12) payments on the Promissory Note of Assistive Technology Medical Equipment Services, LLC, to Note Holder in the monthly payment amount of SEVEN THOUSAND, THREE HUNDRED FORTY-ONE and 84/100 (\$7,341.84) for the business known as Assistive Technology Medical Equipment Services, LLC, located at 126 North Main Street, Sumter, SC 29150

A handwritten signature in black ink, appearing to read 'G. Murrell Smith, Jr.', is written over a horizontal line.

G. Murrell Smith, Jr., Individually

COUNTY OF SUMTER

)))))

WHEREAS, Assisted Technology Medical Equipment Services, LLC ("ATMES") a South Carolina Limited Liability Company (hereinafter referred to as "the Company") was formed and incorporated on November 5, 2008 and operates under an Operating Agreement dated November 5, 2008.

WHEREAS, Phillip L. DeClemente (hereinafter referred to as "DeClemente") is one of four (4) members of the Company and the other members include G. Murrell Smith, Jr. (Smith), Jeffrey J. Reed (Reed) and Kimberly L. Cuce (Cuce). Each member owns a twenty-five percent (25%) interest in ATMES.

WHEREAS, DeClemente desires to sell, transfer, and assign to the Company all of his right, title, interest, and ownership in the Company pursuant to the terms and conditions set forth herein.

WHEREAS, all members of the LLC, pursuant to the aforesaid Operating Agreement, have acknowledged proper notice and have consented to the sale, transfer, and assignment and acknowledge compliance with the terms of the Company=s Operating Agreement.

NOW, THEREFORE, for and in consideration of the sum of Two Hundred Sixty-Five Thousand and 00/100 Dollars (\$265,000.00), representing the purchase price, the receipt of which is hereby acknowledged, the parties agree as follows:

1. That DeClemente does sell, transfer, deliver, and assign to the Company his right, title, interest, and ownership in the Company.
2. That the purchase price of said interest shall be a Two Hundred and Sixty-Five Thousand and 00/100 Dollars (\$265,000.00), payable as follows:
 - a. Execution by the Company and personal guarantee by Smith and Reed (subject to the limitations set forth therein) of a promissory note in the amount of Two Hundred and Sixty-Five Thousand and 00/100 Dollars (\$265,000.00) amortized for a period of forty-five (45) months, at twelve percent (12%) interest, with a monthly payment of Seven Thousand Three Hundred Forty-One and 84/100 Dollars (\$7,341.84). There shall be no benefit to the Company for early payment. If payments are accelerated or paid

in advance, the Seller shall be entitled to all interest as per the amortization schedule. Therefore, total payments will be Three Hundred Thirty Thousand Three Hundred and Eighty Two and 59/100 (\$330,382.59) even upon early payment by ATMES.

- b. That Reed and Smith shall personally guarantee to DeClemente the first twelve (12) payments, and no more, of the promissory note referenced hereinabove. No member shall be personally responsible for said promissory note other than as set forth hereinabove.
 - c. DeClemente shall be entitled to payment, as set forth above, if ATMES is sold to a third-party after five (5) days has elapsed from the date of sale.
3. That DeClemente shall have no further right, title or interest in ATMES, Reliable Medical Equipment of South Carolina, LLC (Reliable) or Abacare Home Medical Inc. (Abacare), Reliable Prosthetics and Orthotics, LLC, Medical Management Company and Adaptive Total Care and shall not hold or occupy any title or position in regard to any ATMES, Reliable or Abacare, Reliable Prosthetics and Orthotics, LLC, Medical Management Company and Adaptive Total Care referenced herein and shall immediately acknowledge and resign any title, office, ownership right or otherwise as it relates to any Corporation, Limited Liability Company or Entity referenced herein.
 4. That DeClemente shall be entitled to the sole and exclusive use, right and ownership in that certain 2008 Chevrolet Silverado vehicle and cell phone which has been used, in the past, as a company phone and shall take every step and action necessary to transfer ownership of the vehicle and cell phone out of the name of Abacare and into the name of DeClemente. Further, until said vehicle and cell phone is transferred out of the name of Abacare, appropriate amounts will be withheld from the monthly payments from the Company to DeClemente as set forth above for payments, taxes and insurance on said vehicle as well as any cell phone currently in possession of DeClemente. DeClemente shall also transfer all debt and cost (including but not limited to Insurance, taxes and maintenance) associated with 2008 Chevrolet Silverado and cell phone. He shall be responsible for all cost associated with the two and hold the company harmless and indemnify them from any liability whatsoever with said Truck and cell phone. If any liability is created by the cell phone or Truck, then Buyers have the right at their discretion, in addition to any other remedy, to withhold said liability from Seller's monthly payment.
 5. That DeClemente shall be entitled to have his health insurance premium in the amount of Three Hundred Forty Five and 25/100 dollars

TRUCK
RETURNED
PRIOR TO
MARCH 2011

(\$345.25) paid by the Company for sixty (60) days and said premium shall be deducted from DeClemente's monthly payment of Seven Thousand Three Hundred and 00/100 Dollars (\$7,300.00).

- 6. That nothing contained herein shall remove, release or discharge DeClemente from any loans, obligations, leases, notes or personal guarantees signed by him to the National Bank of South Carolina or any other creditor, lender or otherwise including, but not limited to the loan to the National Bank of South Carolina in the amount of Eight Hundred and Nine Thousand and 00/100 Dollars (\$809,000.00) shown by that certain commercial note dated November 4, 2008 which is secured by life insurance of DeClemente in the amount of Three Hundred Thousand and 00/100 Dollars (\$300,000.00) together with all accounts receivable, inventory and equipment now owned or hereinafter owned by AMTES. It is understood and agreed by and between the parties that the Company, with its remaining members, will take all steps necessary to remove DeClemente from any personal guarantees or obligations of the Company after a period of twelve (12) months from the execution of this document and further DeClemente acknowledges and understands that he will, not upon execution of this document, enter into or obligate the Company to any liability, debt or responsibility. Further, DeClemente shall be responsible for any debt incurred by him not previously referenced herein including but not limited to any credit card charges, and the Company shall be entitled to withhold and deduct payment for same from any payment due to Seller.**
- 7. That DeClemente will enter into a Covenant Not to Compete, which shall be incorporated into this document by reference wherein he shall not, during the period of payment, as set forth hereinabove, engage in, be associated in, be employed by, give advice, or allow any direct family member engage in the sale, lease or purchase of durable medical equipment. The parties agree that any violation of this provision by the seller shall be a material breach of the covenant not to compete and confidentiality agreement and the buyer shall be entitled to withhold and terminate any future payments to the buyer in addition to the other remedies provided in the said Covenant not to Compete. Nothing contained herein shall prevent the buyer from seeking any further remedies damages in law or equity. The consideration for this contract is based upon the Sellers covenant not to compete among other considerations.**
- 8. That DeClemente shall, simultaneously upon the execution of this Agreement, enter into and sign a Confidential Agreement wherein he shall agree in consideration of the terms and agreement as set forth herein, to hold in strict confidence and not divulge any of the**

provisions of this Agreement or to divulge any and all aspects of the business involved herein, including, AMTES, Reliable or Abacare.

9. That it is further agreed by and between the parties that if at the end of the buyout period as set forth hereinabove, Smith and Reed remain as members and have an ownership interest in the Company then DeClemente shall be paid an additional Thirty Thousand and 00/100 Dollars over a six (6) month period as a compliance bonus, interest paid at the rate of zero percent at the rate of Five Thousand and 00/100 Dollars per month provided and subject to DeClemente not having violated any of the terms of this Buy/Sell Agreement, the Confidentiality Agreement referenced herein and the Covenant Not to Compete referenced hereinabove and has not acted in any manner detrimental to the success of any of the companies referenced herein.
10. The parties acknowledge and understand that simultaneously with the execution of this Buy/Sell Agreement that the remaining members of AMTES, that being G. Murrell Smith, Jr., Jeffrey J. Reed and Kimberly L. Cuce, will enter into an agreement wherein the twenty-five percent (25%) interest of DeClemente transferred and assigned herein shall equally be divided among Smith and Reed only, subject to the terms and conditions of the Agreement including payment method and payment provisions for said additional ownership interest.
11. That DeClemente shall, simultaneously with the execution of this document, execute an assignment of any of his right, title and interest in that certain Commercial Lease Agreement between The Estate of Connely and Abacare date December 27, 2007 so as to assign Smith and Reed all rights, entitlements and privileges up to and through September 15, 2009 as it relates to the option to purchase the Mt. Pleasant property as more specifically described in Exhibit A of that certain Commercial Lease Agreement dated January 1, 2008. Should said Reed and Smith purchase the property in Exhibit A as set forth herein and realize a fifteen percent (15%) discount, Smith and Reed shall pay to DeClemente the sum of Twenty-Five Thousand and 00/100 Dollars (\$25,000.00). Should DeClemente, directly or indirectly, exercise the option to purchase the property in Exhibit A, the current lease dated January 1, 2008 shall become null and void with no further obligation by the tenant. Further, DeClemente shall have the right, after the expiration of the above Smith & Reed option, to purchase the subject property or subsequently sell the subject property to a third-party, however, in said event then the current lease of Abacare shall immediately terminate and Abacare and/or ATMES shall have no further obligations under said lease.

C-5815

WITNESS our signatures this 30 day of June, 2009.

Michael H. H. H.
Cindy Bernick

P. DeClemente
PHILLIP L. DeCLEMENTE

Judith A. Blocker
Bal. for

G. Murrell Smith, Jr.
G. MURRELL SMITH, JR.

Judith A. Blocker
Bal. Then

Jeffrey J. Reed
JEFFREY J. REED

Kimberly L. Cuce
John S. Th...

Kimberly L. Cuce
KIMBERLY L. CUCE

STATE OF SOUTH CAROLINA)

FULL AND FINAL RELEASE

COUNTY OF SUMTER)

WHEREAS, Phillip L. DeClemente, (hereinafter referred to as "DeClemente") is one of four (4) members of a Company known as Assistive Technology Medical Equipment Services, LLC (ATMES) a South Carolina Limited Liability Company (hereinafter referred to as "ATMES").

WHEREAS, the other members include G. Murrell Smith, Jr. (Smith), Jeffrey J. Reed (Reed) and Kimberly L. Cuce (Cuce). Each member owns a twenty-five percent (25%) interest in ATMES.

WHEREAS, a dispute and disagreement arose between DeClemente and the remaining members of ATMES and, as a result DeClemente has agreed to sell, transfer and assign his interest in ATMES and his interest in all other associated Companies, and certain documents have been prepared and are being executed simultaneously with this Release, including, but not limited to a Bill of Sale and a Confidentiality Agreement and Non-Competition Agreement. In addition, a promissory note was executed by ATMES and the promissory note was executed with certain restrictive personal guarantees, by Smith and Reed simultaneously with the Bill of Sale and Confidentiality Agreement and Non-Competition Agreement.

WHEREAS, during the period in which all members operated under ATMES and during the period of negotiation and preparation of the closing documents and other documents referenced hereinabove, certain disputes were referenced, certain allegations were made and certain claims were referenced and the undersigned, in consideration of the mutual promises, covenants and payments to be made pursuant to the Bill of Sale, Confidentiality Agreement and Non-Competition Agreement, the undersigned do intend to and do hereby individually and for thier heirs, executors, administrators, successors and assigns, release, acquit and forever discharge Phillip L. DeClemente as well as his agents, servants, successors, heirs, executors, administrators, personal representatives and all other persons, firms, corporations and associations or partnerships of and from any and all claims, actions, causes of action, demands, rights, damages, cost, loss of services, expenses and compensation whatsoever which the undersigned now has or which may have hereinafter accrue on account of or in any way growing out of any and all ownership interest or employment in any of the entities set forth above whether known or unknown, foreseen or unforeseen and any consequences thereof, resulting or to result from ownership of any of the Companies referenced-above, employment in or with any of the entities referenced-above, business relationship with any of the businesses or individuals referenced-above as well as any negotiation contracts or documents executed as a result of the sale of the business as referenced herein.

It is understood and agreed that this is a settlement or a compromised of a doubtful and disputed claim and that the execution of this Release is not to be construed as an admission of liability on the part of the party or parties hereby released and that said Releasees deny liability therefore and the execution of this Release is merely to avoid litigation and buy the peace of all involved.

The undersigned hereby declare and represent that all documents executed including the Bill of Sale, Confidentiality Agreement and Non-Competition Agreement and this Release were entered into freely and voluntarily without any threat, coercion or otherwise on the part of the Releasees and the undersigned further declares and represents that no promise, inducement or agreement not herein expressed has been made to the undersigned and that this Release contains the entire Agreement between the parties and that the terms of this Release are contractual and not a mere recital.

The undersigned has read this forgoing Release and fully understands same.

Signed, sealed and delivered this 10 day of July, 2009.

WITNESSES:

Judy A. Blocker

Bar Thomas

CAUTION! READ BEFORE SIGNING.

G. MURRELL SMITH, JR. (LS)

Individually and as remaining member
of ATMES

WITNESSES:

Judy A. Blocker

Bar Thomas

CAUTION! READ BEFORE SIGNING.

JEFFREY R. REED (LS)

Individually and as remaining member
of ATMES

WITNESSES:

Judy A. Blocker

Bar Thomas

CAUTION! READ BEFORE SIGNING.

KIMBERLY L. CUCE (LS)

Individually and as remaining member
of ATMES

STATE OF SOUTH CAROLINA)

COUNTY OF SUMTER)

ACKNOWLEDGMENT

On the 10th day of July, 2009, personally appeared before me,
G. Murrell Smith, Jr., to me being the person named herein and who executed the
foregoing release and that he acknowledged to me that he voluntarily executed same.

John E. Thomas (LS)
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 2/10/2019

STATE OF SOUTH CAROLINA)

COUNTY OF SUMTER)

ACKNOWLEDGMENT

On the 10th day of July, 2009, personally appeared before me,
Jeffrey J. Reed, to me being the person named herein and who executed the foregoing
release and that he acknowledged to me that he voluntarily executed same.

John E. Thomas (LS)
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 2/10/2019

STATE OF SOUTH CAROLINA)

COUNTY OF SUMTER)

ACKNOWLEDGMENT

On the 1st day of July, 2009, personally appeared before me,
Kimberly L. Cuce, to me being the person named herein and who executed the
foregoing release and that he acknowledged to me that he voluntarily executed same.

John E. Thomas (LS)
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 2/10/2019

RECORD'S CUSTODIAN CERTIFICATION

(NOTICE)

**DO NOT ACCEPT WITHOUT MEDICAL RECORDS ATTACHED.
A COPY SHALL NOT BE ACCEPTED IN LIEU OF AN ORIGINAL.
ORIGINAL CUSTODIAN CERTIFICATE SHALL HAVE A RAISED NOTARIZED SEAL INTACT**

I, Adrian Gadsden, Health Information Services Department Release of Information Specialist do hereby certify that I am employed, duly authorized and have authority to certify reports, records and copies on behalf of Health Information Services of the Medical University Hospital Authority. These records were prepared and maintained in the ordinary course of business.

Further, I hereby certify that the copies of records attached hereto are true and accurate copies of the records, RE:

NAME:

Phillip DeClemente

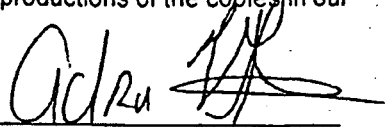
MRN:

137 3339

PAGE(s)

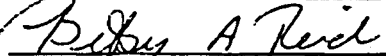
1-11 Eleven

The records maintained by Medical University Hospital Authority may contain copies of medical records originally provided by hospitals, other facilities or other providers of medical care. The originals of such other medical records were prepared and are maintained by the original sources. However, the attached records are true and accurate reproductions of the copies in our records.


Adrian Gadsden, ROI Specialist

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 1 DAY OF Nov, 2013


NOTARY PUBLIC

My Commission Expires:

Aug 2, 2020

(SEAL)

Release of Information #

308 78 733

MUSC Medical Center
INSTITUTE OF PSYCHIATRY DISCHARGE SUMMARY

PATIENT NAME: DECLEMENTE, PHILLIP L
MRN: 001373339
PATCOM: 104502745
ADMITTED: 02/02/2012
DISCHARGED: 02/15/2012
SERVICE: Acute Psychiatry 1 North.
ATTENDING: Christopher S Fields, MD

REFERRING: SELF REFERRAL

PRIMARY CARE PHYSICIAN: PAPPAS, THEODORE - (843)856-5207

REASON FOR ADMISSION: Danger to self and others.

HPI: The patient is a 38-year-old Caucasian male with no endorsed past psychiatric history who presented to the ED after police stand-off on the Arthur Ravenel Bridge where the patient was witnessed to ram his vehicle repeatedly into the concrete barricades both inter-lane as well as outer, on his vehicle were painted messages proclaiming "game over, happy now." The patient was observed to be swearing erratically and pulled perpendicular to the traffic before starting his ramming attempts. Police had to convince after several hours for the patient to come out of his vehicle. Mobile Crisis was called and filled out part 1 of commitment papers. Patient reports that he was attempting to "make a statement to those involved, I just want to get everyone in one place to get them to tell the truth." He reports the bridge served a significant purpose, because of his historical work with body recovery and the fact his business partner would always allude to it (his work experience) in various ways to the patient. He adamantly denied this incident to be suicidal act nor was he homicidal at that time and adamantly denies any intent to use bombs or any other explosives. He denied having any mental problems and stated that he wanted to show people that he was not "crazy" by proving in getting those involved to tell the "truth." However he endorsed having prescribed Chantix for smoking cessation but stopped it because it made him "out there" and was labeled "bipolar by other folks who wanted to pin something on me."

Two years history of increasing paranoia and believed other people were out to get him/stalking him. Apparently, sent a text message out to friends saying everybody better be off the Ravenel bridge.

PAST PSYCHIATRIC HISTORY: No hospitalizations. No history of ECT.

PAST MEDICATION TRIALS: Pristiq, Xanax, Chantix, Adderall.

SUBSTANCE USE: Alcohol "socially." Marijuana near daily use, history of spice. Adderall prescribed by unknown physician. History use of baths salts and cocaine, not in many months, had used marijuana on the day of admission.

PAST MEDICAL HISTORY: Disk herniation.

FAMILY HISTORY: Patient refused to give information on this.

SOCIAL HISTORY: Started several personal businesses including

Patient: DECLEMENTE, PHILLIP L

MRN: 1373339

Encounter: 104502745

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MUSC1 OF 11

personnel investigation and medical transport, rescue squad with police, scuba diving body recovery. Currently unemployed and living alone in a home in Mount Pleasant, separated from family, very few close friends, with legal history of kidnapping and stalking and assault. Current incident resulted in reckless driving.

PHYSICAL EXAM: VITALS: Temperature 36.9, pulse 109, respirations 18, blood pressure 135/78.

GENERAL: Well nourished, in no acute distress.

SKIN: Good skin turgor, multiple abrasions, 5-cm abrasion, and ecchymosis over the extensor portion of the right lower extremity.

HEENT: Extraocular muscles are intact. Anicteric sclera. Moist mucous membranes.

PULMONARY: Clear to auscultation bilaterally.

CARDIOVASCULAR: Regular rate and rhythm. No murmurs, rubs or gallops.

GI: Normoactive bowel sounds, soft, nontender, nondistended.

NEUROLOGIC: Cranial nerves II-XII grossly intact. Motor 5/5 strength in all extremities.

MENTAL STATUS EXAM: Appearance unkempt with several days double long chin, dressed poorly, sweatshirt, track pants, and handcuffed, restraints around waist. Behavior, mildly cooperative, guarded, defensive, suspicious, eye contact good. Motor unable to assess but no deficits, normal later determined. Speech normal, volume normal, hyperverbal. Mood irritable. Affect, constricted at times, appeared to have emotional lability, congruent with mood and topic, angry at times. Thought process, tangential, perseveration on background history to admission, events mildly disorganized. Thought content, paranoia, preoccupation with business partner, adamantly denies SI or HI. Memory intact per interview. Insight significantly impaired, blames outside factors. Judgment significantly impaired.

STUDIES DURING HOSPITALIZATION: Lipid profile within normal limits. BMP within normal limits. Urine drug screen positive for amphetamines and cannabinoids. Salicylate level negative. Acetaminophen level negative. CBC within normal limits. Thyroid stimulating hormone 1.12 within normal limits. T4 3.6, free T3 3.1, all within normal limits. BMP within normal limits. Creatinine 1.3. Lithium level, day prior to discharge 0.4.

IMAGING STUDIES: Leg x-ray, no evidence of fracture or dislocation, a zipper and 2 small metallic densities overlying the leg, these are likely external to the patient, however, correlation with clinical examination is recommended to evaluate the retained radiopaque foreign body. Cervical spine x-ray, no evidence of acute osseous injury to cervical spine. Chest x-ray, no evidence of acute cardiopulmonary disease or displaced rib fracture.

HOSPITAL COURSE: The patient was involuntarily admitted to the Acute Psychiatric Unit, IN and placed under appropriate precautions. He was taken to the emergency room after a stand-off with the police on the Ravenel bridge. On initial presentation, he was hyperverbal, agitated, and moderately disorganized. He reports that he plotted a stand-off to draw attention of a business partner, David Laird, who has allegedly defaulted him a 1000 dollars and has been harassing him for the last 2 years. He denied that he had been experiencing any suicidal or homicidal ideation at that time and denied this repeatedly on the unit.

The patient had no formal psychiatric history and was a poor historian due to the degree of paranoia surrounding his perception of the details. He provided a history of approximately 2 years of worsening paranoia. He reports this coincides with the separation of he and his business partner and the subsequent harassment he suffered at the hands of said partner. In the first days of hospitalization, he detailed incredible accounts of GPS trackers, people coming out of the marsh to observe him, people planting semen in his bed, and truck and cars near his house making excessive noise to disrupt his life. He was so convinced of these events that he had taken into his own hands to stop this harassment. He went to such great lengths as to appoint multiple attorneys and use video and sound recording devices to document "terabytes of data" to defend his case. He stated that the goal of his episode on the bridge was to bring all the guilty parties in one place, so they could "admit what they have done." After effective medication dosing, he remained convinced of these events, however, he was not convicted to act on them. He rationalized all these fantastic event with evidence he had collected while it was going on; however, near the time of discharge, stated he wanted nothing to do with the data he had collected and wanted to just put all of it in the past.

Given his level of paranoia, he was started on Risperdal 1 mg q.h.s. and eventually titrated to 4 mg q.h.s. He demonstrated improvement in his paranoia although continued to have many of the above-mentioned delusions. His degree of agitation at presentation prompted using standing Ativan which was eventually tapered as his antipsychotic and mood stabilizers became effective. More information was obtained from friends of the patient who relayed that in the past, he had gone many days with little sleep, had been hyperverbal, sexually promiscuous, and grandiose. His history appeared to be consistent with hypomania; however, considering the magnitude of incident that resulted in this hospitalization, his diagnosis may be more consistent with true mania, and therefore bipolar affective disorder. He was started on lithium and titrated to a dose of 600 mg b.i.d. A lithium level drawn before the day of discharge revealed a level of 0.4. His dose was increased to 600 mg and 900 mg at night the day of discharge. Per Zettin calculation, this would predict a level of 0.8; within the therapeutic range considering his weight and kidney function. He tolerated this medicine well with minimal side effects. He continued to demonstrate some grandiosity and entitlement during his hospitalization. By the time of discharge, he was far less pressured, less hyperverbal, and demonstrated improved sleep. He has a history of marijuana abuse and was using it on the day of admission. He also has a history of using prescribed stimulants. He was repeatedly reinforced that medication compliance was paramount in his recovery and continued success. He was also educated about the negative effects of illicit drugs, as well as prescribed stimulants and benzodiazepines could have on his recovery. To help ensure compliance, he was given a 1-month supply of his medications at the time of discharge.

At the time of discharge once stabilized on lithium and Risperdal, the patient was not endorsing any intent to harm anyone, was not agitated or overly paranoid. He demonstrated his improved behavior by tolerating unflattering newspaper articles that were presented to him, as well as hate mail that his neighbor had delivered to him without a great deal of agitation. Additionally, friends of the patient verified improvement in his symptoms as well as the patient feeling that he felt more at ease with himself and his thoughts. If the patient were to stop taking his medications, his behavior may become dangerous to himself or others. His case was discussed with hospital attorneys who felt that risk of harm to others was not so great as to necessitate violating his privacy and there was no duty to warrant any

of the people involved in his paranoia, and no time during his hospitalization, he made any direct threats to any individuals. His case was closely followed by Mobile Crisis who were aware of his discharge. He was committed to outpatient treatment at Charleston Mental Health.

DISCHARGE DIAGNOSIS:

Bipolar NOS.

Axis I: Bipolar NOS, psychosis NOS.

Axis II: Deferred.

Axis III: History of disk herniation chronic rib pain.

DISCHARGE MEDICATIONS:

1. Risperdal 4 mg q.h.s.
2. Lithium 600 mg daily.
3. Lithium 900 mg q.h.s.

FOLLOWUP:

1. The patient will follow up with Dr. Marko at Charleston Mental Health at 2:30 p.m. on February 28.
2. The patient will need a lithium level drawn at first visit at Charleston Mental Health, and no sooner than February 21.

DISPOSITION: The patient was discharged to home self-care.

Dictated by: Benjamin Chapman Kalivas, MD

Benjamin Chapman Kalivas, MD

Christopher S Fields, MD
Attending

501772671/medq/

JOB: 1037184

DD: 02/16/2012 12:33:18

DT: 02/17/2012 05:25:28

Authenticated and Edited by BENJAMIN C. KALIVAS, MD On 2/21/12 1:57:34 PM

Authenticated by CHRISTOPHER S. FIELDS, MD On 02/21/2012 02:45:53 PM

 MUSC Health INSTITUTES OF PSYCHIATRY *IOPASSESSMT* Central Inpatient Program Services (CIPS) Assessment Page 1 of 2 Form Origination Date: 02/11 Version: 1 Version Date: 2/11	 P104502745 000.04/24/1873 W M DECLEMENTE PHILLIP Adm 02/02/12 M1373339 Patient Name <u>Phillip DeClemente</u> MRN _____ PATIENT IDENTIFICATION LABEL

Date: 2/3/12 Time: 1100 Methods: ☒ Chart review ☒ Observation ☒ Interview

Reason for Admission: 38 yo M w no previous hx of illness however pt has a 2yr hx of paranoid delusions that people are out to get him. pt exhibits hypervigilance and bizarre behavior concerning being married by a past friend and business partner.

☐ Refused to participate in interview

Response to Initial Interview ☒ Compliant ☐ Receptive ☐ Resistant ☐ Drowsy ☒ Other <u>anxious</u> Grooming / Hygiene / Self-Care ☐ Carefully groomed ☐ Dishveled ☐ Clean ☐ Poor activities of daily living ☐ Appropriate clothing ☐ Inappropriate clothing Affect / Mood ☐ Bright / happy ☐ Labile ☒ Suspicious / paranoid ☐ Appropriate to situation ☐ Inappropriate ☐ Sad / flat / blunted ☐ Euphoric ☒ Anxious ☒ Irritable / angry ☒ Other <u>terrified</u> Concentration and Attention Span ☐ Remains on task ☒ Preoccupied with personal issues ☐ Loses interest quickly ☐ Attends to internal stimuli ☒ Easily distracted	Stressors ☐ Death (who and when) _____ ☒ Financial _____ ☐ Housing _____ ☒ Relationship problems <u>"best friend is antagonist"</u> ☐ School _____ ☒ Legal _____ ☐ Other _____ Leisure Skills and Interest Exercise and athletics ☐ Aerobics ☐ Athletics ☐ Swimming ☐ Bicycling ☐ Running / jogging ☐ Dancing ☐ Walking ☐ Hiking ☐ Weight lifting ☐ Golf ☐ Bowling ☐ Yoga ☐ Martial Arts ☐ Other _____ Relaxation ☐ Bath / shower ☐ Relaxation techniques ☐ Music ☐ Art ☐ Meditation ☐ Driving ☐ Alone time ☒ Other <u>"I stay busy"</u>	Social ☐ AA / NA ☐ Visiting ☐ Going out to eat ☐ Hanging out with friends ☐ Phone calls ☐ Dating ☐ Cards ☐ Table games ☐ Community organizations ☐ School clubs ☐ Church ☐ Other _____ Intellectual / creative ☐ Writing ☐ Reading / library ☐ Games ☐ Photography ☐ Drawing / painting ☐ Craft ☐ Puzzles ☐ Home improvement ☐ Model-building ☐ Needlework ☐ Sewing ☐ Building / fixing something ☐ Pottery ☐ Playing musical instrument ☐ Computers / internet ☐ Other _____ Family ☐ Picnics / outings ☐ Meals ☐ Play with children ☐ Family activities ☐ Pets ☐ Vacations / travel ☐ Other _____

INITIALS SKT
OTC 700671 2/11

Patient: DECLEMENTE, PHILLIP L

MRN: 1373339

Encounter: 104502745

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'ICOPASSESSMT'

Central Inpatient Program Services (CIPS)
Assessment

Form Origination Date: 02/11
Version: 1

Version Date: 2/11



P104502745 DOB:04/24/1973 W
DECLEMENTE
PHILLIP L
Adm:02/02/12 M1373339

Patient Name
MRN

PATIENT IDENTIFICATION LABEL

Outdoors / adventure

- ☐ Travel
- ☐ Backpacking
- ☐ Horseback riding
- ☐ Water sports
- ☐ Boating
- ☐ Fishing
- ☐ Hunting
- ☐ Gardening
- ☐ Time outside
- ☐ Beach
- ☐ Other

Spiritual

- ☐ Church / Sunday school
- ☐ Spiritual readings
- ☐ Choir
- ☐ Prayer / meditation
- ☐ Other

Volunteer

- ☐ Church
- ☐ Coach team
- ☐ Help family or friend
- ☐ Civic
- ☐ School-affiliated
- ☐ 12-step work
- ☐ Other

Entertainment

- ☐ Reading
- ☐ Music
- ☒ Television
- ☐ Movies
- ☐ Video games
- ☒ Internet
- ☐ Other

Work Status

- ☐ Full-time
- ☐ Part-time
- ☐ Position

☐ Student

☒ Unemployed

☐ Disability

☐ Retired

☐ Other

Limitations

☐ Physical

☐ Sensory

☒ Cognitive

☐ Motivation

☒ Other emotional

Problem Areas to Be Addressed by

CIPS

☒ Substance abuse / dependence

Specify mainly mania

scale (FAS)

☐ Depression

☐ Anxiety

☒ Problem-solving skills

☒ Limited / poor coping skills

☐ Anger management

☒ Limited / poor social skills

☐ Poor leisure functioning

☐ Other

Recommendations

☐ Participate in therapy track

☐ CDD

☐ MAP

☐ Living skills

☐ Adolescent

☐ Reassess

☒ Not appropriate for group

☐ involvement at this time

☐ 1:1 as appropriate

Initials SLT Signature & Title Genl. Trng. CIPS Pager ID _____ Date 2/3/12 Time 1100 QWPM

Initials _____ Signature & Title _____ Pager ID _____ Date _____ Time _____ AWPM

Initials _____ Signature & Title _____ Pager ID _____ Date _____ Time _____ AWPM

© CIPS 05/05

INITIALS SLT
OTE 7/06/12.11

Patient: DECLEMENTE, PHILLIP L

MRN: 1373339

Encounter: 104502745

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MUSC Medical Center
INSTITUTE OF PSYCHIATRY DISCHARGE SUMMARY

PATIENT NAME: DECLEMENTE, PHILLIP L
MRN: 001373339
PATCOM: 104514385
ADMITTED: 02/22/2012
DISCHARGED: 03/05/2012
SERVICE: 1 North Institute of Psychiatry.
ATTENDING: Christopher S Fields, MD

REFERRING: SELF REFERRAL

PRIMARY CARE PHYSICIAN: PAPPAS, THEODORE - (843)606-5005

CHIEF COMPLAINT ON ADMISSION: Paranoia and medication noncompliance.

ADMITTING DIAGNOSES: Bipolar disorder with psychotic features and a rule out diagnosis of paranoid personality disorder.

BRIEF HISTORY OF PRESENT ILLNESS: The patient is a 33-year-old male with a history of bipolar disorder and recent marijuana abuse who was just discharged from the Institute of Psychiatry 3 days prior to arriving in the ER. The patient was discharged on February 16, 2012, and presented to the ER again on February 19, 2012. He then had to stay in the ER for 3 days before being transferred to the Institute of Psychiatry on February 22. The patient had been discharged on Risperdal 4mg and Lithium 900/600mg for paranoid and psychotic behavior. The patient reported that as soon as he left the hospital, he stopped taking the Risperdal because he felt that he was having some side effects consistent with EPS. Once he stopped taking his medications, he also was unable to sleep for a period of 3 days. Then, Mobile Crisis was called to his house on the 19th due to threatening behaviors. On arrival, Mobile Crisis discovered that the patient had not slept for 3 days and he was very agitated and he was subsequently committed.

PAST MEDICAL HISTORY: Positive for disk herniation.

SOCIAL HISTORY: He has started several personal businesses including personal investigation, medical transport, rescue squad with the police, scuba diving, recovery center. Currently he is unemployed and living alone in a home in Mount Pleasant. His father currently lives in Florida.

ADMISSION MEDICATIONS: Include Risperdal 4 mg and lithium 900 mg in the morning and 600 mg at night.

ALLERGIES: THE PATIENT HAS NO KNOWN DRUG ALLERGIES.

MENTAL STATUS EXAMINATION ON ADMISSION: He was alert and oriented x4. His appearance is dressed appropriately. Behavior was cooperative. Speech and motor were both normal. Mood was "mad." Affect was constricted. Thought content contained passive SI and paranoia. Thought process was circumstantial and perseverative. Concentration and memory were not assessed. Insight and judgment were both significantly impaired.

DIAGNOSTIC TESTS ON ADMISSION: The patient had a Lithium level which was 0.6. BMP and CEC which were both grossly normal. UDS was not ordered at the time of admission. BAL was 0.

Patient: DECLEMENTE, PHILLIP L

MRN: 1373339

Encounter: 104514385

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DT: 03/06/2012 01:23:49

HOSPITAL COURSE: Given that the patient did not want to take a high potency antipsychotic because of EPS side effects, we considered starting the patient on Seroquel. However, given that he does not have insurance at this time, Thorazine was started, initially at 100 mg in the morning and 200 mg at night. This is ultimately titrated and consolidated to a nighttime dose of 500 mg p.o. q.h.s. He was continued on his lithium; however, it was felt that he may have not been compliant with the lithium also. Lithium level was redrawn after he had been restarted on his medications which showed that the lithium level increased to 0.8, suggesting that he may have been entirely compliant. The patient was noted to be paranoid during rounds and also became paranoid when other individuals had to share the room with him. However, it was felt that his paranoia was likely a baseline paranoia. He spoke of having cameras setup around his house for over 20 years. He stated that when he eventually gets a new house, he would make it "like a fort." His paranoia was consistently within the realm of possibility. His 3-day period of not sleeping after his prior discharge suggests bipolar disorder, however. He denied using any drugs in between discharge and when he was readmitted. Organic causes of his psychosis were considered and an RPR and HIV tests were ordered and both came back negative. A head CT was considered, but not obtained, given that his baseline paranoia and drug use are likely the cause of his worsening paranoid behavior at his age. It was discussed with the patient about possibly moving to Florida and getting out of the area due to paranoia regarding one of his business partners named Laird.

DISCHARGE DIAGNOSES:

Axis I: Bipolar disorder with psychotic features.

Axis II: Rule out paranoid personality disorder.

Axis III: Disk herniation by history.

Axis IV: Moderate social occupational.

Axis V: Global assessment of functioning of 55.

DISCHARGE MEDICATIONS: Lithium 900 mg p.o. q.a.m. and 600 mg p.o. q.h.s. and Thorazine 500 mg p.o. q.h.s.

DISPOSITION: The patient was stable. Denied any SI, HI, or AVH.

APPOINTMENTS: He will follow at Charleston Mental Health with Dr. Dale Marko, phone number is 852-4100, fax number is 571-7719. His appointment is scheduled for Tuesday, March 20 at 2:30 p.m. He also has an appointment with Melissa Camp who will be his case worker at the same address on Charleston Mental Health on Charlie Hall Boulevard. His appointment with her scheduled for Wednesday, March 7 at 1 p.m.

Dictated By: Zachary Stroud, MD

Zachary Stroud, MD

Christopher S Fields, MD
Attending

504168834/medq/
JCE: 1040512

Patient: DECLEMENTE, PHILLIP L

MRN: 1373339

Encounter: 104514365

Page 2 of 3

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DD: 03/05/2012 11:34:42

Authenticated and Edited by ZACHARY STROUD, MD On 3/12/12 11:52:01 AM

Authenticated by CHRISTOPHER S. FIELDS, MD On 03/27/2012 11:28:27 AM

Patient: DECLEMENTE, PHILLIP L

MRN: 1373339

Encounter: 104514365

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  "IOPASSESSMT" Central Inpatient Program Services (CIPS) Assessment Form Origination Date: 02/11 Version: 1 Page 1 of 2 Version Date: 2/11	 P104514385 DOB: 04/24/1973 W M DECLLEMENTE PHILLIP L EAdm: 02/22/12 M1373339 Patient Name <u>Phillip Decllemente</u> MRN _____ PATIENT IDENTIFICATION LABEL

Date: 2-23-12 Time: 1300 Methods: ☒ Chart review ☒ Observation ☐ Interview

Reason for Admission: 38 yo WM w/ Bipolar NOS, marijuana abuse recently
all from IN - pt presents a medication problem, med non-compliance
and sleep, anxiety behavior and thoughts.

☐ Refused to participate in interview

Responses to Initial Interview ☐ Compliant ☐ Receptive ☒ Resistant ☐ Crying ☒ Other <u>agitated</u> Grooming / Hygiene / Self-Care ☐ Carefully groomed ☒ Disheveled ☐ Clean ☒ Poor activities of daily living ☐ Appropriate clothing ☐ Inappropriate clothing Affect / Mood ☐ Bright / happy ☐ Labile ☐ Suspicious / paranoid ☐ Appropriate to situation ☐ Inappropriate ☒ Sad / flat / blunted ☐ Euphoric ☐ Anxious ☒ Irritable / angry ☐ Other _____ Concentration and Attention Span ☐ Remains on task ☒ Preoccupied with personal issues ☒ Loses interest quickly ☐ Attends to internal stimuli ☐ Easily distracted	Stressors ☐ Death (who and when) _____ ☒ Financial _____ ☐ Housing _____ ☒ Relationship problems <u>with</u> _____ ☐ School _____ ☐ Legal _____ ☐ Other _____ Leisure Skills and Interest Exercise and athletics ☐ Aerobics ☐ Athletics ☐ Swimming ☐ Bicycling ☐ Running / jogging ☐ Dancing ☐ Walking ☐ Hiking ☐ Weight lifting ☐ Golf ☐ Bowling ☐ Yoga ☐ Martial Arts ☐ Other _____ Relaxation ☐ Bath / shower ☐ Relaxation techniques ☐ Music ☐ Art ☐ Meditation ☐ Driving ☐ Alone time ☐ Other _____	Social ☐ AA / NA ☐ Visiting ☐ Going out to eat ☐ Hanging out with friends ☐ Phone calls ☐ Dating ☐ Cards ☐ Table games ☐ Community organizations ☐ School clubs ☐ Church ☐ Other _____ Intellectual / creative ☐ Writing ☐ Reading / library ☐ Games ☐ Photography ☐ Drawing / painting ☐ Craft ☐ Puzzles ☐ Home improvement ☐ Model-building ☐ Needlework ☐ Sewing ☐ Building / fixing something ☐ Pottery ☐ Playing musical instrument ☐ Computers / Internet ☐ Other _____ Family ☐ Picnics / outings ☐ Meals ☐ Play with children ☐ Family activities ☐ Pets ☐ Vacations / travel ☐ Other _____

INITIALS RM
OTE 703571 2/11

top_dpc_25525

Patient: DECLLEMENTE, PHILLIP L

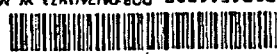
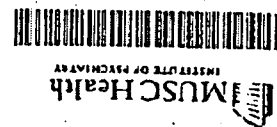
MRN: 1373339

Encounter: 104514385

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MUSC10 OF 11

Patient: DECLEMONT, PHILIP L MRN: 1373339 Encounter: 104514385 Page 19 of 20

PATIENT IDENTIFICATION LABEL	
 PT04514385 DOB: 04/24/1973 W M PHILIP L EAD#: 02/22/12 M1373339	
Patient Name: <u>Philip Declemente</u> MRN: <u>1373339</u>	
Form Configuration Date: 02/11 Page 2 of 2 Version: 1 Version Date: 2/11	
Central Inpatient Program Services (CIPS) Assessment "10PASS55MT"	
 INSTITUTE OF PSYCHIATRY	
Work Status ☐ Full-time ☐ Part-time ☐ Position ☐ Student ☐ Unemployed ☐ Disability ☐ Retired ☐ Other	
Limitations ☐ Physical ☐ Sensory ☐ Cognitive ☐ Motivation ☐ Other	
Recommendations ☐ Participate in therapy track ☐ COD ☐ MAP ☐ Living skills ☐ Adolescent ☐ Recreates ☐ No: appropriate for group ☐ Involve: appropriate at this time ☐ 1:1 as appropriate	
Problem Areas to Be Addressed by CIPS ☐ Substance abuse / dependence ☐ Specify: <u>main problem</u> ☐ Depression ☐ Anxiety ☐ Problem-solving skills ☐ Limited / poor coping skills ☐ Anger management ☐ Limited / poor social skills ☐ Poor leisure functioning ☐ Other	
Initials: <u>CD</u> Signature & Title: <u>David Thompson, MD</u> Date: <u>2.23.12</u> Time: <u>1:30</u> AM/PM: <u>AM</u>	
Initials: _____ Signature & Title: _____ Date: _____ Time: _____ AM/PM: _____	
Initials: _____ Signature & Title: _____ Date: _____ Time: _____ AM/PM: _____	
loc_dps assess	
Initials: <u>CD</u> Signature & Title: <u>David Thompson, MD</u> Date: <u>2.23.12</u> Time: <u>1:30</u> AM/PM: <u>AM</u>	
Initials: _____ Signature & Title: _____ Date: _____ Time: _____ AM/PM: _____	
Initials: _____ Signature & Title: _____ Date: _____ Time: _____ AM/PM: _____	
OT: 700671211	

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

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

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

v.)

HOOD & SELANDER, CPAS, LLC,)
DONNA C. CASH, AS)
REPRESENTATIVE OF THE ESTATE)
OF DOROTHY CONNELLY, KIMBERLY)
CUCE, and PHILLIP DECLEMENTE,)
Defendants.)

**AFFIDAVIT OF
PHILLIP DECLEMENTE**

I, Phillip DeClemente, being over the age of 18 and of sound mind state as follows:

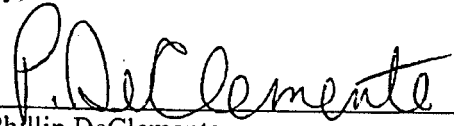
1. On January 6, 2012 I was served with a Summons and Complaint regarding the above matter.
2. During the month of January 2012 I suffered from a mental illness and was unable to consult with an attorney to answer said Complaint.
3. On February 2, 2012 I was involuntarily committed to the Medical University of South Carolina's psychiatric unit, where I was allowed very limited contact with anyone other than my caregivers. (See attached Exhibit 1)
4. After my discharge from the Medical University of South Carolina's psychiatric unit on February 16, 2012 I continued with outpatient therapy.
5. My psychiatric condition remained poor, and I was again hospitalized from February 22, 2012 until March 6, 2012. (See attached Exhibit 2)

6. Upon my release I was again required to participate in out-patient treatment, including regular dosages of Lithium and Thorazine.

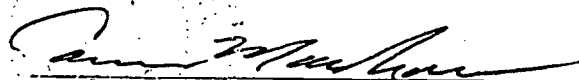
7. On May 11, 2012 I hired attorney Cameron Marshall to defend me in this lawsuit.

8. On August 9, 2012 Mr. Marshall filed an Answer, Counterclaim and a Motion for Enlargement of Time in Which to File Answer.

AFFIANT SAYETH this 21 day of January, 2013.


Phillip DeClemente

SWORN to before me this
21 day of January, 2013.


Notary Public for South Carolina
My Commission Expires: 3-12-19

RECORD'S CUSTODIAN CERTIFICATION

(NOTICE)

**DO NOT ACCEPT WITHOUT MEDICAL RECORDS ATTACHED.
A COPY SHALL NOT BE ACCEPTED IN LIEU OF AN ORIGINAL.
ORIGINAL CUSTODIAN CERTIFICATE SHALL HAVE A RAISED NOTARIZED SEAL INTACT**

I, Adrian Gadsden, Health Information Services Department Release of Information Specialist do hereby certify that I am employed, duly authorized and have authority to certify reports, records and copies on behalf of Health Information Services of the Medical University Hospital Authority. These records were prepared and maintained in the ordinary course of business.

Further, I hereby certify that the copies of records attached hereto are true and accurate copies of the records, RE:

NAME:

Phillip DeClemente

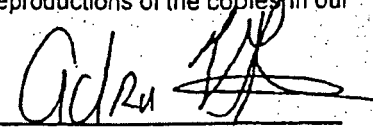
MRN:

137 3339

PAGE(s)

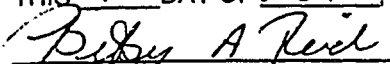
1-11 Eleven

The records maintained by Medical University Hospital Authority may contain copies of medical records originally provided by hospitals, other facilities or other providers of medical care. The originals of such other medical records were prepared and are maintained by the original sources. However, the attached records are true and accurate reproductions of the copies in our records.


Adrian Gadsden, ROI Specialist

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 1 DAY OF Nov 2013


NOTARY PUBLIC

(SEAL)

My Commission Expires: Aug 2, 2020

Release of Information #

308 78733

Exhibit 1

MUSC Medical Center
INSTITUTE OF PSYCHIATRY DISCHARGE SUMMARY

PATIENT NAME: DECLEMENTE, PHILLIP L
MRN: 001373339
PATCOM: 104502745
ADMITTED: 02/02/2012
DISCHARGED: 02/15/2012
SERVICE: Acute Psychiatry 1 North.
ATTENDING: Christopher S Fields, MD

REFERRING: SELF REFERRAL

PRIMARY CARE PHYSICIAN: PAPPAS, THEODORE - (843)856-5207

REASON FOR ADMISSION: Danger to self and others.

HPI: The patient is a 38-year-old Caucasian male with no endorsed past psychiatric history who presented to the ED after police stand-off on the Arthur Ravenel bridge where the patient was witnessed to ram his vehicle repeatedly into the concrete barricades both inter-lane as well as outer, on his vehicle were painted messages proclaiming "game over, happy now." The patient was observed to be swearing erratically and pulled perpendicular to the traffic before starting his ramming attempts. Police had to convince after several hours for the patient to come out of his vehicle. Mobile Crisis was called and filled out part 1 of commitment papers. Patient reports that he was attempting to "make a statement to those involved, I just want to get everyone in one place to get them to tell the truth." He reports the bridge served a significant purpose, because of his historical work with body recovery and the fact his business partner would always allude to it (his work experience) in various ways to the patient. He adamantly denied this incident to be suicidal and nor was he homicidal at that time and adamantly denies any intent to use bombs or any other explosives. He denied having any mental problems and stated that he wanted to show people that he was not "crazy" by proving in getting those involved to tell the "truth." However he endorsed having prescribed Chantix for smoking cessation but stopped it because it made him "out there" and was labeled "bipolar by other folks who wanted to pin something on me."

Two years history of increasing paranoia and believed other people were out to get him/stalking him. Apparently, sent a text message out to friends saying everybody better be off the Ravenel bridge.

PAST PSYCHIATRIC HISTORY: No hospitalizations. No history of ECT.

PAST MEDICATION TRIALS: Pristiq, Xanax, Chantix, Adderall.

SUBSTANCE USE: Alcohol "socially." Marijuana near daily use, history of spice. Adderall prescribed by unknown physician. History use of bath salts and cocaine, not in many months, had used marijuana on the day of admission.

PAST MEDICAL HISTORY: Disk herniation.

FAMILY HISTORY: Patient refused to give information on this.

SOCIAL HISTORY: Started several personal businesses including

Patient: DECLEMENTE, PHILLIP L

MRN: 1373339

Encounter: 104502745

Page 1 of 4

MUSC1 OF 11

personnel investigation and medical transport, rescue squad with police, scuba diving body recovery. Currently unemployed and living alone in a home in Mount Pleasant, separated from family, very few close friends, with legal history of kidnapping and stalking and assault. Current incident resulted in reckless driving.

PHYSICAL EXAM: VITALS: Temperature 36.9, pulse 109, respirations 18, blood pressure 135/78.

GENERAL: Well nourished, in no acute distress.

SKIN: Good skin turgor, multiple abrasions, 5-cm abrasion, and ecchymosis over the extensor portion of the right lower extremity.

HEENT: Extraocular muscles are intact. Anicteric sclera. Moist mucous membranes.

PULMONARY: Clear to auscultation bilaterally.

CARDIOVASCULAR: Regular rate and rhythm. No murmurs, rubs or gallops.

GI: Normoactive bowel sounds, soft, nontender, nondistended.

NEUROLOGIC: Cranial nerves II-XII grossly intact. Motor 5/5 strength in all extremities.

MENTAL STATUS EXAM: Appearance unkempt with several days double long chin, dressed poorly, sweatshirt, track pants, and handcuffed, restraints around waist. Behavior, mildly cooperative, guarded, defensive, suspicious, eye contact good. Motor unable to assess but no deficits, normal later determined. Speech normal, volume normal, hyperverbal. Mood irritable. Affect, constricted at times, appeared to have emotional lability, congruent with mood and topic, angry at times. Thought process, tangential, perseveration on background history to admission, events mildly disorganized. Thought content, paranoia, preoccupation with business partner, adamantly denies SI or HI. Memory intact per interview. Insight significantly impaired, blames outside factors. Judgment significantly impaired.

STUDIES DURING HOSPITALIZATION: Lipid profile within normal limits. BMP within normal limits. Urine drug screen positive for amphetamines and cannabinoids. Salicylate level negative. Acetaminophen level negative. CBC within normal limits. Thyroid stimulating hormone 1.12 within normal limits. T4 9.6, free T3 3.1, all within normal limits. BMP within normal limits. Creatinine 1.3. Lithium level, day prior to discharge 0.4.

IMAGING STUDIES: Leg x-ray, no evidence of fracture or dislocation, a zipper and 2 small metallic densities overlying the leg, these are likely external to the patient, however, correlation with clinical examination is recommended to evaluate the retained radiopaque foreign body. Cervical spine x-ray, no evidence of acute osseous injury to cervical spine. Chest x ray, no evidence of acute cardiopulmonary disease or displaced rib fracture.

HOSPITAL COURSE: The patient was involuntarily admitted to the Acute Psychiatric Unit, 1N and placed under appropriate precautions. He was taken to the emergency room after a stand-off with the police on the Ravenel bridge. On initial presentation, he was hyperverbal, agitated, and moderately disorganized. He reports that he plotted a stand-off to draw attention of a business partner, David Laird, who has allegedly defaulted him a 1000 dollars and has been harassing him for the last 2 years. He denied that he had been experiencing any suicidal or homicidal ideation at that time and denied this repeatedly on the unit.

The patient had no formal psychiatric history and was a poor historian due to the degree of paranoia surrounding his perception of the details. He provided a history of approximately 2 years of worsening paranoia. He reports this coincides with the separation of he and his business partner and the subsequent harassment he suffered at the hands of said partner. In the first days of hospitalization, he detailed incredible accounts of GPS trackers, people coming out of the marsh to observe him, people planting semen in his bed, and truck and cars near his house making excessive noise to disrupt his life. He was so convinced of these events that he had taken into his own hands to stop this harassment. He went to such great lengths as to appoint multiple attorneys and use video and sound recording devices to document "terabytes of data" to defend his case. He stated that the goal of his episode on the bridge was to bring all the guilty parties in one place, so they could "admit what they have done." After effective medication dosing, he remained convinced of these events, however, he was not convicted to act on them. He rationalized all these fantastic events with evidence he had collected while it was going on; however, near the time of discharge, stated he wanted nothing to do with the data he had collected and wanted to just put all of it in the past.

Given his level of paranoia, he was started on Risperdal 1 mg q.h.s. and eventually titrated to 4 mg q.h.s. He demonstrated improvement in his paranoia although continued to have many of the above-mentioned delusions. His degree of agitation at presentation prompted using standing Ativan which was eventually tapered as his antipsychotic and mood stabilizers became effective. More information was obtained from friends of the patient who relayed that in the past, he had gone many days with little sleep, had been hyperverbal, sexually promiscuous, and grandiose. His history appeared to be consistent with hypomania; however, considering the magnitude of incident that resulted in this hospitalization, his diagnosis may be more consistent with true mania, and therefore bipolar affective disorder. He was started on lithium and titrated to a dose of 600 mg b.i.d. A lithium level drawn before the day of discharge revealed a level of 0.4. His dose was increased to 600 mg and 900 mg at night the day of discharge. Per Zettin calculation, this would predict a level of 0.8, within the therapeutic range considering his weight and kidney function. He tolerated this medicine well with minimal side effects. He continued to demonstrate some grandiosity and entitlement during his hospitalization. By the time of discharge, he was far less pressured, less hyperverbal, and demonstrated improved sleep. He has a history of marijuana abuse and was using it on the day of admission. He also has a history of using prescribed stimulants. He was repeatedly reinforced that medication compliance was paramount in his recovery and continued success. He was also educated about the negative effects of illicit drugs, as well as prescribed stimulants and benzodiazepines could have on his recovery. To help ensure compliance, he was given a 1-month supply of his medications at the time of discharge.

At the time of discharge once stabilized on lithium and Risperdal, the patient was not endorsing any intent to harm anyone, was not agitated or overly paranoid. He demonstrated his improved behavior by tolerating unflattering newspaper articles that were presented to him, as well as hate mail that his neighbor had delivered to him without a great deal of agitation. Additionally, friends of the patient verified improvement in his symptoms as well as the patient feeling that he felt more at ease with himself and his thoughts. If the patient were to stop taking his medications, his behavior may become dangerous to himself or others. His case was discussed with hospital attorneys who felt that risk of harm to others was not so great as to necessitate violating his privacy and there was no duty to warrant any

of the people involved in his paranoia, and no time during his hospitalization, he made any direct threats to any individuals. His case was closely followed by Mobile Crisis who were aware of his discharge. He was committed to outpatient treatment at Charleston Mental Health.

DISCHARGE DIAGNOSIS:

Bipolar NOS.

Axis I: Bipolar NOS, psychosis NOS.

Axis II: Deferred.

Axis III: History of disk herniation chronic rib pain.

DISCHARGE MEDICATIONS:

1. Risperdal 4 mg q.h.s.
2. Lithium 600 mg daily.
3. Lithium 900 mg q.h.s.

FOLLOWUP:

1. The patient will follow up with Dr. Marko at Charleston Mental Health at 2:30 p.m. on February 28.
2. The patient will need a lithium level drawn at first visit at Charleston Mental Health, and no sooner than February 21.

DISPOSITION: The patient was discharged to home self-care.

Dictated by: Benjamin Chapman Kalivas, MD

Benjamin Chapman Kalivas, MD

Christopher S Fields, MD
Attending

501772671/medq/

JOB: 1037184

DD: 02/16/2012 12:33:18

DT: 02/17/2012 05:25:28

Authenticated and Edited by BENJAMIN C. KALIVAS, MD On 2/21/12 1:57:34 PM

Authenticated by CHRISTOPHER S. FIELDS, MD On 02/21/2012 02:45:53 PM

 MUSC Health INSTITUTE OF PSYCHIATRY *IOPASSESSMT* Central Inpatient Program Services (CIPS) Assessment Page 1 of 2 Form Origination Date: 02/11 Version Date: 2/11	 PT04502745 DOB: 04/24/1973 W M DECLLEMENTE PHILLIP Adm: 02/02/12 M1373339 Patient Name: <u>Phillip DeClemente</u> MRN: _____ PATIENT IDENTIFICATION LABEL

Date: 2/3/12 Time: 1100 Methods: ☒ Chart review ☒ Observation ☒ Interview

Reason for Admission: 38 yo M E no previous hx of illness however he has a 2 yr hx of a paranoid delusion that people are out to get him. He exhibits hyper-vigilance and bizarre behavior concerning being targeted by a past friend and business partner.

☐ Refused to participate in interview

Response to Initial Interview ☐ Compliant ☒ Receptive ☐ Resistant ☐ Drowsy ☒ Other <u>anxious</u> Grooming / Hygiene / Self-Care ☐ Carefully groomed ☐ Disheveled ☐ Clean ☐ Poor activities of daily living ☐ Appropriate clothing ☐ Inappropriate clothing Affect / Mood ☐ Bright / happy ☒ Flat ☒ Suspicious / paranoid ☐ Appropriate to situation ☐ Inappropriate ☐ Sad / flat / blunted ☐ Euphoric ☒ Anxious ☒ Irritable / angry ☒ Other <u>terrified</u> Concentration and Attention Span ☐ Remains on task ☒ Preoccupied with personal issues ☐ Loses interest quickly ☐ Attends to internal stimuli ☒ Easily distracted	Stressors ☐ Death (who and when) _____ ☒ Financial _____ ☐ Housing _____ ☒ Relationship problems <u>best friend is paranoid</u> ☐ School _____ ☒ Legal _____ ☐ Other _____ Leisure Skills and Interest Exercise and athletics ☐ Aerobics ☐ Athletics ☐ Swimming ☐ Bicycling ☐ Running / jogging ☐ Dancing ☐ Walking ☐ Hiking ☐ Weight lifting ☐ Golf ☐ Bowling ☐ Yoga ☐ Martial Arts ☐ Other _____ Relaxation ☐ Bath / shower ☐ Relaxation techniques ☐ Music ☐ Art ☐ Meditation ☐ Driving ☐ Alone time ☒ Other <u>"I stay busy"</u>	Social ☐ AA / NA ☐ Visiting ☐ Going out to eat ☐ Hanging out with friends ☐ Phone calls ☐ Dating ☐ Cards ☐ Table games ☐ Community organizations ☐ School clubs ☐ Church ☐ Other _____ Intellectual / creative ☐ Writing ☐ Reading / library ☐ Games ☐ Photography ☐ Drawing / painting ☐ Craft ☐ Puzzles ☐ Home improvement ☐ Model-building ☐ Needlework ☐ Sewing ☐ Building / fixing something ☐ Pottery ☐ Playing musical instrument ☐ Computers / internet ☐ Other _____ Family ☐ Picnics / outings ☐ Meets ☐ Play with children ☐ Family activities ☐ Pets ☐ Vacations / travel ☐ Other _____

INITIALS RL
07E700571 251

Patient: DECLLEMENTE, PHILLIP L

MRN: 1373339

Encounter: 104502745

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'IOPASSESSMT'

Central Inpatient Program Services (CIPS)
Assessment
Page 2 of 2

Form Origination Date: 02/11
Version: 1

Version Date: 2/11



P104602745 006/04/24/1873 W
DECLEMENTE
PHILLIP L
Adm: 02/02/12 M1373339

Patient Name _____
MRN _____

PATIENT IDENTIFICATION LABEL

Outdoors / adventure

- ☐ Travel
- ☐ Backpacking
- ☐ Horseback riding
- ☐ Water sports
- ☐ Rafting
- ☐ Fishing
- ☐ Hunting
- ☐ Gardening
- ☐ Time outside
- ☐ Beach
- ☐ Other _____

Spiritual

- ☐ Church / Sunday school
- ☐ Spiritual readings
- ☐ Choir
- ☐ Prayer / meditation
- ☐ Other _____

Volunteer

- ☐ Church
- ☐ Coach team
- ☐ Help family or friend
- ☐ Civic
- ☐ School-affiliated
- ☐ 12-step work
- ☐ Other _____

Entertainment

- ☐ Reading
- ☐ Music
- ☒ Television
- ☐ Movies
- ☐ Video games
- ☒ Internet
- ☐ Other _____

Work Status

- ☐ Full-time
- ☐ Part-time
- ☐ Position _____

☐ Student

☒ Unemployed

- ☐ Disability
- ☐ Retired
- ☐ Other _____

Limitations

☐ Physical

☐ Sensory

☒ Cognitive

☐ Motivation

☒ Other emotional

Problem Areas to Be Addressed by CIPS

☒ Substance abuse / dependence
Specify methamphetamine
social / past

☐ Depression

☐ Anxiety

☒ Problem-solving skills

☒ Limited / poor coping skills

☐ Anger management

☒ Limited / poor social skills

☐ Poor leisure functioning

☐ Other _____

Recommendations

☐ Participate in therapy track

☐ CDD

☐ MAP

☐ Living skills

☐ Adolescent

☐ Reassess

☒ Not appropriate for group involvement at this time

☐ 1:1 as appropriate

Initials SLT Signature & Title Samir Timp, CRPS Page ID _____ Date 2/3/12 Time 1100 @WPM

Initials _____ Signature & Title _____ Page ID _____ Date _____ Time _____ @WPM

Initials _____ Signature & Title _____ Page ID _____ Date _____ Time _____ @WPM

00 003 00303

INITIALS SLT
OTE 700611 2/11

Patient: DECLEMENTE, PHILLIP L

MRN: 1373339

Encounter: 104502745

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Exhibit 2

MUSC Medical Center
INSTITUTE OF PSYCHIATRY DISCHARGE SUMMARY

PATIENT NAME: DECLEMENTE, PHILLIP L
MRN: 001373339
PATCOM: 104514385
ADMITTED: 02/22/2012
DISCHARGED: 03/06/2012
SERVICE: 1 North Institute of Psychiatry.
ATTENDING: Christopher S Fields, MD

REFERRING: SELF REFERRAL

PRIMARY CARE PHYSICIAN: PAPPAS, THEODORE - (843)606-3005

CHIEF COMPLAINT ON ADMISSION: Paranoia and medication noncompliance.

ADMITTING DIAGNOSIS: Bipolar disorder with psychotic features and a rule out diagnosis of paranoid personality disorder.

BRIEF HISTORY OF PRESENT ILLNESS: The patient is a 33-year-old male with a history of bipolar disorder and recent marijuana abuse who was just discharged from the Institute of Psychiatry 3 days prior to arriving in the ER. The patient was discharged on February 16, 2012, and presented to the ER again on February 19, 2012. He then had to stay in the ER for 3 days before being transferred to the Institute of Psychiatry on February 22. The patient had been discharged on Risperdal 4mg and Lithium 900/600mg for paranoid and psychotic behavior. The patient reported that as soon as he left the hospital, he stopped taking the Risperdal because he felt that he was having some side effects consistent with EPS. Once he stopped taking his medications, he also was unable to sleep for a period of 3 days. Then, Mobile Crisis was called to his house on the 19th due to threatening behaviors. On arrival, Mobile Crisis discovered that the patient had not slept for 3 days and he was very agitated and he was subsequently committed.

PAST MEDICAL HISTORY: Positive for disk herniation.

SOCIAL HISTORY: He has started several personal businesses including personal investigation, medical transport, rescue squad with the police, scuba diving, recovery center. Currently he is unemployed and living alone in a home in Mount Pleasant. His father currently lives in Florida.

ADMISSION MEDICATIONS: Include Risperdal 4 mg and lithium 900 mg in the morning and 600 mg at night.

ALLERGIES: THE PATIENT HAS NO KNOWN DRUG ALLERGIES.

MENTAL STATUS EXAMINATION ON ADMISSION: He was alert and oriented x4. His appearance is dressed appropriately. Behavior was cooperative. Speech and motor were both normal. Mood was "mad." Affect was constricted. Thought content contained passive SI and paranoia. Thought process was circumstantial and perseverative. Concentration and memory were not assessed. Insight and judgment were both significantly impaired.

DIAGNOSTIC TESTS ON ADMISSION: The patient had a Lithium level which was 0.6. BMP and CBC which were both grossly normal. UDS was not ordered at the time of admission. BAL was 0.

Patient: DECLEMENTE, PHILLIP L

MRN: 1373339

Encounter: 104514385

Page 1 of 3

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DT: 03/06/2012 01:23:49

HOSPITAL COURSE: Given that the patient did not want to take a high potency antipsychotic because of EPS side effects, we considered starting the patient on Seroquel. However, given that he does not have insurance at this time, Thorazine was started, initially at 100 mg in the morning and 200 mg at night. This is ultimately titrated and consolidated to a nighttime dose of 500 mg p.o. q.h.s. He was continued on his lithium; however, it was felt that he may have not been compliant with the lithium also. Lithium level was redrawn after he had been restarted on his medications which showed that the lithium level increased to 0.8, suggesting that he may have been entirely compliant. The patient was noted to be paranoid during rounds and also became paranoid when other individuals had to share the room with him. However, it was felt that his paranoia was likely a baseline paranoia. He spoke of having cameras setup around his house for over 20 years. He stated that when he eventually gets a new house, he would make it "like a fort." His paranoia was consistently within the realm of possibility. His 3-day period of not sleeping after his prior discharge suggests bipolar disorder, however. He denied using any drugs in between discharge and when he was readmitted. Organic causes of his psychosis were considered and an RPR and HIV tests were ordered and both came back negative. A head CT was considered, but not obtained, given that his baseline paranoia and drug use are likely the cause of his worsening paranoid behavior at his age. It was discussed with the patient about possibly moving to Florida and getting out of the area due to paranoia regarding one of his business partners named Laird.

DISCHARGE DIAGNOSES:

Axis I: Bipolar disorder with psychotic features.

Axis II: Rule out paranoid personality disorder.

Axis III: Disk herniation by history.

Axis IV: Moderate social occupational.

Axis V: Global assessment of functioning of 55.

DISCHARGE MEDICATIONS: Lithium 900 mg p.o. q.a.m. and 600 mg p.o. q.h.s. and Thorazine 500 mg p.o. q.h.s.

DISPOSITION: The patient was stable. Denied any SI, HI, or AVH.

APPOINTMENTS: He will follow at Charleston Mental Health with Dr. Dale Marko, phone number is 852-4100, fax number is 371-7719. His appointment is scheduled for Tuesday, March 20 at 2:30 p.m. He also has an appointment with Melissa Camp who will be his case worker at the same address on Charleston Mental Health on Charlie Hall Boulevard. His appointment with her scheduled for Wednesday, March 7 at 1 p.m.

Dictated by: Zachary Stroud, MD

Zachary Stroud, MD

Christopher S Fields, MD
Attending

504168834/medq/
JCB: 1040512

Patient: DECLEMENTE, PHILLIP L

MRN: 1373339

Encounter: 104514385

Page 2 of 3

MUSC8 OF 11

DD: 03/05/2012 11:34:42

Authenticated and Edited by ZACHARY STROUD, MD On 3/12/12 11:52:01 AM

Authenticated by CHRISTOPHER S. FIELDS, MD On 03/27/2012 11:28:27 AM

Patient: DECLEMENTE, PHILLIP L

MRN: 1373339

Encounter: 104514385

Page 3 of 3

MUSC9 OF 11

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COMMON PLEAS COURT
) IN THE NINTH JUDICIAL CIRCUIT
)

ASSISTIVE TECHNOLOGY MEDICAL
EQUIPMENT SERVICES, LLC,

Civil Action No. 2011-CP-10-8011

Plaintiff,

AFFIDAVIT OF MURRELL SMITH

vs.

HOOD & SELANDER, CPAS, LLC,
DONNA C. CASH, AS
REPRESENTATIVE OF THE ESTATE
OF DOROTHY CONNELLY,
KIMBERLY CUCE AND PHILLIP
DECLEMENTE,

Defendants.

2014 JAN -9 PM 1:51
JULIE J ARMSTRONG
CLERK OF COURT
BY 

FILED

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

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 to this affidavit.
3. I am a partner in Assistive Technology Medical Equipment Services, LLC, the Plaintiff in the above-captioned matter.
4. This lawsuit was filed in October 2011 and served upon Phillip DeClemente on December 1, 2011 according to the affidavit of Service provided to my attorney.
5. On March 30, 2012, after waiting far in excess of the 30 days required to answer, my attorneys filed an Affidavit of Default as to Mr. DeClemente. This is 120 days past from the date of service upon Mr. DeClemente. During this time, Mr. DeClemente in consultation of an attorney other than his current attorney of record.

6. DeClemente's Motion to Extend is not timely. On May 14, 2012, Cameron Marshall filed a letter of appearance. Eighty-seven (87) days later on August 9, 2012, Mr. Marshall filed a Motion to Extend Time under Rule 6 and 60 of the SCRCp. This motion was filed Two Hundred Fifty-Two (252) days from the date of service. This is not timely as required by Rule 55 of the SCRCp.

7. DeClemente's Motion is improper and the relief requested cannot be granted. Ms. Declemente has never sought the proper relief. Indeed, even when the Court offered to allow him to proceed under Rule 55 at the hearing he made no such request from my understanding of the Proceedings

8. DeClemente's Motion is not supported by a meritorious Defense. The only Defense asserted by DeClemente at the hearing was a Release entered into by Mr. Declemente myself and Mr. Jeff Reed. This Release is wholly inapplicable to this case inasmuch as the Release covers conduct after the transaction that gave rise to this lawsuit. The relevant Release language is "WHEREAS, during the period in which all members operated under ATMES and during the period of negotiation in preparation of the closing documents and other documents referenced hereinabove." The lawsuit brought against Mr. DeClemente arises out of his and others failure to disclosure information prior to the formation of ATMES and a wholly different and earlier transaction wherein he and others intentionally withheld information concerning the failure of the prior entity purchased by ATMES to pay sales tax. This had a significant negative impact on the value of the company purchased by ATMES. As such, the Release referenced in DeClemente's affidavit as his ONLY meritorious defense is wholly inapplicable to the claims in this lawsuit.

9. **Prejudice.** I and ATMES will suffer prejudice in having to re-litigate this case should Mr. DeClemente be allow to enter an Answer. He thus far has only been allowed to participate in discovery as it relates to Damages due to his default. His failure to respond as required and re-entry would also have an impact on cross-claims he proposes to bring against other co-defendants and would change the way we would have handled this matter. His entry at this point would also prejudice potential settlement negotiation of exiting parties and undermine those efforts.

10. I have reviewed the supplemental affidavit provided by Mr. DeClemente and while most is hearsay and not competent evidence improperly submitted and should not be considered in support of his position in this matter, I would like to respond as follows”

- a. Mr. DeClemente states that we were “in constant communication with Scott Winburn, Murrell Smith, Jeff Reed from January 6, 2012 and May 8, 2012. This is not true. I spoke with Mr. DeClemente only one time following his incident on the Ravenel Bridge.
- b. There were never by me nor by my attorney nor did I authorize any discussions of resolving this matter after the filing of the lawsuit.
- c. Mr. DeClemente in his affidavit faults me, my partner and my attorneys for not explaining to him that he need to answer the Complaint. 1) There is no duty for me, my partner or my attorney to do such; 2) the Summons clearly directs that and is sufficient and 3) it is clear from the DeClemente Affidavit that had other counsel, assistance and the sophistication in his business experience to understand his obligations. His depression does not relieve him of his obligation to respond to the

Summons. Furthermore, an Affidavit of Default was not filed until well after his Release from MUSC. While he may have been in default, We did not file an default proceedings while he was hospitalized.

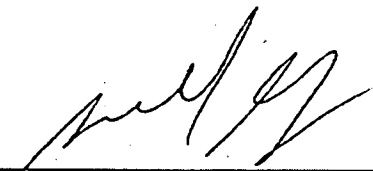
d. The DeClemente affidavit reveals that he was receiving legal advice from the period of October 31, 2011 through to February 1, 2012 and from May 9, 2012 to present and wants this Court to believe he did not know he was required to respond to the Summons.

e. Indeed, I advised him through his counsel on June 12, 2012, see Exhibit A, that Mr. DeClemente was in default and still no action was taken until August 9, 2012.

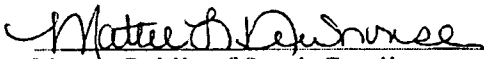
11. As such, Mr. DeClemente (1) has never filed to correct Motion for the Relief he seeks; (2) is not timely; (3) does not raise a meritorious defense and (4) would prejudice me and ATMES in this case should he be allowed to enter an Answer.

FURTHER AFFIANT SAYETH NOT.

7/2, 2014


Murrell Smith

Sworn to and Subscribed before me
this 2nd day of January, 2014


Notary Public of South Carolina
My Commission Expires 10-15-2019

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 THE ESTATE OF)
JAMES B. CONNELLY, KIMBERLY)
CUCE, PHILLIP DECLEMENTE,)

Defendants.)

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

**MOTION TO ALTER OR
AMEND JUDGMENT OR IN THE
ALTERNATIVE, TO STAY
DAMAGES HEARING**

BY

JULIE A. STRONG
CLERK OF COURT

2014 MAY -5 PM 4:32

FILED

Defendant Donna Cash, as Personal Representative of the Estate of Dorothy A. Connelly, moves to alter or amend the April 24, 2014 Order of this Court pursuant to Rule 59(e), or in the alternative, moves to stay the damages hearing as to Mr. DeClemente's default. This limited request pertains only to the language in the Order which provides "a hearing to ascertain damages shall be set for the next term of this Court."

The grounds for this motion are that the damages in this case are complex and not-liquidated, and discovery as to damages and liability is ongoing. There are other defendants in this case, including Defendant Cash, who have appeared and filed timely answers. Both case-law and equity require the answering defendants be allowed their day in court to present evidence as

to both liability and damages. As such, Defendant Cash moves to alter or amend the portion of the Court's order that provides "a hearing to ascertain damages shall be set for the next term of this Court."

In the alternative, should a motion to alter or amend not be the appropriate procedural mechanism for delaying the damages hearing, Defendant Cash respectfully requests that the Court stay the default damages hearing pending the determination of liability as to the answering defendants so that evidence of damages can be presented and addressed by all parties to this action at the same time.

WOMBLE CARLYLE SANDRIDGE & RICE, LLP



James D. Myrick, S.C. Bar No. 012004
Adriane Malanos Belton, S.C. Bar No. 71994
5 Exchange Street
Charleston, SC 29401
843-722-3400

*Attorney for Donna C. Cash, as Personal Representative of
the Estate of Dorothy A. Connelly*

May 5, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

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

ASSISTIVE TECHNOLOGY MEDICAL
EQUIPMENT SERVICES, LLC,

Plaintiff,

v.

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

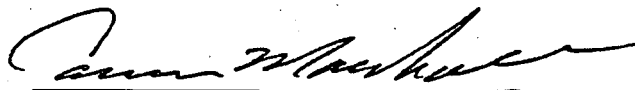
Defendants.

MOTION TO RECONSIDER
PURSUANT TO RULES 52 AND 59

FILED
2014 MAY -5 PM 1:15
JULIE J. ARMSTRONG
CLERK OF COURT

Pursuant to South Carolina Rules of Civil Procedure 52 and 59, Defendant Phillip DeClemente, by and through his undersigned attorney, hereby moves the Court for a reconsideration of the order entered on May 1, 2014.

Respectfully submitted,



Cameron L. Marshall
7 Gamecock Ave, Suite 707
Charleston, SC 29407
(843) 795-2298
cameron@attorneymarshall.com
Attorney for Defendant Phillip DeClemente

May 2, 2014
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Common Pleas Court Judge

Case No. 2011-CP-10-8011

Assistive Technology Medical
Equipment Services, LLC,

Respondent,

v.

Phillip DeClemente,

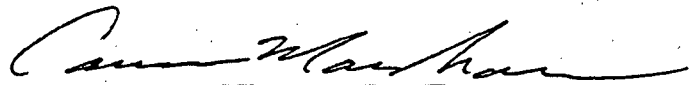
Appellant.

NOTICE OF APPEAL

FILED
2014 JUN -3 PM 2:27
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Phillip DeClemente appeals the judgment of the Honorable J.C. Nicholson, Jr., dated April 24, 2014. Appellant filed a Motion to Reconsider which was denied by Order dated May 3, 2014 and filed May 7, 2014. Appellant received written notice of entry of this Order on May 12, 2014.

May 30, 2014



Cameron L. Marshall
7 Gamecock Ave., Suite 707
Charleston, South Carolina 29407
(843) 795-2298
Attorney for Appellant Phillip DeClemente

Other Counsel of Record:
James E. Smith, Jr.
1422 Laurel Street
Columbia, South Carolina 29201
TELEPHONE NUMBER
Attorney for Respondent

R. Davis Howser
1508 Washington Street
Columbia, South Carolina 29201
TELEPHONE NUMBER
*Attorney for Defendant Hood & Selander,
CPAS, LLC*

James D. Myrick
5 Exchange Street
PO Box 999
Charleston, SC 29402
*Attorney for Defendant Donna C. Cash,
as Personal Representative of the Estate
of Dorothy A. Connelly*

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COMMON PLEAS COURT
) IN THE NINTH JUDICIAL CIRCUIT
)

ASSISTIVE TECHNOLOGY MEDICAL
EQUIPMENT SERVICES, LLC,

Civil Action No. 2011-CP-10-8011

Plaintiff,

AFFIDAVIT OF MURRELL SMITH

vs.

HOOD & SELANDER, CPAS, LLC,
DONNA C. CASH, AS
REPRESENTATIVE OF THE ESTATE
OF DOROTHY CONNELLY,
KIMBERLY CUCE AND PHILLIP
DECLEMENTE,

Defendants.

FILED
2015 DEC - 8 AM 11:24
JULIE J. ARMSTRONG
CLERK OF COURT
BY

1. My name is Murrell Smith and I am a member of Assistive Technology Medical Equipment Services, LLC (hereinafter "ATMES").

2. I offer this affidavit in response to Defendant Cash's Motion for Summary Judgment in the above-captioned matter.

3. I executed the Stock Purchase Agreement and Assignment dated November 7, 2008 by and between the Estate of Dorothy A. Connelly (hereinafter "Estate") and Assistive Technology Medical Equipment, LLC (hereinafter "ATMES").

4. In that Agreement, the "Estate" sold 80% of their stock shares of Abacare Home Medical Inc. (hereinafter "Corporation") to "ATMES" and Phillip Declemente (hereinafter "Declemente") assigned his rights with the remaining 20% of the stock of the Corporation. The "Corporation" was set up by attorney Sam Applegate who was also the PR of the "Estate." The "Corporation" was a separate "C" corporation in which share of stock were issued and sold in the Stock Purchase Agreement.

5. The Stock Purchase Agreement (Exhibit 2 in the "Estate's Motion") provides on page 1 that "Whereas, seller currently owns one hundred and four (104) shares of Abacare Home Medical, Inc. (the Corporation)..."

6. Paragraph 3(C) of the Stock Purchase Agreement provides "The Corporation" shall, following the closing, continue to lease the land and building at 2553 Highway 17 North, Mt. Pleasant, South Carolina; TMS NO. 580-19-00-006 (the building), pursuant to that lease agreement, attached hereto as Exhibit A. Therefore, "ATMES" was not required under the Stock Purchase Agreement to continue the lease. The Corporation was the only entity that was required to continue the lease. The lease, which is attached to the "Estate's" Motion, is between the Estate of James B. Connelly and the Corporation. "ATMES" was never a party to the lease nor did "ATMES" ever agree to continue the lease. "Abacare" was the only entity required to continue the lease. "Abacare" is not a party to this action. There was no other document other than the Stock Purchase Agreement executed in regards to the lease.

7. The "Estate" made representations and warranties in paragraph 4E as follows: "Sellers, representations and warranties and all statements, certificates, schedules, documents, or other information furnished or to be furnished by the sellers to the purchasers pursuant to this agreement are true, correct and complete in all material respects and neither contain or will contain any untrue statements of material fact or omit nor will omit to state any material facts necessary to make the statements contained therein not misleading."

8. The "Estate" retained the services of Hood and Sealander, CPA, LLP who provided copies of all taxes and other financial information to Art Bradham, a CPA. Mr. Bradham reviewed all financials provided and gave opinions based upon the financial information provided prior to the execution of the Agreement.

9. Per the testimony of Mr. Bradham, there were representations by the "Estate's" Agent, Hood and Sealander, CPA that all state and federal taxes were paid and reported completely and accurately in nature. Following the sale of the stock, the Department of Revenue upon information and belief, contacted "the Corporation" for an audit. At that point, I contacted Sam Applegate who was then the Personal Representative of the "Estate." I advised Mr. Applegate that there seemed to be some discrepancy in the sales tax return in the filings with the Department of Revenue that were provided to us. At that point, Mr. Applegate stated that he would have his CPAs (Hood & Sealander) prepare their own audit to submit to the Department of Revenue.

10. Mr. Applegate contacted me following Hood & Sealander's audit to advise that there was under-reporting of sales taxes by the "Estate" in the amount of \$100,320.41 during their ownership of "the Corporation." Despite assurances from Mr. Applegate in the beginning of this process that the Estate would pay all taxes prior to the sale, Mr. Applegate later advised that his client ("Estate") refused to pay the amount of taxes that were due as a result of "the Corporation's" under-reporting of sales taxes.

11. "ATMES" subsequently contacted "Declemente" about the under-reporting of sales taxes. "Declemente" advised that the Connelys were aware of this and produced the attached Shareholder Meeting Agreement dated September 24, 2007 which is incorporated herein as Exhibit 1.

12. This shareholder meeting of July 24, 2007 (prior to the negotiations) clearly states that there was an issue concerning the sales taxes. David Sealander, the CPA for Abacare, advised Dorothy Connely and Phillip Declemente that the sales reported on the sales tax forms appeared significantly understated. Mr. Sealander stressed the importance to report as accurately as possible the taxable sales on the monthly forms.

13. Despite this knowledge of "Declemente," the "Estate," and Mr. Sealander, this information was never relayed during the negotiation of the sale nor was it disclosed to any agent, servant or member of "ATMES" prior to the sale.

14. After this information was provided, it became apparent that the warranties provided under the contract were not true and correct. In fact, it appears that the "Estate" and/or "Declemente" induced entry into this Agreement by fraud, deceit, or concealment.

15. Paragraph E specifically states "Sellers, representations and warranties and all statements, certificates, schedules, documents, or other information furnished or to be furnished by the sellers to the purchasers pursuant to this agreement *are true, correct and complete in all material respects* and neither contain or will contain any untrue statements of material fact *or omit nor will omit to state any material facts necessary to make the statements contained therein not misleading.*" (emphasis added) Obviously, the sales tax returns filed by "the Corporation" were not accurate and complete in all material respects. Furthermore, there was knowledge that Dorothy A. Connely, "Declemente" and/or their agents and servants were fully aware of this under-reporting of sales taxes.

16. Had the "Estate" and/or any of their agents or servants reported that there was an under-reporting of sales tax which could create a liability in excess of \$100,000.00, "ATMES" would never have entered into this Stock Purchase Agreement nor pay the price contracted in the Agreement.

17. Furthermore, the Stock Purchase Agreement was the only document that referenced the Lease Agreement for the land located at 2553 Highway 17 North in Mt. Pleasant, South Carolina from the sale in 2008. Again, if there had not been a material omission, fraud and/or misrepresentation by the "Estate" and/or their agents and servants concerning this sales tax issue, "ATMES" would have never entered into the Stock Purchase Agreement which would have in turn

contained the Lease for the building located at 2553 Highway 17 North, Mt. Pleasant, South Carolina.

18. The undersigned does verily believe that the "Estate" and their agents and/or servants committed fraud in the inducement to the entry of the Stock Purchase Agreement of November 7, 2008.

19. In January of 2010, the undersigned was contacted by the Personal Representative of the "Estate," Sam Applegate, to sell the exercise to option to the property subject to the lease. In exchange for sale, Mr. Applegate negotiated the waiver of ongoing rent as well as a modification of the terms of the Lease. Mr. Applegate negotiated that the Lease ended on October 31, 2012 rather than December 31, 2012.

20. It appears that there was a mutual mistake and typographical error made in the negotiation. Rather than the Lease terminating in 2012, Mr. Applegate mistakenly placed the calendar year 2013 rather than 2012.

21. I noticed that Joy Spencer opined in her Affidavit that the Lease constitutes a binding contract between "ATMES" and the "Estate" "ATMES" strongly disagrees with that assertion as the "Estate" fraudulently induced the execution of the Agreement by failing to disclose the underpayment of sales taxes. This was clearly known to all sellers and/or assignees per the minutes of the July 2007 shareholder meeting. Also, "ATMES" never agreed to be bound to the lease. The agreement only requires Abacare to continue the lease.

22. The Department of Revenue took the position that although the taxes were incurred under a different stockholder. "The Corporation" was obligated to repay the debt incurred under the "Estate's" ownership. Therefore, there was an agreement entered into with the South Carolina Department of Revenue to repay the under-reporting of taxes of the Corporation while under the ownership of the "Estate."

23. On June 13, 2012, "ATMES" wrote the "Estate" stating that it was abandoning the Lease due to the misrepresentations, willful concealment and fraud committed by the "Estate" in not disclosing the under-reporting of sales taxes. In order to mitigate the damages, "ATMES" would abandon the Lease by July 1, 2012.

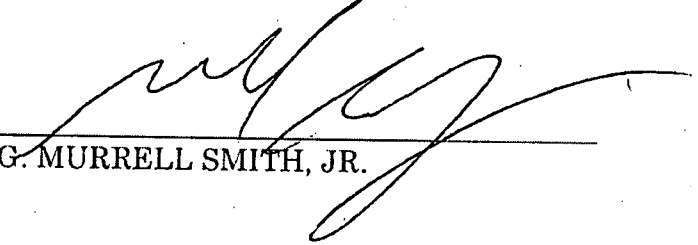
24. "ATMES" instituted this action against the "Estate" to recover damages for the fraud and the under-reporting of sales taxes. It is also "ATMES" position that the fraud in the inducement, willful misrepresentation and concealment of the payment of sales taxes is a material breach that causes "ATMES" substantial damages. There was no choice but to mitigate those damages

by abandoning the Lease which was entered into based upon the fraud of the sellers.

25. Also, "ATMES" disputes the damages alleged in the Affidavit of Joy Spencer. First, she makes a legal opinion that the contract entered into to reduce the term does not affect the lease. Next, there is a calculation of interest, fees, etc. There has never been any notice to cure, notice of default or request to pay any of the fees or costs to us prior to the filing of the Affidavit. "ATMES" disputes her repairs and other fees in this calculation.

26. ATMES is not a party to the lease. There is no document sufficient to enforce any terms of a lease upon ATMES. But for the Defendants' participation in fraudulent and deceitful conduct by failing to disclose a material concern, a \$100,000.00 tax liability, ATMES would have never entered into the Stock Purchase Agreement. Notwithstanding these facts, the only party that Defendant Cash can seek to enforce the lease is the lessee, who is Abacare and who is not a party to this action.

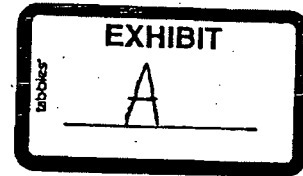
Further the Deponent sayeth not:


G. MURRELL SMITH, JR.

Sworn to before me this 24th day of
November, 2015.


Notary Public for the State of S.C.
My Commission Expires: 10-15-19

COPY



STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

COMMERCIAL LEASE AGREEMENT

THIS COMMERCIAL LEASE AGREEMENT (the "Lease") is made and entered into as of the 1st day of January, 2008, by and between the Estate of James B. Connelly or its successors and assigns (hereinafter referred to as "Landlord"), and ABACARE Home Medical, Inc. f/k/a East Cooper Medical Services, Inc. f/k/a Cooper Hall Health Services, Inc. (hereinafter referred to as "Tenant").

WITNESSETH:

In consideration of TEN AND NO/100th (\$10.00) Dollars, other good and valuable consideration, paid each to the other, the receipt whereof is hereby acknowledged, and the covenants and agreements of the respective parties hereto which are herein contained and which are expressly agreed to by Landlord and Tenant, the parties do, for themselves and their respective successors, distributees, personal representatives and permitted assigns, hereby agree as follows:

1. LEASED PREMISES. Landlord leases unto Tenant, and Tenant hires and leases from Landlord, all that certain piece, parcel or lot of land with the building constructed by Landlord thereon, known and designated as the Northwestern portion of Lot 23, part of Boone Hall Plantation in the Town of Mount Pleasant, State of South Carolina, TMS No. 580-14-00-006, the exact legal description of which is attached hereto and made a part hereof, labeled Exhibit "A" (the "Leased Premises").

The Leased Premises and the use thereof shall be subject to all applicable zoning ordinances, other applicable governmental laws or regulations and all restrictions and easements of record.

2. TERM OF LEASE RENEWAL OPTION. The term of this lease shall be for a period of five (5) years from the commencement date set forth in Paragraph 3 herein next below (the "Initial Term"). Tenant shall have the option to renew the lease for two consecutive five (5) year periods (each a "Renewal Term") commencing upon the expiration of the Initial Term, upon the same terms, covenants and conditions set forth in this Lease Agreement except for the amount of rent which is specifically provided for in Paragraph 4 hereof. This option to renew must be exercised by Tenant in writing at least ninety (90) days prior to the expiration of the Initial Term and any succeeding five (5) year lease term and said option may not be renewed by Tenant if Tenant is in default of any provision of this Lease at the time Tenant exercises an option or at the time of the commencement of the Renewal Term.

3. COMMENCEMENT OF TERM. The term of this Lease and the payment of rent hereunder shall commence on the date first above mentioned.

4. RENT.

CHARLESTON 3/14/22/04

(a) Tenant shall pay the monthly rent of EIGHT THOUSAND, SEVEN HUNDRED (\$8,700.00) DOLLARS to the Landlord, or such agent of Landlord as Landlord may, from time to time, designate in writing, due and payable in advance on the first day of each month (the "Rent Payment Date") during the Initial Term and any Renewal Term.

If Tenant elects to exercise its options to renew the lease for additional five (5) year terms, the rental shall be adjusted at the end of each five (5) year period for the cumulative CPI for the immediately preceding five (5) year period.

(b) In the event Landlord shall fail to receive any monthly rental payment within ten (10) days from the due date, a late charge of five (5%) percent of the monthly rental amount, compounded monthly, shall be added to the rental and paid to Landlord for each such late payment, and the same shall be treated as additional rent and shall be due and payable with such month's rental payment.

5. USE OF THE LEASED PREMISES. The Leased Premises and all improvements located thereon shall be used only for the sale and rental of medical equipment and supplies or such other purpose(s) as shall be approved by the written consent of the Landlord in its sole discretion, and such use shall at all times comply with all applicable municipal, state, and federal laws. It shall be and remain the sole responsibility of the Tenant to obtain and pay for all licenses and permits as may be required for the operation of Tenant's business at the Leased Premises and Tenant agrees that all activities conducted upon the Leased Premises shall be done in accordance with all applicable zoning and safety regulations and laws relating to the Leased Premises or Tenant's business.

6. MAINTENANCE OF THE LEASED PREMISES. The Tenant shall, at Tenant's sole expense, maintain the grounds and the landscaping thereon in the same condition as they are in at the commencement of the Lease Term, make all routine repairs which are necessary to maintain the entire Leased Premises in a good state of repair, including but not limited to the grounds, fixtures, signs, HVAC systems, plumbing systems, electrical systems, windows, glass, walls, doors, and all other appliances, equipment and appurtenances, sidewalks, and curbs on the Leased Premises, up to a gross amount of TWO THOUSAND (\$2,000.00) DOLLARS per year. Landlord will be responsible for any such repairs for amounts in excess of TWO THOUSAND (\$2,000.00) DOLLARS per year.

All repairs shall be made promptly when necessary and shall be in quality and class at least equal to the original construction. Upon default of the Tenant in making any such repairs, the Landlord may, but shall not be required to, make such repairs for the Tenant's account, and the expense thereof shall constitute and be collectible as additional rent, immediately due and payable.

7. TAXES AND INSURANCE. Throughout the term of this lease, the Tenant shall be responsible for payment of all real and personal property taxes, Charleston County garbage disposal user's fees and any other governmental fees and charges assessed against the Leased Premises during the

term of this Lease or any renewal thereof. Tenant shall maintain and pay for all premiums for fire and extended casualty insurance coverage on the Leased Premises insuring Landlord against all risks and in such amounts and with such companies as shall be reasonably required by the Landlord and shall provide evidence of such insurance to Landlord prior to commencement of the Lease Term and each rental year thereafter. Tenant shall also pay in addition to the rent, on the Rent Payment Date, an escrow amount of FIVE HUNDRED (\$500.00) DOLLARS each for taxes and for insurance with a final adjustment of the amount due for the full year being made at the end of each year during the Rental Term. Such adjustment amount, if any, shall be payable on the next succeeding February 1 Rental Payment Date in each year.

8. UTILITIES. The Tenant shall be responsible for the payment of all telephone, electrical, water, sewer or other utility service to the Leased Premises including any deposits required therefore, which accounts shall be in the name of Tenant.

9. ASSIGNMENT OR SUBLEASE. Tenant shall have the right to assign or sublet the Leased Premises or any part thereof to be used by others so long as the assignee or subtenant and the intended use are approved in writing by the Landlord, in its sole discretion. Such approval shall not be unreasonably withheld. Notwithstanding such acceptance by the Landlord of an assignee or subtenant, the Tenant shall remain personally liable to Landlord for the full performance of all terms and conditions contained in this Lease.

10. SUBORDINATION OF LEASE. Tenant's rights under this Lease shall be and remain subject to and subordinate to any mortgages which are now or may hereafter be placed upon the Leased Premises by Landlord. Upon request of Landlord, Tenant shall, in writing, subordinate its rights hereunder to the lien of any mortgage now or hereafter enforced against the Premises, and to any and all advances made or hereafter to be made upon the security thereof.

11. RIGHT OF ENTRY BY LANDLORD. Tenant shall at any time during this Lease term permit inspection of the Leased Premises during reasonable business hours by Landlord or Landlord's designees.

12. INDEMNIFICATION. Tenant shall defend, hold harmless and indemnify Landlord against any loss or damage, including attorney's fees and expenses, incurred as a result of any and all claims, demands, causes of action, suits, judgments, fines or penalties (including but not limited to all fees and expenses incurred as a result of death or injury to persons or for loss of or damage to property) arising out of or in connection with the use and occupancy of the Leased Premises by Tenant or Tenant's agents, employees, licensees or invitees. In the event of any such claims made or suits filed, Landlord shall give the Tenant prompt written notice thereof, and Tenant shall have the right to defend or settle the same to the extent of Tenant's interest hereunder. Tenant agrees to at all times carry public liability insurance in an amount not less than \$100,000.00 per claim, with Landlord named as additional insured on such

policy, through a company approved by the Landlord, and Tenant shall from time to time provide Landlord with proof of such insurance upon demand of Landlord.

Landlord shall hold harmless and indemnify Tenant against any loss or damage, including attorney's fees and expenses, incurred as a result of or arising out of any default of Landlord under this Lease Agreement.

83. IMPROVEMENTS AND ALTERATIONS. No alterations or improvements to the Leased Premises shall be made by Tenant without the prior written consent of the Landlord. Any alterations, additions or improvements made by the Tenant and any fixtures installed by Tenant shall at the Landlord's option become the property of the Landlord at the expiration or other sooner termination of this Lease; provided, however, Landlord shall have the right to require Tenant to remove such fixtures at Tenant's expense upon the termination of this Lease.

14. DAMAGE OR DESTRUCTION. If the Leased Premises shall be wholly or partially damaged by fire or other casualty without the fault or neglect of Tenant, Tenant's servants, employees, agents, visitors or licensees, the damage shall be repaired by and at the expense of the Landlord to the extent that the insurance coverage received from the policy/policies obtained by Tenant are sufficient to cover the cost of such repair. If such damage shall render the premises untenable in whole or in part, the rent shall be abated wholly or proportionately as the case may be until the damage shall be repaired and the premises restored. If the damage shall be so extensive as to require the substantial rebuilding (i.e., expenditure of 50% or more of the replacement cost) of the Leased Premises, Landlord or Tenant may elect to terminate the lease by written notice to the Landlord or Tenant, as the case may be, provided that such notice shall be given within thirty (30) days after occurrence of such damages.

15. DEFAULT. If Tenant shall default in the fulfillment of any of the covenants, terms and conditions hereof and does not cure or remedy any such default within ten (10) days after receipt of written notice thereof or, regarding any default other than the payment of rent, shall not within such ten (10) day period commence such action as shall be required to remedy such default and shall not complete such action within thirty (30) days after said written notice, then Landlord shall, in addition to any other rights or remedies at law or in equity, have the right to declare a default, to retake possession of the premises, to declare the full amount of the remaining rent for the balance of the term at once due and payable, to re-let or sublet the premises at the risk of Tenant, or to declare this lease terminated for the balance of its term, all of which rights shall be cumulative.

16. RIGHTS OF HEIRS AND ASSIGNS. The covenants and agreements contained in the lease shall apply to, inure to the benefit of, and be binding upon the parties hereto and their respective heirs, successors, personal representatives and assigns.

17. RIGHT TO PURCHASE LEASED PREMISES. In the event of the death of Dorothy A. Connelly ("Connelly") during the term of this Lease or any renewal term thereof, Philip DeClemente ("DeClemente") shall, if employed by Tenant on the date of such death and upon the date of the exercise of such right to purchase, have the right to purchase the Leased Premises for EIGHTY FIVE (85%) PERCENT of the appraised value at the date of Connelly's death, as determined by an MAI Appraiser. DeClemente shall have the lesser of EIGHTEEN (18) months from Connelly's death or the number of months left on the second renewal term to exercise the Right to Purchase. After such time, he shall no longer have the right to purchase the Leased Premises as hereinabove provided.

18. PARAGRAPH HEADINGS. The paragraph headings contained herein are only for convenience and are in no way to be construed, nor do they, limit the scope of the particular paragraph to which they refer.

19. ENTIRE AGREEMENT. This Agreement contains the entire understanding of the parties hereto. There are no oral understandings, terms or conditions and neither party has relied upon any representation, express or implied, not contained in this Agreement. All prior understandings, terms or conditions are deemed merged into this Agreement. This Agreement may be changed or supplemented only by an instrument in writing signed by both parties.

20. ADDITIONAL INSTRUMENTS. The parties agree to execute and deliver any instruments in writing necessary to carry out any agreement, term, condition or assurance in this Agreement whenever occasion shall arise including the execution of a short form memorandum of lease agreement which may be recorded at the Charleston County R.M.C. Office by Tenant at Tenant's expense, including the cost of documentary stamps.

21. SURRENDER OF PREMISES. Tenant agrees to deliver all keys and to surrender the Leased Premises at the expiration or sooner termination of this lease, or any extension thereof, clean and in substantially the same condition as when said property was delivered to Tenant, or as altered pursuant to the provisions of this lease, and Tenant shall remove all of Tenant's property. Tenant agrees to pay a reasonable cleaning charge in the event cleaning is necessary to restore or cause to be restored the premises to the condition required by this agreement.

22. WAIVER OF COVENANTS. It is agreed that the waiver of any term, covenant or condition of this lease agreement in writing by either party shall be limited to the particular instance and shall not be deemed to be a waiver of any other breach of such term, covenant or condition.

23. SIGNAGE. Tenant shall be permitted to install any signage on the Leased Premises selected by it which complies with the ordinances and regulations of the Town of Mount Pleasant.

24. COMMISSIONS. Landlord and Tenant acknowledge and represent that there is no real estate agent involved in this transaction.

25. ESTOPPEL CERTIFICATES. Tenant shall, from time to time, within ten (10) days from the receipt of written notice from Landlord, execute, acknowledge and deliver to the Landlord a written statement certifying that this Lease is in full force and effect. This statement shall also include whether or not there is an existing default in performance of any covenant or condition of this Lease. The failure of Tenant to execute, acknowledge and deliver to the Landlord a statement in accordance with this covenant shall constitute a waiver of any defaults by Landlord which may have existed prior to the date of such notice. Further, Tenant hereby grants to Landlord a limited power of attorney to sign an estoppel certificate for Tenant in the event Tenant fails to execute an estoppel certificate in a timely manner.

26. TIME OF ESSENCE. Time is expressly made of the essence as to the performance of each and every obligation and condition of this Lease Agreement.

27. SOUTH CAROLINA LAW. This Lease shall be enforced and construed according to the laws of the State of South Carolina.

28. ATTORNEYS FEES. In the event that any party hereto (or any third-party beneficiary of this Agreement) shall bring an action to enforce the terms hereof or to declare rights hereunder, the prevailing party in any such action, shall be entitled to his court costs and reasonable attorneys' fees to be paid by the non-prevailing party as fixed by the court of appropriate jurisdiction, including, but not limited to, attorney's fees and court costs incurred in courts of original jurisdiction, bankruptcy courts, or appellate courts.

29. NOTICES. It is agreed that the legal address of the parties for all notices required or permitted to be given hereunder, or for purposes of billing, process, correspondence, and any other legal purposes whatsoever, shall be deemed sufficient, if given by a communication in writing by United States Mail, postage prepaid and certified, and addressed as follows:

To the Landlord: Dorothy A. Connelly
410 Mill Street, Suite 302
Mt. Pleasant, SC 29464

With a copy to: W. E. Applegate, III
Moore & Van Allen, PLLC
P.O. Box 22828
Charleston, SC 29413-2828

To the Tenant: ABACARE HOME MEDICAL, INC.
2353 Highway 17 N.
Mt. Pleasant, SC 29466

With a copy to: _____

30. MEMORANDUM OF LEASE. This Lease shall not be recorded, but at the request of either party, a memorandum of lease that provides for its existence but not its financial terms may be recorded in the RMC Office for Charleston County.

IN WITNESS WHEREOF, the parties hereto have hereunder set their hands and seals as of the day and year first above written.

WITNESSETH:

Stacey Clark
Stacey Brown
(as to Landlord)

LANDLORD:

The Estate of James B. Connelly

By: Dorothy A. Connelly
Its: CEO

TENANT:

ABACARE Home Medical, Inc.

By: P. Dellemente
Its: COO

Stacey Clark
Stacey Brown

EXHIBIT "A"
TO COMMERCIAL LEASE AGREEMENT

LEASED PREMISES

ALL that certain piece, parcel or lot of land, situate, lying and being on the Southeast side of US Highway 17 in Christ Church Parish, in the Town of Mount Pleasant, County of Charleston, State of South Carolina, and being known and designated as the Northwestern portion of Lot 23, part of Boone Hall Plantation.

MEASURING AND CONTAINING in front on US Highway 17, One Hundred (100') feet, on the Northeast line Two Hundred Sixteen (216') feet, on the Southeast on rear line, One Hundred Three (103') feet, and on the Southeast line One Hundred Eighty-Seven (187') feet be the said dimensions more or less.

BUTTING AND BOUNDING to the Northwest on US Highway 17, to the Northeast on Lot No. 22, to the Southeast on the remaining portion of Lot No. 23, to the Southwest on Lot No. 24.

SAID property also shown on a plat made by ARC Surveying Company, Inc., dated June 11, 1999, revised November 29, 1999 and recorded in Plat Book DC at Page 585 in the RMC Office for Charleston County.

TMS No. 580-14-00-006

EXHIBIT

tabler
1

HOOD & SELANDER, CPA'S PA

TO: DOROTHY A. CONNELLY AND PHILIP DECLEMENTE
FROM: DAVID B. SELANDER, CPA
SUBJECT: ABACARE HOME MEDICAL SHAREHOLDER MEETING
DATE: 7/31/2007
CC:

Abacare Home Medical

Shareholder Meeting

Date: 07/24/07

Attendees: Dorothy A. Connelly (Shareholder)
Philip DeClemente (Shareholder)
David B. Selander (Accountant)

The shareholders of Abacare Home Medical met on July 24, 2007 to discuss the bookkeeping, financial health of the company and various other company issues. The following memo is the written minutes of this meeting.

Financial Statements

Philip opened the meeting by handing out the June 30, 2007 Balance Sheet and Profit & Loss statements prepared internally. The financial statements were reviewed and discussed. Several adjustments including depreciation, and inventory have not been posted. If these adjustments were posted, they could influence the shareholders conclusions. Based on the financial statements as presented, the company appears to net approximately \$147,002.36 in net income for the six months ended June 30, 2007.

Philip expects year-end gross sales to be 1.2 to 1.5 million and net profit to be 20% of Sales for the year end.

Joy will be asked to print financial statements with percentages in the future.

New Billing System and Accounts Receivable

The company started a new billing system early in February. The Company is still working on converting all the old receivables to the new system. There have been several set-backs in the conversion and Philip expects the conversion to be complete in the next couple of months. Abacare is currently 60 days behind in billing.

Philip explained the following reasons for the problems on the billing software conversion:

- 1 - Lack of time to do proper training.
- 2 - Initial set up of daily billing items were incorrectly entered and had to be corrected.
- 3 - CMS has been auditing several (approx 30) claims. The result of these audits has not been settled at this point.
- 4 - Billing must bill old system receivables and new system receivables until the old system's claims are transferred or paid.

Accounts receivable at present appears to be approximately \$335,970 plus \$50,000 outsourced to the delinquent account collector. This is an approximate \$110,000 increase in receivables since January 31, 2007. Dorothy asked when the billing/collection problems will be corrected. Philip did not have a projected date. The shareholders agreed to review the progress at the next meeting.

Philip reported no software problems have been noted with the new system. If they cannot correct the billing problems soon, then he is considering outsourcing the billing.

Philip has assigned Nikki and Michael to focus on catching up the billing.

Philip expects billing to average \$130,000 to \$150,000 per month in the future.

Delinquent Accounts

Philip gave a progress report on the delinquent accounts collection. In the last meeting, Philip noted all accounts receivable over 90 days would be outsourced to a delinquent account collector. Currently, Philip terminated the arrangement with the first collection agency and has entered an arrangement with a new agency, Vengroff Collection, a FL company.

The collection company currently holds approximately \$50,000 in receivables. No reports were provided at the shareholder meeting to review.

Last meeting, the shareholders were advised to report to Joy the balances turned over to the collection company. Philip should provide Joy a list of the receivables that are turned over to collections. Joy will include a journal entry to post the accounts to an "allowance for bad debts" account on the company Balance Sheet. Joy should be provided with a monthly schedule of accounts held by the Collection Company and actual collections. Currently, none of this activity is reported to Joy. The importance for accountability of these amounts was stressed again. Additionally, an approval form should be developed to move the deemed uncollectible account to the agency.

New Employee -- Rehab Specialist

Philip hired John Friend, a rehab specialist. John is expected to market rehab equipment and develop a new high profit center for Abacare. Abacare is currently purchasing the equipment and has not billed any yet. We will review this area at the next shareholder meeting.

Sales Taxes

David asked to discuss sales taxes next. 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.

Philip stated the sales tax forms are completed based on collections rather than billing. David stressed that sales tax is computed on Sales for the month regardless of actual collections. Philip explained that all DME companies, that he is aware of, use collections for the sales tax returns. 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.

New Equipment

Philip is negotiating the purchase of new equipment and reviewing leasing options. David advised Philip to seek a revolving line of credit from a bank as a financing alternative. This is usually a lower cost alternative. Lease arrangements tend to have high financing costs. Dorothy inquired on the current lease arrangements and requested that the financing percentage be listed on the financial statements.

New Building

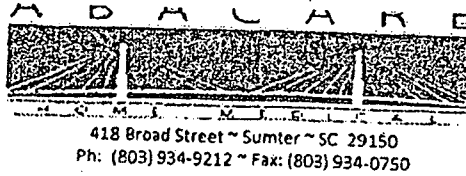
The new building is behind schedule. Philip is checking on it daily and will continue to push the contractor to complete the building as timely as possible.

Payroll

Payroll responsibilities will be moved to Joy in the near future.

Conclusion

The meeting was concluded. The shareholders agreed to meet early in December to discuss the progress on the items discussed.



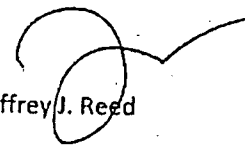
June 13, 2012

Estate of Dorothy Connelly
410 Mill Street, Suite 302
Mt. Pleasant, SC 29464

To the Estate of Dorothy Connelly:

Please be advised that on July 15, 2012 we will vacate the building located at 2353 Hwy. 17 N in Mt. Pleasant. We plan to pay a prorated portion of July's rent for the 15 days we will occupy the building. We will no longer be exercising the lease due to the financial strains placed on the company by the sales tax liability incurred under previous ownership of Abacare.

Sincerely,



Jeffrey J. Reed

cc: W.E. Applegate

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

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

ASSISTIVE TECHNOLOGY MEDICAL)
EQUIPMENT SERVICES, LLC,)

Plaintiff,)

v.)

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

Defendants.)

**DEFENDANT DECLEMENTE'S
MOTION TO CONSIDER
EVIDENCE OF DAMAGES, ADOPT
PROPOSED ORDER AND
RECONVENE DAMAGES HEARING**

Phillip DeClemente, by and through undersigned counsel, moves the Court for consideration of exhibits submitted herewithin which are relevant to the issue of damages. Mr. DeClemente also moves for adoption of the Proposed Order of Damages Judgment, submitted herewithin.

Mr. DeClemente additionally moves to have the damages hearing reconvene to allow the Court to rule on the outstanding Motions to Compel and Quash, determine settlement amounts paid by co-defendants and hear expert testimony from a Certified Public Accountant.

Respectfully Submitted,

Cameron L. Marshall
7 Gamecock Ave, Suite 707
Charleston, SC29407
(843) 795-2298
cameron@attorneymarshall.com
Attorney for Defendant Phillip DeClemente

January 24, 2017

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ASSISTIVE TECHNOLOGY MEDICAL
EQUIPMENT SERVICES, LLC,

Plaintiff,

v.

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

Defendants.

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

**PROPOSED ORDER OF
DAMAGES JUDGMENT**

Phillip DeClemente has been held in default on causes of action three, four, six, seven and nine. Cause of action three alleges Fraud, number four alleges Negligence, number six alleges Negligent Misrepresentation, number seven alleges Promissory Estoppel and cause of action nine alleges Civil Conspiracy. DeClemente is not named in the substantive cause of action, number one, alleging Breach of Contract. The causes of action in which the Complaint names Mr. DeClemente are derivative of the Breach of Contract allegation. Damages hearings were held on November 14, 2016 and January 5, 2017.

On November 7, 2008 the Estate of Dorothy Connelly sold its durable medical equipment company, Abacare, to Plaintiffs. Phillip DeClemente was not a seller in that transaction, as evidenced by the sales contract and the Complaint's Breach of Contract cause of action. Mr. DeClemente was an assignor/purchaser in the transaction, by which he purchased twenty-five

percent ownership of Abacare's new parent company, Assistive Technology Medical Equipment Services, LLC. (ATMES). It remains unclear why Plaintiffs believe Mr. DeClemente would desire to inflate the value of Abacare since he was purchasing, not selling, twenty-five percent of Abacare's parent company, ATMES. Inflating Abacare's value would have led to Mr. DeClemente paying more for the company he was purchasing, ATMES.

Mr. DeClemente is not a defendant in the substantive derivative cause of action, Breach of Contract. Though Mr. DeClemente has been held in default, this Court is responsible for exercising its equitable powers and taking judicial notice, where appropriate, to arrive at a just damages award.

Mr. DeClemente and his partners, Reed, Smith and Cuce, paid \$807,000.00 for Abacare on November 7, 2008. It was subsequently determined that for the period January 1, 2007 through October 31, 2008 Abacare had outstanding sales tax liability owed to the State of South Carolina in the amount of \$87,525 plus interest of \$13,118, for a total of \$100,643. However, the Burkett valuation report upon which Plaintiffs based their decision to purchase Abacare is dated April 30, 2008. Therefore the calculation of money due SCDOR improperly includes the months of May through October, 2008. Expert testimony is needed to arrive at the proper reduced tax liability, and Mr. DeClemente offers to present such testimony.

Plaintiffs Reed and Smith sold Abacare's assets on December 30, 2009 to Long's Medical for "somewhere between \$560,000 and \$600,000" according to Mr. Smith's and Mr. Reed's testimony. Their ownership of Abacare therefore lasted just short of fourteen months. Mr. DeClemente sold his interest in ATMES in May, 2009, and was thus an owner for approximately six months.

After Mr. DeClemente became an owner of ATMES, in November 2008, the company made distributions to its four owners in 2008 totaling \$66,006.00. In 2009 ATMES made distributions to its four owners totaling \$226,569.00. In 2010 and 2011 ATMES distributed to its two remaining partners, Smith and Reed, a total of \$349,175.00.

Plaintiffs seeks to be awarded \$875,000 based upon the testimony of Certified Public Accountant, Art Bradham. Mr. Bradham testified that Abacare's outstanding \$87,525 tax liability at the time Plaintiffs purchased the company resulted in Abacare being a "worthless company." Mr. Bradham opines that Plaintiffs have therefore been damaged in an amount in excess of the \$807,000 they paid for Abacare. The Court finds this opinion incredulous and unpersuasive.

Mr. Bradham's credibility is undermined by numerous facts.

First, Mr. Bradham is the Plaintiffs' long-time personal accountant. Mr. Bradham's business involvement with Plaintiffs began years before Mr. DeClemente's dealings with Plaintiffs.

Second, during Mr. DeClemente's ownership of ATMES, Art Bradham served as Mr. DeClemente's accountant. Mr. Bradham's testimony against Mr. DeClemente is therefore a conflict of interest in violation of sections 1.100, 1.200, 1.320, and 2.000.020 of the American Institute of Certified Public Accountants Code of Professional Conduct. Mr. Bradham did not controvert this fact during his testimony, and instead testified that he does not know whether his actions constitute an ethical violation.

Third, Mr. Bradham performed no due diligence in valuing Abacare. He instead based his valuation completely upon a confidential valuation report prepared by Certified Public

Accountant, Ronald Burkett. Mr. Bradham came into possession of the report illegally and used it illegally. He testified that he does not know how he came to possess it.

Fourth, Mr. Bradham has been a defendant in a lawsuit related to this suit, 2015-CP-10-3325. In that action, Mr. DeClemente sued Art Bradham for the unprofessional acts Bradham has committed in this suit. Mr. Bradham was eventually dismissed from that lawsuit when Mr. DeClemente was unable to finance retention of an accounting expert. In that suit, Mr. Bradham was represented by attorney James Smith, the attorney hiring him to assess Plaintiffs' damages in this case

Fifth, Mr. Bradham has refused to produce subpoenaed documents essential to an accurate damages ruling. The subpoena was issued on Mr. DeClemente's behalf and properly served on November 1, 2016. The subpoena was issued after Plaintiffs refused to respond to Mr. DeClemente's discovery requests. Mr. Smith represents Mr. Bradham in a Motion to Quash the subpoena. Bradham's motion alleges the documents ordered to be produced would embarrass the Plaintiffs. Mr. DeClemente has filed a Motion to Compel production of the subpoenaed documents and a Motion for Sanctions. This Court has not yet ruled on these cross-motions.

Sixth, Mr. Bradham testified that, at the time Plaintiffs purchased Abacare, he was unaware that Abacare used the cash collection sales tax reporting method, which Mr. Bradham claims to have been improper at the time utilized by Abacare. In fact, however, Mr. Bradham used the same sales tax reporting method for Reliable in the accounting he performed for Reliable prior to ATMES's formation, subsequent to its formation, and for ATMES itself after Abacare and Reliable merged.

Seventh, Mr. Bradham testified Mr. Burkett's report was excellent, but states the method Mr. Burkett used in his valuation was not identified. In fact, however, page thirty-four of Mr.

Burkett's report states, as does a different portion of Mr. Bradham's report, the methodology Mr. Burkett employed.

Eighth, Mr. Bradham's report states he did not rely on any of Mr. Burkett's report in arriving at his \$875,000 damages figure, and fails to state a valuation method he used. Nor does Mr. Bradham state how he arrived at his damages calculation.

Ninth, Mr. Bradham's damages figure conflicts with the calculations shown in his report, one of which shows Mr. Burkett's valuation to have been inflated by \$93,859.22 in light of the later discovered tax debt.

Mr. Declemente testified that he has twenty-two years experience owning and managing durable medical equipment operations and that no damages calculation in excess of Abacare's tax debt and interest, totaling \$100,643.00, is defensible by a person possessing ordinary business knowledge and common sense. It is undisputed that during their fourteen month ownership of Abacare, Plaintiffs Smith and Reed received at least \$758,050.00, the total of the money received when Abacare was sold and the distributions they received during their Abacare ownership during 2008 and 2009. Plaintiffs' costs in this case total the \$807,000.00 purchase price plus the tax debt of \$100,643.00 for a total of \$907,643.00. These calculations would result in damages of \$149,593.00. However, as noted earlier, the tax liability was calculated incorrectly by Mr. Bradham because his calculations included taxes owed for the months of May through October, 2008. Expert testimony will help identify the needed adjustment.

The Court finds importance and credibility in Plaintiff Reed's deposition testimony in which he states Mr. DeClemente caused Plaintiffs no damages. However, this Court finds proper damages to be the amount of South Carolina Department of Revenue's tax bill incurred by

Abacare between January 1, 2007 and April 30, 2008 rather than the full audit period covering January 1, 2007 through October 31, 2008.

Pursuant to the South Carolina Uniform Contribution Among Tortfeasors Act, Defendant DeClemente is to be credited for any settlement amounts Plaintiffs received from Co-Defendants. Since those amounts are unknown, the damages hearing will reconvene to ascertain the settlement amounts Co-Defendants have paid Plaintiffs and Mr. DeClemente will be credited accordingly.

AND IT IS SO ORDERED.

Charleston, South Carolina
_____, 2017.

The Honorable Deadra L. Jefferson
Judge, Ninth Judicial Circuit

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

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

ASSISTIVE TECHNOLOGY MEDICAL)
EQUIPMENT SERVICES, LLC,)

Plaintiff,)

v.)

HOOD & SELANDER, CPAS, LLC,)
DONNA C. CASH, AS)
REPRESENTATIVE OF THE ESTATE)
OF DOROTHY CONNELLY, KIMBERLY)
CUCE, and PHILLIP DECLEMENTE,)

Defendants.)

**AFFIDAVIT OF
RONALD BURKETT, CPA, CVA**

2011 AUG 23 PM 2:11
CLERK OF COURT

PERSONALLY APPEARED before me, Ronald H. Burkett, CPA, CVA, who after bring duly sworn deposes and states as follows:

I am a licensed Certified Public Accountant and Certified Valuation Analyst, as well as President of Burkett Burkett & Burkett Certified Public Accountants, P.A. located in West Columbia, South Carolina.

Burkett Burkett & Burkett Certified Public Accountants, P.A. has been engaged by Phillip Declemente (Defendant) to assist Cameron Marshall, Esq. (Attorney) in his representation of Phillip Declemente in the above referenced case.

Sometime in 2008 my firm, Burkett Burkett & Burkett Certified Public Accountants, P.A., was engaged by Mr. Phillip Declemente to prepare a valuation of the common stock of Abacare Home Medical, Inc. (Abacare) to be used by Mr. Declemente to purchase the stock of Mrs. Dorothy A. Connelly. We presented Mr. Declemente with a draft valuation report dated July 14, 2008. It was stamped with a draft watermark and this valuation was not completed. This valuation, if completed, was only to be used for the purchase of Mrs. Connelly's stock by Mr. Declemente.

Since that time it has come to my attention this draft valuation was used in a lawsuit concerning Mr. Declemente as a result of the stock purchase and assignment agreement between the Estate of Dorothy A. Connelly and Phillip L. Declemente and Assistive Technology Medical Equipment Services, LLC on November 7, 2008.

It is alleged that Mr. Declemente was a cause of damages to Assistive Technology Medical Equipment Services, LLC, a South Carolina Limited Liability Company (ATMES, LLC) because he failed to disclose them at the time of the purchase/merger that there was potential sales tax liabilities owed by Abacare.

The central claim in this case is the fact that there was unrecorded sales tax liability of Abacare that the purchaser was not aware of at the time of the purchase. Based on my review of the records it seems clear to me that the purchaser had knowledge or should have had knowledge of the fact that there were potential additional sales tax due from Abacare at the time of the transaction.

The reasons for this are the following:

- It was common knowledge in the industry that DME products had long been considered non-taxable and the taxability was being reviewed by the South Carolina Department of Revenue. The DME products being referred to are the products that resulted in the underpayment of the sales tax by Abacare.
- The purchasers were involved in a class action suit concerning the fact there was potential claim for sales tax by the Department of Revenue prior to the transaction. They were represented by McNair Law Firm, P.A. and the law firm stated, "On August 28, 2007, the South Carolina Administrative Law Court (ALC) issued a decision in the case of Anonymous Corporation v. South Carolina Department of Revenue, Docket No. 06-ALJ-17-0683-CC interpreting Section 12-36-2120(28)(a). The ALC granted the taxpayer's motion for summary judgment ruling that the taxpayer's sales of certain durable medical equipment, specifically, CPAP, BiPAP, and NIPPV devices; ventilators; nebulizers, and also enteral nutritional formulas were exempt from sales and use taxes under the statute." I have seen no evidence that Abacare did not file and remit sales tax based on this decision.
- Once the business was purchased by the purchaser they continued to file the sales tax returns as they had been filed by Abacare and owed additional sales tax.
- As Mr. Mark T. Hobbs states in his affidavit, "The sales tax treatment which was used in preparation of the returns was consistent with industry practice. This fact is acknowledged in the financial statements as issued by the purchaser for the years ended in December 31, 2009, 2010 and 2013 (see exhibit A attached). The SC Supreme Court reversed a previous opinion of the Administrative Law Court on April 20, 2009 which resulted in these sales being subject to sales tax in South Carolina".
- There is further evidence that the purchasers were aware of the sales tax issue based on a letter dated December 9, 2009 by Mr. Art Bradham to Mr. Roger Watson with the South Carolina Department of Revenue asking for forgiveness of penalties as it relates to there amended sales tax return. He states in this letter, "The taxation of DME products has been subject to strong controversy over the past few years, with taxpayers taking positions that nothing is taxable to fully taxable, and no guidance has been available until the SC Supreme Court reversed an earlier decision of an administrative law court judge in 26638 – Home Medical Systems v SCDOR filed April 20, 2009. This court case established the tax liability of a number of DME products that had long been considered non-taxable." Mr. Bradham, one of the experts, states in this letter that the DME products in question had long been considered non-taxable. The DME products he is referring to are the products that resulted in the underpayment of the sales tax by Abacare.

Based on the above facts it is clear that the purchaser had or should have had knowledge at the time there was potential sales tax issues associated with the purchase of Abacare and that could have been taken into consideration when they determined the purchase price of the business and that very well could have been taken into consideration at the time of the purchase.

The purpose of our valuation is as I stated above, was for Mr. Declemente to value the company for him to purchase Mrs. Connelly's stock. The opposing parties are contending that Mr. Declemente did not provide us with expenditures that could have resulted in a reduction of our valuation of the company. If one believes this, then they would have to believe that Mr. Declemente was willing to pay more to purchase the stock of Mrs. Connelly than what it was worth. I see no plausible explanation for this.

In addition, I would like to state again that our valuation was a draft valuation and my report states that the enclosed valuation report was developed for the exclusive and confidential use for Mrs. Connelly and Mr. Declemente. Our Draft Valuation should not have been used to develop a purchase price between another party.

FURTHER AFFIANT SAYETH NOT.

Executed on August 4, 2017.

Ronald H. Burkett, CPA, CVA

Ronald H. Burkett, CPA, CVA

Sworn to before me this 4th day of
August, 2017

Angelica J. Roman

Notary Public for South Carolina

My commission expires: June 20, 2023

Information Used in Affidavit of Ronald H. Burkett, CPA, CVA
August 4, 2017

1. Affidavit of Art Bradham – Exhibit 11 to his deposition dated October 18, 2013.
2. Stock Purchase and Assignment Agreement between the Estate of Dorothy A. Connelly (the seller) and Phillip L. Declemente (Assignor) and Assistive Technology Medical Equipment Services, LLC (the Purchaser) dated November 7, 2008.
3. Affidavit of Mark T. Hobbs, CPA dated May 2, 2016.
4. A letter from Erik P. Doerring at McNair Law Firm, P.A. to Abacare Home Medical, Inc. concerning SC Sales Tax Refund Claim dated May 20, 2008.
5. Draft Valuation of the Common Stock of Abacare Home Medical, Inc. dated July 14, 2008 by Burkett Burkett & Burkett Certified Public Accountants, P.A.
6. A Letter from Art Bradham, CPA to Mr. Roger Watson at SCDOR dated December 9, 2009.

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

ASSISTIVE TECHNOLOGY MEDICAL)
EQUIPMENT SERVICES, LLC,)

Plaintiff,)

v.)

PHILLIP DECLEMENTE,)
Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-10-08011

MOTION TO AMEND JUDGMENT
AND BE RELIEVED FROM
JUDGMENT

2018 JAN -8 PM 4:06
JULIE J. ARNISTON
CLERK OF COURT

FILED

Pursuant to SCRCP 59 and 60, Defendant Phillip Declemente moves to amend and be relieved from the judgment entered against him by Judge Deadra L. Jefferson on December 21, 2017. The Notice of Judgment was mailed on December 28, 2017 and received by Mr. Declemente's attorney on January 2, 2018.

Pursuant to SCRCP 59 Mr. Declemente requests that the Court's Order of Judgment be amended to state that the judgment against him has been satisfied by the attached Exhibit #1, "*Full and Final Release*." The fourth paragraph of the Release states that Mr. Declemente is forever discharged from any damages awarded against him as a result of his business relationship with Plaintiffs.

Pursuant to SCRCP 60(b)(1), Mr. Declemente asserts that he should be relieved from the judgment due to mistake, inadvertence, surprise and excusable neglect. In addition to being mentally ill at the time he was served with Plaintiff's Complaint, Mr. Declemente correctly believed he was not required to answer a frivolous Complaint brought in violation of a legally binding Full and Final Release.

Additionally, pursuant to SCRCP 60(b)(3), (4), and (5), Mr. Declemente asserts that he is further entitled to relief from the subject judgment because Plaintiff's Complaint was brought with fraudulent misconduct, the judgment is void and the judgment has been satisfied, released and discharged, pursuant to the Full and Final Release.

Finally, there is no dispute between the parties that the Full and Final Release is a meritorious defense to any potential claim by Plaintiff that it is entitled to collect the judgment. Please see attached Exhibit #2 (transcript of a portion of a hearing conducted before Judge J.C. Nicholson on December 16, 2013). On page 32, line 18 of the transcript, Plaintiff's Counsel admits that the full and final release constitutes a meritorious defense to collection of any judgment against Mr. Declemente.

Respectfully submitted,

CAMERON MARSHALL, LLC



Cameron Marshall, Esq. - S.C. Bar # 64192
7 Gamecock Avenue, Ste. 707
Charleston, South Carolina 29407
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NOTICE OF APPEAL IN A CIVIL CASE
IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Circuit Court Judge

Case No. 2011-CP-10-08011

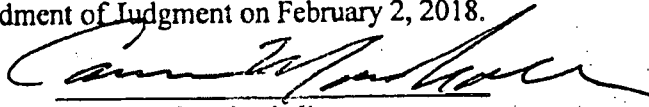
Phillip DeClemente,.....Appellant,
v.

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

NOTICE OF APPEAL

Phillip DeClemente appeals the Default Order of the Honorable J. C. Nicholson dated April 24, 2014. By Order filed on November 17, 2014, the Court of Appeals dismissed Appellant's previous appeal of the ruling as premature. Appellant received Notice of the Honorable Deadra L. Jefferson's Order Denying Amendment of Judgment on February 2, 2018.

March 2, 2018


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Other Counsel of Record:

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NOTICE OF APPEAL IN A CIVIL CASE
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APPEAL FROM CHARLESTON COUNTY
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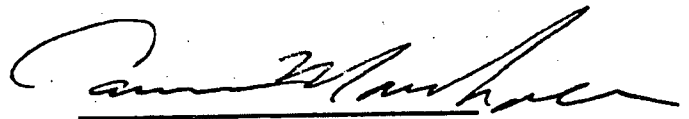
Phillip DeClemente,.....Appellant,
v.

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

NOTICE OF APPEAL

Phillip DeClemente appeals the Judgment of the Honorable Deadra L. Jefferson dated December 21, 2017 and the Order Denying Amendment of Judgment dated January 26, 2018. Appellant received written notice of entry of the Order Denying Amendment of Judgment on February 2, 2018.

March 2, 2018



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1 State of South Carolina

2 County of Charleston

In Common Pleas Court

3

4 Assistive Technology Medical
Equipment Services, LLC,

5

Plaintiff,

6

V.

2011-CP-10-8011

7

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

10

Defendants.

11

12

13

30(b)(6) Deposition of: Assistive Technology
Medical Equipment Services, LLC (Murrell Smith)

14

Location: 1422 Laurel Street
Columbia, South Carolina

15

16

Date: Wednesday, October 31, 2012

17

Time: 10:35 a.m. - 1:34 p.m.

18

Court Reporter: Kathleen M. Hagood

19

20

The 30(b)(6) deposition is taken pursuant to

21

notice and/or agreement, in the above-entitled

22

cause pending in the above-named court and

23

pursuant to the South Carolina Rules of Civil

24

Procedure.

25

1 any professional accounting services for it?

2 A Well, today I realize that indirectly
3 we did, and directly -- let me explain to you, if
4 I could, the -- the -- how this situation went is
5 we bought -- ATMES was formed as an LLC. And so
6 we bought ATME--- we formed ATMES and then
7 purchased from the Connelly -- whichever -- the
8 Estate of Connelly -- I -- I don't know who it
9 was. Whoever owned it. Either -- Dorothy
10 Connelly's estate I believe is who we purchased it
11 from. It's whatever's in the paperwork. We
12 bought the company from them, and so in there you
13 had -- in the way ATMES was set up is you had some
14 holding companies. We -- the -- the business in
15 Sumter is called Reliable Medical Equipment of
16 South Carolina, LLC. And so --

17 Q Reliable what?

18 A Medical Equipment --

19 Q Thank you.

20 A -- of Sumter, LL--- I mean, of South
21 Carolina, LLC. Sorry. And so that was already in
22 a -- in business, and then you had the Abacare
23 Home Medical, Inc., which was already in business,
24 which the Connellys and Phillip DeClemente owned.
25 So then, you know, the merger happened and so the

1 way we were gonna structure this was we were going
2 to open up under ATMES and -- and keep the Abacare
3 and keep the Reliable Medical, 'cause you have to
4 do that 'cause you've got provider numbers. And
5 those are -- Medicare issues you a provider number
6 and Medicaid issues you a provider number. So if
7 -- if you change entities, you've got to -- you
8 lose your Medicare number and you've got to start
9 all over again. So ATMES owned those -- the --
10 owned those entities.

11 And -- and so as it relates to
12 Mr. Selander and the law f--- and the law firm --
13 the CPA firm of Hood and Selander, they did --
14 they were engaged by -- by Abacare Home Medical.
15 And the reason they were engaged by Abacare Home
16 Medical is Mr. Selander, at the end -- he was
17 their accountant in the beginning. And at the --
18 after we purchased this, we had an accountant --
19 Art Bradham was our CPA. And so at that point we
20 had to file tax returns, so what my understanding
21 is -- and you'll talk to Mr. Bradham to get -- be
22 more specific about it -- is that Selander ended
23 up filing the tax returns for Abacare Home
24 Medical, Inc. in 2008. And so that, in turn, was
25 when we -- he filed those in -- in the 2009 before

1 the sales tax issue?

2 A I -- I think I did, 'cause I remember
3 dealing with that issue, 'cause at that time there
4 was a sales tax issue with durable medical
5 equipment sales. There was an Administrative Law
6 Court case in which they had made certain exem---
7 they said they were exempt from sales taxes, and
8 that was on appeal to the Supreme Court and the
9 Supreme Court ended up reversing it. And I
10 remember having discussions with DeClemente and
11 Cuce saying, folks, we have got to pay sales taxes
12 and so I just want this to be perfectly clear --
13 that we all understand that sales taxes have been
14 paid and that we're gonna pay them going forward
15 on what the Department of Revenue says, not on
16 what you think. 'Cause some companies just
17 stopped paying sales taxes completely. And so
18 both DeClemente and Cuce assured me that sales
19 taxes were being paid appropriately and that we
20 were gonna do that moving forward too.

21 Q All right. So they assured you that
22 the sales tax were being paid appropriately?

23 A That's what they told me.

24 Q All right. Did they tell you who the
25 CPA was for Abacare?

1 subsequent --

2 Q Okay.

3 A -- so I -- I may, may not have. I just
4 can't tell you.

5 Q Does Assistive Technology contend that
6 Hood and Selander had knowledge of any
7 indebtedness for unpaid taxes of Abacare to the
8 South Carolina Department of Revenue?

9 A I think -- yes. I think we do.

10 Q All right. What knowledge do you
11 contend that Se--- Hood and Selander had that
12 there was actually unpaid indebtedness?

13 A Well, I don't think there was actual
14 unde~~b~~tedness (sic) -- indebtedness at that point,
15 I think that they were underreporting sales taxes
16 at Abacare. And, you know, if you went back and
17 you looked at what they were doing -- and my
18 understanding is that Mr. Selander was the one
19 filling out the sales tax returns and -- and
20 sending them to the Department of Revenue. And if
21 I recall correctly -- and, you know, I have not
22 looked at this since we went through this
23 situation whenever we reported to the DO--- to DOR
24 about this, but I believe that Abacare was
25 substantially underreporting the in--- the income

1 of that company on their sales tax returns. 'Cause
2 I remember having a conversation with
3 Mr. Applegate saying, Sam, it's -- this is not --
4 you know, there was a question about what was
5 deductible and not deductible, per this -- per the
6 statute the Supreme Court resolved. And I said
7 this isn't about taking deductions that were
8 subsequently not allowed, this is in my opinion
9 underreporting income and -- and, you know, I have
10 a real concern about that. And so, you know, it
11 -- to me, Mr. Selander would see the income that
12 was coming in to Abacare and then seeing the
13 income that he was reporting to the DOR in sales
14 tax or in--- you know, revenue for the company to
15 base sales tax on were completely different.

16 And then let me add one more thing too,
17 is -- in -- and I can't remember the months, but
18 there was one month when we received a call from
19 the Department of Revenue after we bought the
20 company in 2009, and a sales tax return was not
21 filed by Abacare, Inc. prior to our ownership.
22 And so my partner, Jeff Reed obviously called Sam
23 Applegate and Sam Applegate referred him over to
24 David Selander. And so he went and -- either he
25 talked to Selander or he visited him and -- and

1 Se--- and David Selander told him -- said, I knew
2 it, I knew it, I told them they were
3 underreporting this. Or something to that effect;
4 you'd have to ask him more about that. But, you
5 know, Se--- Mr. Selander acknowledged then that
6 they were underreporting income to him. That's
7 what he relayed to me, so it's hearsay, but...

8 Q Now, who -- who related this to you?

9 A Jeff Reed, the --

10 Q Okay.

11 A -- co-owner.

12 Q All right. And Jeff Reed tells you
13 that -- that Mr. Selander said, I knew they were
14 underreporting?

15 A I told them, or something to that
16 effect. Yes, sir. 'Cause I asked him -- we
17 talked about that this morning on the way over
18 here, I just wanted to confirm that was the
19 conversation. And I think the -- Mr. Selander
20 prepared that report that was not filed and --
21 well, let me back up. It -- what Mr. Reed told --
22 and -- and of course, you know, I'm under oath, so
23 I want to make sure you -- this is hearsay, so I
24 -- you know, what I'm saying. But I think what
25 Mr. Reed -- if I remember correctly what he was

1 shape of that company.

2 Q All right. With regard to any
3 underpaid or unpaid sales tax liability, how far
4 back did that underpayment or nonpayment run?

5 A It was from three years notice of
6 audit. It's in the sales tax forms. Mr. Selander
7 should have a copy of that. I'd have to look at
8 it, but they -- they could go back three years and
9 that's what they did. For -- I don't know when it
10 started, but it would have gone -- I would say it
11 was back to 2006, but I'm not sure.

12 Q All right. You think it's 2006, 2007
13 and 2008?

14 A Maybe it's 2007, '08 and '09 -- and
15 some of '09. I -- I can't remember. It's -- it's
16 in there.

17 Q Well, if it -- if it's 2009, that would
18 have been after the sale occurred, though?

19 A Yeah. Yeah. The audit went through
20 after the sale occurred. No. Let me back up. I
21 -- I don't know what it did. It's -- I -- it's
22 been so long since I looked at that. But I think
23 some of the audits -- some of the debt was
24 afterwards too, because some of it was for
25 deductions that the Supreme Court had said was not

1 proper deduction, so, you know, some of this was
2 for that too. They -- I can't remember what
3 things they came back and said they weren't
4 deducted that we had historically taken.

5 Q Okay. In your complaint you allege
6 that the purchase price of the stock paid by the
7 Plaintiff, ATMES, was based on a host of
8 considerations, including the corporation's
9 profitability, its assets and its liabilities.

10 A Correct.

11 Q What other considerations went into the
12 purchase price besides profitability, assets and
13 liabilities?

14 A I would presume goodwill, but, you
15 know, again, I'm -- I defer to the CPAs. That's
16 why I hire them, to look at those valuations.

17 Q Well, it says that the purchase price
18 of the -- for the stock, paid by Plaintiff, was
19 based on a host of considerations. And I'm just
20 trying to find out from you what those host of
21 considerations were.

22 A I -- I -- I don't know. I -- I -- I
23 don't know the answer. And of course I didn't
24 draft that complaint and...

25 Q How do you maintain -- you, being

1 A Other than the sales tax, no. Not to
2 my knowledge.

3 Q Do you have any knowledge as to whether
4 or not Abacare was reporting its sales tax on the
5 basis that was usual and customary in this medical
6 field?

7 A I -- I would say they didn't -- they
8 weren't, because when we realized that there was
9 -- after that Supreme Court case came out, in --
10 before we even -- and I think we self-reported,
11 but, you know, I can't remember how that happened.
12 But before this, we went -- and once the case came
13 out, we went and looked -- there was a computer
14 program that Abacare used at that point that
15 tracked their sales. And in the medical equipment
16 business everything is computerized 'cause you
17 submit electronically your bills. And so -- and
18 we can -- I -- I think it was called QS/1 or
19 something like that, is what they use. That's not
20 the same program we use. So when we went back
21 into QS/1, the sales that were recorded in there
22 were completely different from what was reported
23 to the South Carolina Department of Revenue.
24 'Cause I remember calling up Sam Applegate and
25 saying, that's the problem I have, Sam; this isn't

1 y'all not following the -- following the
2 deductions and taking deductions you shouldn't, it
3 looks like y'all just, for all practical purposes,
4 were misrepresenting the income to the Department
5 of Revenue, and I said, you know, I've got some
6 concerns about that. And that's when he said,
7 hold on, hold on, hold on, and then he said, I'll
8 call my clients and we'll be back in touch. And
9 then that's when they -- and I don't know how all
10 that went, because somehow Selander and/or
11 Applegate engaged some other CPA firm to come up
12 with these numbers. And I think if you look at
13 the amended returns and you look at the returns
14 that were filed, you would find them to be
15 different.

16 Q Okay. All right. So -- following up,
17 though, you paid -- you, being ATMES -- 157,000
18 dollars approximately --

19 A Right.

20 Q -- to the South Carolina Department of
21 Revenue?

22 A Correct.

23 Q Having paid that amount to the South
24 Carolina Department of Revenue, did it reduce the
25 taxable income of ATMES?

1 reviewed before purchasing Abacare?

2 A I cannot answer. I can't say what -- I
3 just don't recall four-and-a-half years ago --

4 Q Right.

5 A -- what I -- what I reviewed and what I
6 didn't. I know I reviewed information. I just
7 don't know what I reviewed.

8 Q And as we sit here today, you can't
9 identify a single document that you reviewed
10 before the purchase of Abacare?

11 A No. No.

12 Q Okay. Do you know who provided
13 information to you?

14 A It would have been Art Bradham.

15 Q Did you receive information from any
16 other sources?

17 A I -- I -- I can--- I can't recall. I
18 don't know.

19 Q And if I asked you when you received
20 it, you wouldn't know that?

21 A That's right.

22 Q Okay. How did the Abacare opportunity
23 first come to your attention?

24 A Through Kim Cuce.

25 Q Okay. What did she tell you and when?

1 A I want to say spring/summer of '08,
2 that you have to get into -- the competitive
3 bidding with -- of -- Medicare was coming into
4 effect and that the trend in the industry was that
5 we needed to be a -- have a -- more than one
6 place. You needed to have a -- more of a
7 statewide presence, 'cause that was gonna be the
8 way that the medical equipment company industry
9 went, and that there was an opportunity to merge
10 with another company in Charleston who was of
11 similar size that, it was represented to me --
12 that -- that would be able to grow from there.

13 Q Okay. So -- and can I infer from that
14 that you had had a durable medical equipment
15 business before?

16 A Right. We had Reliable Medical
17 Equipment of South Carolina.

18 Q Tell me about Reliable Medical Care
19 (sic) of South Carolina.

20 A It was a durable medical equipment
21 company that we started, I want to say, 1998.
22 Jeff Reed and I.

23 Q 1998?

24 A Yeah.

25 Q So you had been in the business nine

1 was -- it had to do with some Medicare rules in
2 conjunction with State rules and whether med---
3 certain medical equipment was exempt from sales
4 tax. Moreover, there was a question of, if you
5 pay something through Medicare and/or Medicaid and
6 that's where you receive your reimbursement,
7 whether that was subject to sales tax. And the
8 Administrative Law Court -- and I have to look at
9 the order -- basically ruled in favor of what the
10 industry did. They have a -- the industry's
11 called South Carolina MESA -- SC MESA -- Medical
12 Equipment Supplier Association. They filed a suit
13 against the South Carolina Department of Revenue,
14 that went through the court, and I can't remember
15 which Administrative Law judge ruled in -- in SC
16 MESA's favor. And then the -- the -- the Supreme
17 Court overturned that, maybe about eighteen months
18 -- two years later.

19 Q Okay. So what I'm trying to
20 understand, I guess at this point is, is that the
21 100,000 dollar sales tax issue or is that a
22 separate issue?

23 A That's a separate issue.

24 Q So they're two separate issues
25 underway?

1 A Yeah.

2 Q Okay.

3 A And I don't know -- I -- I don't know
4 if that could have been an issue in their
5 calculat--- in Abacare's calculation of the sales
6 tax, 'cause you -- you know, when -- let me
7 explain to you. When I -- when I had this
8 conversation with Applegate, what I was telling
9 him is that there is a question as to the
10 deductibility -- whether you deducted -- every
11 company was doing it differently. I mean, a bunch
12 of companies were just saying once that
13 Administrative Law Court ruling came out, we're
14 not paying sales tax on Medicare and Medicaid
15 receipts. And then some companies were saying
16 oxygen's -- you know, I'm just using examples --
17 oxygen's -- is -- is -- is not subject to sales
18 tax, or some of this isn't. And finally the
19 Supreme Court came out and clarified it all, what
20 was subject to sales tax, what wasn't subject to
21 sales tax.

22 So I don't know what they -- what David
23 Selander and -- and Abacare were claiming. It
24 just looked for me, at some point when I looked at
25 the returns from the computers what they collected

1 that month and then what they reported to the
2 South Carolina Department of Revenue, were two
3 different numbers.

4 Q And as we sit here today, it's your
5 impression that those are a distinct issue;
6 deductibility in Medicare versus just you've got
7 to pay taxes on your sales. You're not sure of
8 any overlap there?

9 A There may be overlap.

10 Q Okay.

11 A I -- I'm not a hundred percent sure. I
12 -- I don't know -- I -- I don't know how -- you
13 know, I never got the explanation as to how they
14 -- why and how they were calculating the sales tax
15 returns, because upon me discovering -- once I --
16 once the Supreme Court ruling came out, obviously
17 we had to go back and look at our sales tax
18 returns. And so when we went back and looked at
19 it, that's when I called Sam Applegate and said,
20 Sam, you know, we've got some problems here. And
21 Sam -- and we went and had this discussion and
22 that's what I think I told -- said earlier. I
23 said, Sam, this isn't -- you know, there's
24 questions in every durable medical equipment
25 company. Even the one I own, we had an

1 underreporting of sales tax liability, because we
2 were taking deductions. But I said, this isn't
3 the underreporting because you were claiming
4 things that we all thought was deductible, it
5 looks like to me that y'all have underreported
6 what your income was to the South Carolina
7 Department of Revenue and honestly, Sam, I'm
8 worried about some fraud issues.

9 Q Uh-huh.

10 A And so, you know -- and that's when he
11 said, whoa, whoa, whoa, whoa, let's -- let's just
12 stop right there, let me talk to my clients. And
13 of course I'm paraphrasing it. And then Sam
14 called me back later and said, just give me the --
15 get me the documents, we will file them into tax
16 returns, we want to file them. And so that --
17 they all went to him.

18 Q Okay. Thanks for that clarification.
19 Just before I forget it, we talked a little bit
20 about that July 24, 2007 set of minutes.

21 A Uh-huh.

22 Q Do you know what I'm talking about?

23 A Yeah.

24 Q And there was a -- apparently -- I'll
25 see if I can find that real fast. And there's a

1 the complaint. What was your due diligence
2 comprised of?

3 A Of hiring Art Bradham.

4 Q Okay. Is that it, in total?

5 A And having the attorneys communicate, I
6 would presume. Yeah.

7 Q Anything else?

8 A Not that I'm aware of.

9 Q Okay.

10 A Now -- and let me back up and tell you
11 this also, is Kim Cuce was involved in a lot of
12 the -- also in the negotiations at this point too.

13 Q Uh-huh.

14 A But she's no longer with us, so I can't
15 obviously produce her.

16 Q Got it. Was the 25 percent to
17 DeClemente, 25 percent to Reed, 25 percent to you
18 and 25 percent to Cuce -- was that an ownership of
19 the new company that was determined prior to the
20 purchase of Abacare?

21 A Correct.

22 Q Okay. And that's why you all four
23 signed off as purchasers --

24 A Correct.

25 Q -- on the contract? Okay. Do you know

1 conditions and we had to make capital
2 contributions to survive through this. And she
3 could not make capital contributions and so she
4 was offered the forgivance (sic) for -- we -- I
5 think we paid her like 15,000 dollars and, you
6 know, forgave her negative capital count, and that
7 was the end of -- that was the end of our
8 relationship.

9 Q Okay. Was there any other reason,
10 other than the capital cause, that Kim Cuce is no
11 longer a member --

12 A Well, I mean, because of --

13 Q -- or an owner of the company?

14 A Because of -- in my opinion, you know,
15 the way she was -- she was -- when we set up the
16 corporate structure, she and DeClemente were
17 supposed to be the operating partners, and they
18 ended up wrecking the business. And they -- they
19 each, in their own individual way, in addition to
20 what's happening with this sales tax, I mean, this
21 just -- you know, it's one thing after another
22 with them. I mean -- you know, they -- the two of
23 them didn't renew our -- our Medicare billing
24 number when they were supposed to, and so for like
25 three or four months we couldn't bill Medicare.

1 Q Yeah.

2 A And Abacare -- I mean, it just one --
3 it was just one thing after another. You know,
4 DeClemente got put out of the business real early.
5 I mean -- you know, we had a -- we had to -- we
6 had to get rid of him, 'cause he was threatening.
7 And then we found out that the two of them were
8 sleeping together and they didn't bother to tell
9 us that. And, you know, I had specifically asked
10 Kim Cuce whether they were doing that. And so,
11 then, we -- the -- Synergy or something like that
12 -- some human resources thing that -- I think both
13 of them were smoking marijuana. I mean, it's just
14 -- it was like a soap opera, so we disassociated
15 ourselves from those two people.

16 Q Okay. Did Mr. Reed do any separate due
17 diligence that you know of?

18 A You'd have to ask him that.

19 Q Would his -- was the information also
20 fed from Bradham -- is it Bradham or Bradtham?

21 A I think Bradham.

22 Q Bradham? Okay. I got it. That's what
23 I thought.

24 A I hope so. I'm --

25 Q All right. So was the information that

In The Matter Of:

*ASSISTIVE TECHNOLOGY MEDICAL EQUIPMENT SERVICES, LLC v.
DONNA C. CASH, ET AL*

ART BRADHAM, CPA

October 18, 2013

Rayl Reporting Service

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Original File BRADHAM.prn

Min-U-Script® with Word Index

Page 5 EXHIBITS 1. Opinion Letter dated 7-14-2008 From Burkett Burkett & Burkett CPAs 16 2. Email to Connelly and DeClemente from Selander dated 7-31-07 with Shareholder Minutes from 7-24-07.....28 3. Abacare Company document 37 4. Abacare Home Medical, Inc. Recap of SCDOR Exam Results 48 5. Abacare Home Medical, Inc., Recap of Sales tax results.....49 6. Stock Purchase and Assignment Agreement..... 101 7. Letter to Rodger Watson from Bradham Dated 12-9-09 171 8. Engagement Letter from Art Bradham Dated 10-19-09..... 175 9. Valuation of the Common Stock of Abacare Home Medical, Inc. dated 7-14-08 199 10. Income Tax Return for 2008 for Abacare Home Medical, Inc..... 199	Page 7 STIPULATIONS Pursuant to Notice and/or consent of the parties, the deposition hereon captioned was conducted at the time and place mentioned before Debbie Rayl, Court Reporter and Notary Public in and for the State of South Carolina. The deposition was taken for use in accordance with the South Carolina Rules of Civil Procedure unless herein stipulated and agreed to by the parties. It is stipulated by and between counsel for the respective parties that all objections are reserved until the time of trial save as to the form of the question. The reading and signing of the deposition by the deponent was expressly RESERVED by the deponent.
Page 6 EXHIBITS (CONTINUED) 11. Affidavit of Art Bradham 200 12. Email string from Selander to Bradham Dated 3-11-09 200 13. Email to Connelly and DeClemente From Selander dated 7-31-07 with attached Minutes of Shareholder Meeting of Abacare Home Medical 200 14. Letter to G. Murrell Smith, Jr. from Art Bradham in re: ATMES v Phillip DeClemente, et al..... 201	Page 8 PROCEEDINGS 1 Whereupon, 2 (ART BRADHAM, CPA, having been duly 3 sworn, testified as follows): 4 5 ++++++ 6 EXAMINATION 7 BY MR. HOWSER: 8 Q. Would you give us your full name, 9 please? 10 A. My name is Arthur Falk Bradham, B-R- 11 A-D-H-A-M. 12 Q. Mr. Bradham, my name is Dave Howser 13 and I represent one of the defendants in this 14 case, Hood and Selander, who are CPAs, and we're 15 going to be asking you some questions. I don't 16 know whether you've ever given a deposition 17 before or not? 18 A. I have. 19 Q. The rules of court nevertheless 20 require me to give you certain instructions. 21 If I should ask a question that you 22 do not understand, you should tell me that and I 23 will rephrase or restate the question, rather 24 than addressing that to someone else. 25 A. I understand.

Page 25

1 associated with a compilation -- even a
2 compilation statement that made those sort of
3 statements. So the answer is, no, I'm not going
4 to throw out my judgment, my experience just
5 because it's a compilation.
6 Q. All right. Let me modify it then and
7 say, is it true that in preparing a compilation,
8 you rely primarily on the representations of
9 management?
10 A. I'll agree with that statement.
11 Q. Did you ever have any discussions
12 about the report prepared by Burkett, Burkett and
13 Burkett with anyone at Burkett, Burkett and
14 Burkett?
15 A. No, sir.
16 Q. Let's turn for a minute to your
17 affidavit and that affidavit is -- I'm not going
18 to get it marked, but it's dated -- it says
19 executed the 4th day of August 2011, and the
20 notary is -- says it was sworn to and subscribed
21 before the notary on the 26th of September 2011.
22 A. I don't have that copy, but that
23 appears to be my signature.
24 Q. Your affidavit states that defendants
25 knew that Abacare Home Medical, Inc. had

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1 overstated their sales as a result of
2 understating their sales tax and was indebted to
3 the South Carolina Department of Revenue.
4 A. Could you repeat that?
5 Q. I'll point that out to you.
6 A. Thank you.
7 Q. If you look on Page 2 at Paragraph 8,
8 beginning on the second sentence.
9 A. Okay.
10 Q. It begins, "For example."
11 A. Yes, sir.
12 Q. When you say defendants, what
13 defendants are you talking about?
14 A. To the information that I have and my
15 knowledge and belief, all of the owners of
16 Abacare and Mr. Selander -- is it Selander, am I
17 pronouncing that right?
18 Q. That's the way I say it.
19 A. And Mr. Selander were aware that they
20 had a sales tax under-reporting issue and that it
21 had not been addressed.
22 Q. And so, that -- the basis for your
23 statement -- what is the basis for that
24 statement?
25 A. May I present this?

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1 Q. Sure.
2 A. These are minutes that were prepared
3 on Hood and Selander letterhead for reasons I
4 can't comprehend, and you'll notice at Page 3,
5 which I marked there, and if you read that
6 section, Mr. Selander has been crystal clear in
7 telling ownership and management that they are
8 underreporting sales tax, that they're using the
9 wrong method of calculation. There's -- in
10 other words, there's no -- absolutely no tax
11 authority whatsoever to support the method
12 they're using -- purportedly using to report
13 sales tax and that their sales tax are
14 understated.
15

MR. HOWSER:

Okay, maybe
16 we could get some copies made.
17

MR. SMITH: That's in
18 your packet. That's in the packet everybody has.

MR. HOWSER: Let's get
20 this marked as Exhibit Number 2.

+++++
21
22 (EMAIL FROM SELANDER
23 TO CONNELLY AND
24 DECLEMENTE DATED
25 7-31-07 WITH

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1 MINUTES OF THE
2 SHAREHOLDERS MEETING
3 DATED 7-24-07
4 WAS MARKED FOR
5 IDENTIFICATION AS
6 DEPOSITION EXHIBIT
7 NUMBER 2)
8 +++++

9 BY MR. HOWSER:

10 Q. I have marked as Exhibit Number 2 the
11 shareholder meeting of July 24, 2007, correct?

12 A. Yes, sir.

13 Q. Have you reviewed any other minutes
14 of Abacare in connection with this transaction?

15 A. No, sir.

16 Q. Now, let's talk for a moment about
17 this transaction. What percentage of stock in
18 Abacare did Dorothy Connelly own?

19 A. I do not know.

20 Q. What percentage of stock in Abacare
21 did James B. Connelly or his estate own?

22 A. I do not know.

23 Q. Do you know what percentage of stock
24 in Abacare Mr. DeClemente owned?

25 A. It is my understanding and

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1 and Murrell Smith.
2 Q. Do you still perform accounting work
3 or tax work for ATMES?
4 A. Yes, sir.
5 Q. Now, what is your understanding of
6 the nature of the business of Abacare?
7 A. They are what's called a DME, Durable
8 Medical Equipment. They provide -- it can be --
9 range from as simple as wound care, I think, to
10 as complicated as a wheelchair -- a \$25,000
11 wheelchair. It's a fairly sophisticated
12 business, prosthetics.
13 MR. HOWSER: Let me
14 show you a document, which we will mark as
15 Exhibit Number 3.
16 +++++
17 (EXCERPT FROM THE
18 BURKETT, BURKETT
19 AND BURKETT REPORT
20 WAS MARKED FOR
21 IDENTIFICATION AS
22 DEPOSITION EXHIBIT
23 NUMBER 3)
24 +++++
25 BY MR. HOWSER:

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1 Q. This is shown as Page 3 of 55 of the
2 Burkett, Burkett and Burkett report.
3 A. Page 6, I believe you mean.
4 Q. Yes. What did I say, Page 5? Page
5 6, I'm sorry, of 55.
6 A. All right.
7 Q. Does this accurately, insofar as you
8 know, describe the nature of Abacare?
9 A. Yes, sir.
10 Q. To your knowledge, did Abacare sell
11 any of the following medical products, CPAP
12 machines?
13 A. I don't know, sir.
14 Q. Do you know what a CPAP machine is?
15 A. I do.
16 Q. Did it sell bilevel positive airway
17 pressure machines or BiPAP machines?
18 A. I do not know, sir.
19 Q. Did it sell ventilator devices?
20 A. I do not know, sir.
21 Q. Did it sell nasal intermediate --
22 excuse me, nasal intermittent positive pressure
23 ventilation devices?
24 A. I do not know, sir.
25 Q. Did it sell nebulizer devices?

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1 A. I've heard all of those terms in
2 connection with these businesses, but I wouldn't
3 know one if it -- so, no, sir.
4 Q. Okay. Did it sell certain
5 nutritional formulas?
6 A. I don't know, sir.
7 Q. What was Reliable Medical Equipment
8 of South Carolina, LLC?
9 A. Very similar. We call them DMEs,
10 Durable Medical Equipment.
11 Q. Who are the members of Reliable
12 Medical Equipment of South Carolina, LLC?
13 A. I'm going to struggle with the answer
14 to that because I think that ATMES, LLC is the
15 sole owner of Reliable Medical.
16 Q. Do you perform accounting services
17 for Reliable Medical?
18 A. Yes, sir.
19 Q. What type of services?
20 A. We would do accounting and tax
21 returns.
22 Q. And when you say accounting, would
23 that include preparing financial statements?
24 A. On Reliable, I'm not sure whether a
25 financial statement is prepared. I know we

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1 prepare financial statements on ATMES.
2 Q. And with regard to the financial
3 statements on ATMES, do you do audited financial
4 statements or do you do compilations?
5 A. No, sir, we do compilations, I
6 believe, quarterly or periodically as required by
7 the bank, and then we do what's called a reviewed
8 statement, which is an intermediary statement
9 between a compilation and audit.
10 Q. But you do not audit -- prepare audit
11 financial statements for ATMES?
12 A. We do not audit.
13 Q. Do you audit for other clients? That
14 is, do you perform auditing work?
15 A. Yes, sir.
16 Q. Did Reliable Medical exist prior to
17 ATMES?
18 A. Yes, sir.
19 Q. Did Reliable Medical sell any of the
20 products that I mentioned with regard to Abacare;
21 that is, the CPAP machine or the BiPAP machine or
22 the ventilator devices?
23 A. It's my understanding that they did;
24 yes, sir.
25 Q. Let me show you two documents that I

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1 believe come from your file material, and ask you
2 -- and I'm sorry, I only have one of these
3 because of its size.
4 MR. SMITH: Okay.
5 THE WITNESS: When you
6 say, my file material, what do you mean by that
7 exactly because this is not a document that we
8 would have ever prepared.
9 BY MR. HOWSER:
10 Q. Is this not your document?
11 A. No, sir. That looks to be an
12 internally generated document from one of the
13 companies. If you're willing to ask that young
14 lady in the corner, she could identify.
15 Q. That's all right. She's not being
16 deposed.
17 A. Okay. That didn't -- to my
18 knowledge, that didn't come from me because I --
19 that's not something we would have prepared.
20 BY MR. HOWSER:
21 Q. Okay. That's fine.
22 A. Can I expand on that? There was a
23 huge file related to the South Carolina
24 Department of Revenue's examination of both of
25 these companies. It's possible that that was

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1 part of the South Carolina Department of
2 Revenue's report, but that doesn't mean that I
3 prepared it.
4 Q. All right. Well, would you ever have
5 had access to it?
6 A. It's possible; yes, sir.
7 Q. Now, let me direct your attention now
8 to ATMES. Did ATMES or does ATMES sell the CPAP
9 machines?
10 A. It is my understanding that they do
11 or did.
12 Q. BiPAP machines?
13 A. It's my understanding they did or do.
14 Q. Ventilator devices?
15 A. Same answer.
16 Q. Nasal intermittent positive pressure
17 ventilation devices?
18 A. (Shrugs) I'm sorry to shrug, but
19 that's literally, I don't know.
20 Q. Nebulator devices?
21 A. I do not know.
22 Q. Nutritional formulas?
23 A. I do not know.
24 Q. Let me show you a document entitled,
25 Audit.10/2006 through 9/2009, and ask if that's

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1 some document that you prepared?
2 A. It's possible. During the
3 examination from South Carolina Department of
4 Revenue, we worked with Ms. Martha Jo Smith and
5 her staff extensively, and so, whether this came
6 from my office, this looks like one of her
7 documents, but this is -- this is certainly not
8 foreign to me.
9 Q. Well, let's discuss this. If it's
10 not foreign, do you understand what it is?
11 A. It appears to be a listing of what
12 gross sales were and what sales tax -- what was
13 taxable and the tax paid. I'm assuming from
14 looking at this that this is one of -- larger
15 document. This is one page, an intermediate step
16 in determining what was owed on sales tax as a
17 result of the examination.
18 Q. Okay. If we look, it has gross sales
19 from October 2006 through -- it looks like June
20 of '09 because there's nothing for July, August
21 or September, correct?
22 A. Yes, sir. Now, I must point out a
23 few deficiencies in this document. It has no
24 name. It has no date of preparation. I don't
25 know what company this is. I don't know who

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1 prepared it, and I don't know what the sources of
2 this information are.
3 Q. At any rate, it shows gross sales and
4 then next to that it shows what?
5 A. Well, the columns are gross sales,
6 respiratory, misspelled, prosthetics, total, net
7 taxable and paid.
8 Q. And if you look under respiratory,
9 that's misspelled, will you accept that these
10 items -- I think there's seven of them, total
11 \$551,824.38?
12 A. Mr. Howser, I'll accept that your
13 math is correct, but there's nothing on this
14 paper that shows that number.
15 Q. I'll agree with that. And if you
16 would like to add it up, I'll be happy for you to
17 add it up.
18 A. Okay. I don't have any reason to
19 doubt you, but it appears that that looks like
20 about the right number.
21 Q. Do you know what these numbers would
22 represent?
23 A. I have -- I don't know what company
24 this is. I don't know who prepared this document.
25 I don't know where it came from. I have no

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1 knowledge of this document.
2 Q. Give me just one second.
3 A. Okay. Looks like something you just
4 passed that's in the right area. That's the
5 sales tax audit right there.
6 Q. Well, I can't put my hands on it, but
7 it came out of this material, but anyway, rather
8 than ---
9 Prior to June 2009, how did Reliable
10 Medical treat the sale of respiratory products
11 for sales tax purposes?
12 A. I do not know.
13 Q. From November 2008 to June 24, 2009,
14 how did Assistive Technology treat the sale of
15 respiratory products for sales tax purposes?
16 A. I do not know.
17 Q. At least in a file that I have, is
18 South Carolina Revenue ruling 10. or 10-2, a copy
19 of which I will show you ---
20 MR. HOWSER: And I'm
21 sorry I don't have more than two copies.
22 BY MR. HOWSER:
23 Q. Are you familiar with this Revenue
24 ruling?
25 A. I've read it. It's been a long time;

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1 yes, sir.
2 Q. Was Reliable treating the reporting
3 of sales tax consistent with South Carolina
4 Revenue ruling 10.2 prior to June 24, 2009?
5 A. I do not know.
6 Q. Was Assistive Technology treating the
7 reporting of its sales tax consistent with
8 Revenue ruling 10.2 prior to June 24, 2009?
9 A. I do not know.
10 Q. Was Abacare reporting its sales tax
11 consistent with Revenue ruling 10.2?
12 A. I still don't know.
13 Q. What is your understanding of what
14 Revenue ruling 10. or 10-2 addressed?
15 A. I'm simply not prepared to offer an
16 opinion on that. I don't know.
17 Q. And dealing with the South Carolina
18 Department of Revenue over the tax liability
19 arising from Abacare, did you consult Revenue
20 ruling 10.2 or 10-2?
21 A. I did not represent Abacare Home
22 Medical for their sales tax examination.
23 Q. All right. How about Assistive
24 Technology?
25 A. I did.

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1 Q. Did you rely on Revenue 10. or 10-2?
2 A. I simply do not remember.
3 Q. Do you know whether or not Revenue
4 ruling 10-2 gave companies such as Abacare,
5 ATMES, Reliable favorable treatment for sales tax
6 liability on the sale of respiratory equipment?
7 A. I do not know, I'm sorry.
8 Q. Do you know if ATMES, up until June
9 24, 2009 -- in just a minute I'll get to the
10 significance of that date, that is, ATMES till
11 that date, Reliable Medical, to that date, was
12 treating the sale of respiratory equipment the
13 same way that Abacare had treated it prior to the
14 purchase of this stock?
15 A. I do not know the answer to that.
16 Mr. Howser, you have to understand, I didn't
17 prepare the sales tax returns for ATMES or
18 Abacare.
19 Q. You were involved with the Department
20 of Revenue in the assessment of taxes and sales
21 tax interest and penalties ---
22 A. For the ---
23 Q. --- for the surviving entity?
24 A. Yes, sir.
25 Q. And Reliable?

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1 A. For the ATMES Reliable side of the
2 house, it was my understanding that the -- prior
3 to the purchase, Abacare folks wanted to hire
4 their own specialized people to handle that.
5 Q. All right. Let me show you two
6 documents and ask you if this is -- they're not
7 identical, but maybe address the similar subject
8 matter.
9 The first one is called Abacare Home
10 Medical, Inc. recap of SCDOR exam results. Are
11 you familiar with that?
12 A. I'm assuming that that -- that
13 appears to be a document that I prepared.
14 Whether those are where it ended up or not, I
15 can't -- I have no idea.
16 MR. HOWSER: Let's get
17 that marked as -- which is Exhibit 4.
18 ++++++
19 (ABACARE HOME MEDICAL
20 RECAP OF SCDOR
21 EXAM RESULTS WAS
22 MARKED FOR
23 IDENTIFICATION AS
24 DEPOSITION EXHIBIT
25 NUMBER 4)

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1 ++++++

2 BY MR. HOWSER:

3 Q. While we're at it, let me show you

4 another document that appears to be somewhat

5 similar, although the figures differ slightly.

6 Are you familiar with that document?

7 A. That appears to be something that I

8 prepared; yes, sir.

9 MR. HOWSER: Let's get that

10 marked as Exhibit Number 5.

11 ++++++

12 (ABACARE HOME MEDICAL,

13 INC., RECAP OF

14 SALES TAX RESULTS

15 WAS MARKED FOR

16 IDENTIFICATION AS

17 DEPOSITION EXHIBIT

18 NUMBER 5)

19 ++++++

20 BY MR. HOWSER:

21 Q. All right. Looking at Exhibit Number

22 4, it says, total per exam report, tax \$142,316;

23 interest \$17,611; for a total of \$159,978,

24 correct?

25 A. That's what it says; yes, sir.

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1 Q. And then it says, less amounts owed

2 by ATMES Group, amounts from 11/2008 to 12/2009.

3 A. Yes, sir, I see ---

4 Q. Do you see that -- I believe that

5 total sum, what, \$50,000 and some odd dollars?

6 A. Close to sixty; yes, sir.

7 Q. What is the reason that ATMES Group

8 owed this amount?

9 A. When the auditors came in, there were

10 several issues that were controversy. For

11 example, they charged ATMES for -- they had a

12 software service and they considered that to be

13 use tax, and none of us had ever heard of that

14 application and that was a substantial amount of

15 money.

16 Second, they had customers that one

17 might think would normally be exempt, but they

18 somehow found that they were not exempt according

19 to their regulations, et cetera.

20 Third, there were errors. Flat out,

21 this should have been taxable and tax was not

22 remitted.

23 Q. All right. And so, the total amount

24 of that tax with interests was roughly, it looks

25 \$59,000 and some change?

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1 A. Yes, sir. That's correct.

2 Q. Initially the South Carolina

3 Department of Revenue sought to impose penalties.

4 Do you know if those penalties were waived?

5 A. All I can tell you is what I recall.

6 Q. What do you recall?

7 A. There was an -- some type of amnesty

8 program that if you report it and you did these

9 things, that they would waive the penalties.

10 Apparently the notification to the ATMES Group

11 didn't go to the right address, didn't go to the

12 right person. They didn't -- they didn't apply

13 within the right period of time. Now whether

14 that waiver was ultimately granted or not, I

15 cannot recall, but there was an amnesty

16 program.

17 Q. And the amnesty program, do you

18 recall it being a period of time in August 2009?

19 A. I can't recall but that does sound

20 correct.

21 Q. And so, as I understand it right now,

22 you don't know the status of whether any

23 penalties were assessed or whether those

24 penalties were waived?

25 A. I do not recall; no, sir.

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1 Q. Now, your documents make reference to

2 a decision of the South Carolina Supreme Court

3 and Home Medical Systems versus SCDOR.

4 A. You're going to have to show me my

5 document that says that.

6 Q. All right. Give me just a minute.

7 A. I'm not denying, but I'm just saying

8 you're going to have to show it to me.

9 Q. That's fair enough. Let me show you

10 a letter of December 9, 2009 to Mr. Roger Watson,

11 it appears on your letterhead.

12 A. Okay.

13 MR. HOWSER: Off the

14 record.

15 (Off the record briefly.)

16 THE WITNESS: In the

17 course of prosecuting this examination, we were

18 doing absolutely everything we could possibly do

19 to reduce the amount that was owed. There had

20 been an amnesty program, ATMES, whichever company

21 we're talking about here, Reliable, had failed to

22 comply with one of the deadlines and I was simply

23 -- I know Mr. Watson, he and I work together well

24 and respectfully, and I said, there are good and

25 valid reasons why DOR should grant this amnesty

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1 and reduction of penalties, even though we did
2 not comply with the deadlines. I wrote that
3 letter. I hope I was successful.
4 BY MR. HOWSER:
5 Q. But just to recap and not to be
6 repetitious, what is Exhibit Number 5 that varies
7 slightly in the dollar amount, it's also labeled
8 Abacare Home Medical, Inc., recap?
9 A. I understand the question.
10 Q. What's the difference in the
11 documents?
12 A. I don't know the -- why there's \$300
13 difference between the two. May I explain?
14 Q. Sure.
15 A. The DOR refused to deal with two
16 different groups of representatives for a single
17 examination of a single entity, Abacare,
18 Charleston, and so, we were -- we had to put this
19 together.
20 At the end of the process when the
21 calculations were done and agreed, at that point
22 we wanted to be able to differentiate between
23 that sales tax penalties and interest that had
24 been -- that was owed as of the date of the
25 purchase and those that accrued after the day of

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1 the purchase, and that's what this document
2 calculates.
3 Q. Let's refer back to the minutes,
4 which I believe was Exhibit Number 2.
5 A. Yes, sir.
6 Q. Did you ever make any determination
7 as to whether or not the position of Abacare, as
8 relayed to Mr. Selander and reported in the
9 minutes, was consistent with Revenue ruling
10 10-2?
11 A. I'm going to answer, no, but can I
12 expand my answer?
13 Q. You can.
14 A. This -- the conversation here doesn't
15 have anything to do with 10.2. What it has to do
16 with, Mr. Selander understood absolutely and
17 completely that the method that Abacare was using
18 to report sales tax was incorrect. There was no
19 tax authority whatsoever at that time to report
20 sales tax based on collections rather than on
21 charges, and he is telling them absolutely
22 positively you're not paying -- reporting the
23 right amount of sales tax. That's just wrong.
24 It's wrong for two reasons.
25 One, there's no tax authority under

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1 DOR regulations to support that, and two, you're
2 violating cash versus accrual rules on the
3 financial statements and the tax returns. So
4 when ATMES got a set of financial statements,
5 part of it was being presented on the accrual
6 basis and a substantial liability was being
7 calculated based on the cash basis as per Mr.
8 Selander.
9 Mr. Selander suggested, and I
10 wholeheartedly agreed with what he suggested,
11 that if they wanted to fight that battle, if they
12 wanted to have that argument with DOR, they
13 should set up a reserve and that they should
14 record what was -- what may be owed, but only pay
15 what they thought was owed.
16 If Mr. Selander had communicated that
17 to Mr. Burkett, if it had been in the part of the
18 tax returns, we wouldn't be here today.
19 Q. Let me -- and I don't mean to be
20 casting any dispersions at you, but if you or
21 anyone else on behalf of ATMES or Reliable or
22 whoever was purchasing the stock, had gone to Mr.
23 Selander and said, do you know of any potential
24 tax liabilities ---
25 A. They did. I did not. In your

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1 purchase document you're going to find a
2 paragraph that long that says that the sellers
3 represent that there are no liabilities and we'll
4 find that document so we know what they are. In
5 Mr. Burkett's report repeatedly he states that no
6 one has informed him that there were any
7 violations. We'll look at his exact words.
8 Q. All right. But the question is, did
9 anybody ever address that issue to Mr. Selander,
10 to your knowledge?
11 A. To my knowledge, no, sir.
12 Q. And had they done so, you will
13 acknowledge that Mr. Selander could have
14 expressed to them what it appears in those
15 minutes?
16 MR. SMITH: Object to
17 the form. You can answer.
18 THE WITNESS: May I
19 answer a little more fully?
20 BY MR. HOWSER:
21 Q. Sure.
22 A. Hood and Selander are a reputable,
23 thoroughly competent CPA firm. I would no more
24 ask them, did you prepare the sales tax returns
25 correctly than I would ask you, are you

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1 company was zero, was negative, was nothing. I
2 mean, the net tangible assets, all of the value
3 of the company was based on its potential to earn
4 future cash.
5 Q. All right. For tax purposes, does
6 ATMES file a separate return from Reliable?
7 A. I think that's changed over the
8 years, but to answer your question, Reliable
9 flows into ATMES and there's only one real tax
10 return filed.
11 Q. Is there any way of determining
12 whether ATMES versus Reliable is profitable?
13 A. It is profitable; yes sir.
14 Q. That is, ATMES is profitable?
15 A. I don't think that we're operating
16 Reliable as an entity, we're retaining it because
17 we need the federal ID numbers for reporting
18 payor purposes.
19 Q. Let's look at the -- what was the --
20 let's go back, let's say 2011. What was the net
21 income of ATMES?
22 A. If you'll let me look at that
23 document, I'll be delighted to.
24 Q. Sure. Okay.
25 We've been going about an hour and 45

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1 minutes, do you want to take a break while we
2 look for that?
3 A. That would be great.
4 (Off the record briefly.)
5 BY MR. HOWSER:
6 Q. What Abacare documents do you have
7 related to this transaction?
8 A. I'm sorry, but I don't know how to
9 answer that question that broad.
10 Q. Okay. Can you give me some idea by
11 category of documents you have? Do you have
12 minutes of Abacare? Do you have tax returns? Do
13 you profit and loss statements? Do you have
14 financial statements of ---
15 A. Let me walk down that list, if you
16 don't mind. Minutes, no, and I presume your
17 question is from the date of ATMES Group purchase
18 back?
19 Q. Right.
20 A. To my knowledge and in my possession,
21 I do not.
22 Q. Okay.
23 A. Financial statements and tax returns,
24 as far as I know, the only thing we have are the
25 tax return that was prepared by Hood and Selander

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1 for 2008 and the documents that are included in
2 Mr. Burkett's reports.
3 Q. Okay.
4 A. What was next?
5 Q. Well, I guess, minutes, tax returns,
6 financial reports, which you've now answered,
7 correspondence?
8 A. There's a handful of e-mails that was
9 all connected with that 2008 tax returns.
10 Q. And Mr. Smith said he would furnish
11 those to us. Anything else that you can think
12 of?
13 A. No, sir, not that I ---
14 Q. All right. With regard to Reliable,
15 do you have minutes of stockholders meetings?
16 A. I don't get those, no, sir. If they
17 have them, I don't have them.
18 Q. You would have tax returns?
19 A. Yes, sir.
20 Q. Do you have correspondence?
21 A. I'm sure there would be e-mails.
22 Now, again, we're going to have to kind of
23 bracket our timeframes because there's been some
24 name changes and entity structure changes, but
25 the answer to your question is, whatever e-mails

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1 we have and you identify, we would provide.
2 Q. And what information do you have on
3 Abacare with the South Carolina Department of
4 Revenue?
5 A. Well, I think I furnished the entire
6 file that was respect to the -- my part of that
7 examination.
8 Q. And so, you don't have any other
9 documents other than what's related to your part
10 of the examination?
11 A. That's correct.
12 Q. All right. And do you have any
13 documents with SCDOR related to Reliable with the
14 tax issue?
15 A. As far as I know it was all handled
16 as one -- one group of entities, Abacare and
17 ATMES -- I don't know how to answer your question
18 precisely.
19 Q. All right. Now, how would we
20 determine, as far as sales tax on Durable
21 Medical Equipment, how will you determine the
22 liability allocated between Abacare and ATMES and
23 Reliable?
24 A. I believe in the work papers that you
25 have and that report that was provided, you will

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1 A. Yes, sir. 2 Q. Do you know if Reliable or ATMES 3 joined in that lawsuit? 4 A. I don't know that. 5 Q. Do you know if Abacare joined? 6 A. I don't know that. 7 Q. At the time that the amnesty came 8 down, amnesty provision, let's assume it's August 9 of 2009, do you know if any members of ATMES were 10 on the board of the -- I'll call it the trade 11 organization for this Durable Medical Equipment? 12 A. Not directly, no, sir. 13 Q. Do you know if any members in 14 management of ATMES had actual knowledge of the 15 amnesty program? 16 A. It's my understanding that Jeff Reed 17 was aware of this situation, but all I'm telling 18 you is whether that's hearsay or where that 19 falls, gentlemen, that's y'all's precinct. All I 20 knew is that Jeff Reed had some knowledge. 21 Q. Okay. As part of any due diligence 22 that ATMES undertook or the purchasers of the 23 stock, did they seek to determine the value of 24 the assets of Abacare? 25 A. I would say, yes, and that was done	1 the purchasers of the stock of Abacare about 2 potential tax liabilities? 3 A. I do not. 4 Q. The same question with regard to 5 inquiry of Hood and Selander? 6 A. I do not. 7 Q. Do you know about whether inquiry was 8 made to any other source as to potential tax 9 liability? 10 A. I do not. 11 Q. And as we've established, you do not 12 know whether Reliable, for example, and ATMES -- 13 when Reliable was treating taxability for sales 14 tax purposes of the Durable Medical Equipment any 15 differently than Abacare? 16 A. I was not involved in their sales tax 17 computations. 18 Q. And the same would be true for ATMES 19 between November and June -- of November 2008 and 20 June 2009? 21 A. Are you asking me did I know anything 22 about sales tax or after the preparation? 23 Q. Right. 24 A. No, I do not. 25 Q. Let's look for a moment at your
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1 primarily by reviewing the report from Mr. 2 Burkett and I think they had some actual 3 knowledge of what -- you know, in other words, 4 they know that business, they know, yeah, they've 5 got about this much in inventory, et cetera. 6 Q. As part of that due diligence, do you 7 know whether ATMES or the purchasers of stock 8 sought to determine liabilities of Abacare? 9 A. I don't know whether any efforts were 10 made beyond accepting the financial statements 11 and representations of the sellers. 12 Q. And with regard to any due diligence, 13 are you aware of any inquiry that was made of 14 Abacare, Selander or anyone else about the 15 potential tax liabilities? 16 MR. SMITH: Object to 17 the form You can answer anyway. 18 MR. HOWSER: What's the 19 objection? Is it because of compound? 20 MR. SMITH: Yes. 21 MR. HOWSER: All right. 22 Let me break it up. 23 BY MR. HOWSER: 24 Q. With regard to the due diligence, do 25 you know what investigation was made by ATMES or	1 affidavit. Give me just a minute. 2 Mr. Bradham, it would help me 3 understand your affidavit if I pose this question 4 to you: You're the accountant for ATMES, and I 5 want to enter into a contract to purchase the 6 assets from the stock of ATMES. As the 7 accountant for ATMES, do you view it as your 8 responsibility to tell me if there's a potential 9 tax liability of ATMES without me asking? 10 A. Let me rephrase to make sure I 11 understand the question. 12 You're my client? 13 Q. I'm not your client. 14 A. All right. 15 Q. ATMES is your client. 16 A. Okay. 17 Q. I'm entering into a contract to 18 purchase --- 19 A. I'm sorry, I didn't mean you, as in, 20 ATMES is my client. 21 Q. Correct? 22 A. My client is here. 23 Q. Yes. 24 A. And they are entering into a 25 transaction as a potential tax liability did I

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1 he's demonstrated that with the notes to 2 management -- he went to the Board of Directors 3 and told them they were doing it wrong. 4 Q. But you would say, do you know of any 5 potential tax liabilities? Had you asked that or 6 somebody asked that on behalf of ATMES, you would 7 have expected Mr. Selander to --- 8 A. Told the truth. 9 Q. --- told the truth? 10 A. Oh, yeah. I don't doubt it. Like I 11 say, I have no --- 12 Q. And don't you think -- well, strike 13 that. 14 A. Can we go to 10B while we're there? 15 Q. I thought that's just where we were? 16 A. All right. Well, if you don't mind, 17 are you okay? 18 Q. Sure. 19 A. This is the tax return that was 20 signed by Hood and Selander for that period of 21 time that understates the tax liabilities under 22 penalty of perjuries, and it says, "To the best 23 of my knowledge and belief, it is true, correct 24 and complete." 25 Q. That's not -- but who is signing the	1 your affidavit that Mr. Selander knew or should 2 have known that the information he provided or 3 failed to provide to Burkett, Burkett and Burkett 4 would be relied on by the plaintiff? 5 A. You can stamp draft on a report, you 6 can limit a report all you want to, but I got it, 7 and if I get it, you've got an obligation to me, 8 and he knew the purpose of this valuation was to 9 sell the company. He had an obligation that went 10 beyond just the Connellys because he knew what 11 they were going to do with this report. 12 Q. How did he know that? 13 A. He knew they were selling the 14 company. 15 Q. Well, how did he know that the report 16 was going to be given to the purchasers? 17 A. Unfortunately in my side of the 18 field, we do financial statements and we don't 19 know what's going to happen to them when they 20 leave our hands. That's why we have compilation 21 review, audit statements, that's why we have a 22 whole body of opinions. 23 Q. And that's why you, as a certified 24 public accountant, would put in there, this is 25 for the exclusive use of -- in this instance, Ms.
Page 98	Page 100
1 statement under penalty of perjury is the company 2 itself, not Mr. Selander? 3 A. No, sir. When I sign that return, 4 it's just as applicable to me as it is to the 5 company. I can't sign a tax return -- Mr. 6 Howser, with all respect, I practice in tax court 7 and I can assure you that they will go after you 8 if you sign a tax return that you know is 9 incorrect. 10 Q. They go to you as making an error as 11 a tax preparer and it is the actual filer --- 12 A. I'm not going to argue that point 13 with you, but I disagree. 14 Q. What is the basis in view of the 15 letter that I showed you, which I believe is 16 Exhibit Number 1, it says that this valuation is 17 for the exclusive benefit --- 18 A. Of -- of the people that are listed? 19 Q. Right. 20 A. Well --- 21 Q. You understand that's what the 22 engagement says, doesn't it? 23 A. That's what his opinion says. 24 Q. All right. And if that is true, what 25 is the basis of your statement in Paragraph 13 of	1 Connelly and Mr. Selander -- or Mr. DeClemente? 2 A. I'm too tired to discuss that point, 3 I'm sorry. 4 Q. Well, don't you agree that his letter 5 is a limitation of to whom that report was to be 6 relied upon? 7 A. That may have been his intention, but 8 the bank, NBSC got this, I got this and as far as 9 I know, everybody that was associated with ATMES 10 and Abacare got this. So they didn't pay -- they 11 didn't heed his limitation. 12 Q. Do you have a copy of the stock 13 purchase and assignment agreement that's referred 14 to in Paragraph 10 of the complaint? 15 A. I've seen it, but I don't have it in 16 front of me; no, sir. 17 Q. Do you know if you have a copy of 18 that in your files? 19 A. I do. Would you like me to get that? 20 Q. That would be great. And in this 21 report, who is the seller? 22 A. It appears to me the estate of 23 Dorothy Connelly, Phillip DeClemente and --- 24 Q. So that seller is designated as one 25 person, isn't it? Isn't Ms. DeClemente assignor?

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1 A. If that were the singular issue, I
2 would.
3 Q. And you think that there's an issue
4 beyond that in the sense that they were not
5 paying the sales tax because they were
6 calculating it on an accrual basis rather than on
7 a cash basis?
8 A. They didn't want to pay the sales tax
9 and they were-- the returns may or not have been
10 correct. And that's not my opinion, that's the
11 opinion of the Department of Revenue Examiners.
12 Q. Well, I'm saying the issue is -- not
13 only ---
14 A. There are at least two issues.
15 Q. All right. One would be whether or
16 not certain devices were exempt from sales and
17 use taxes, and the second issue is whether or not
18 the taxes should have been paid on a cash basis
19 rather than accrual basis?
20 A. I agree those are two different
21 issues.
22 Q. All right. And those are the two
23 issues in this case in as far as you see them?
24 A. I'm going to add one more.
25 Q. Okay.

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1 A. What other items were discovered as a
2 result of the examination? Were there just flat
3 out they made errors in their reporting of sales
4 tax ---
5 Q. But that would not be the
6 accountant's responsibility?
7 A. Well, the accountant is telling them
8 flat out unequivocally he wrote this, "taxable
9 sales reported on the June sales tax forms appear
10 to be significantly understated."
11 He's not saying I think you're making
12 the wrong determination based on this law. He's
13 saying I think you're filling out your sales tax
14 returns wrong and I'm bringing it to the Board's
15 attention.
16 Q. All right. But the third item
17 correlates to issues, for example, with ATMES or
18 Reliable in that they had failed to pay certain
19 taxes properly ---
20 A. For whatever reason.
21 Q. --- for whatever reason and that's
22 not your responsibility or not the CPA's
23 responsibility?
24 A. I disagree with that, and if Mr.
25 Selander is bringing to the Board's attention

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1 that they're not preparing their sales tax
2 returns correctly period.
3 Q. But if they make a mathematical
4 error ---
5 A. I don't think he would bring -- I
6 can't speak for him.
7 Q. I'm addressing your third category.
8 A. Yes, sir.
9 Q. If somehow the client makes a mistake
10 in reporting, for example, sales, that's not your
11 responsibility as a CPA?
12 A. That would depend. If every single
13 time I looked at a sales tax return and I -- and
14 see, Mr. Selander's office is preparing the
15 returns, they're also preparing the general
16 ledger, so they're comparing what's on the sales
17 tax return with what's on the general ledger and
18 he -- I would not go to the Board and say, what
19 you're reporting is incorrect if it were
20 immaterial or it was a matter of we did it in
21 June and we should have done it in July. This
22 was a serious issue that he was reporting to the
23 Board. This is management is not doing its job.
24 They're understating, you've got a problem. This
25 is drop dead serious. If I were to do something

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1 like that, it would be -- I'm ready to quit the
2 account is where I would be.
3 Q. Do you have any knowledge as to
4 whether or not the sales price was based on the
5 report prepared by Burkett, Burkett and
6 Burkett ---
7 A. Absolutely. To my knowledge it
8 absolutely formed the foundation of the sales
9 price.
10 Q. And what do you base that on?
11 A. Because -- if somebody will hand me a
12 calculator, I don't have one, we'll do a
13 little ---
14 Q. Well, as opposed to a report that was
15 done subsequently to the Burkett, Burkett and
16 Burkett report by some other person or entity.
17 A. Anything's possible.
18 Q. Would you have made any inquiry of
19 that?
20 A. I had no reason to. As far as I
21 know, my clients went to the bank and borrowed
22 \$809,000 as a result of this.
23 Q. All right. Do you know if the sales
24 price was impacted at all by the death of Ms.
25 Connelly?

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1 might have to ask you some things over.
2 A. That's fine.
3 Q. But one thing I didn't hear was, how
4 long have you been doing Reliable's accounting
5 work?
6 A. I'm not certain. I can answer that
7 question with just a wee bit of research, but for
8 some number of years before Abacare came on the
9 scene. Best guess would be 2006 -- perhaps 2005.
10 Q. Okay. That's perfectly fine for my
11 purposes. And then ATMES from what period would
12 you say?
13 A. Well, ATMES was the entity formed to
14 purchase and consolidate Reliable, Abacare and
15 all the other entities that they owned and
16 operated.
17 Q. So Reliable and Abacare fit
18 underneath ATMES now?
19 A. That's correct.
20 Q. So when was ATMES formed? Was that
21 November of 2008?
22 A. I believe it was right at the first
23 of November 2008.
24 Q. And then Abacare, since they came
25 under the ATMES umbrella, which would have been

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1 around November 2008 as well?
2 A. I'm not sure when they came under the
3 umbrella, but they certainly were a stand alone
4 entity from -- well, they have been and continue
5 to be.
6 Q. And you've done their work since --
7 my question is, you've done their work since
8 November of 2008?
9 A. Yes, sir.
10 Q. And I believe you said earlier that
11 those are the only Murrell Smith related entities
12 that you do any work for, that you don't do their
13 personal stuff, but you've handled these things?
14 A. No, I do Murrell Smith's individual
15 return, but I don't think any of the other
16 entities that he owns, I do the accounting. He
17 has K-1's from a number of partnerships and
18 various investments and that sort of thing. I
19 don't think I do the accounting for any of them.
20 Q. Okay. And how long have you been
21 doing Murrell Smith's individual tax returns?
22 A. Several years. I'm not sure exactly
23 how many.
24 Q. Would it go back to the era when you
25 first took on Reliable, which was 2005, 2006 or

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1 did it predate that?
2 A. It did not predate that. I think it
3 would be about 2008, but I'm not certain.
4 Q. You first started doing Reliable and
5 then a little bit later Murrell Smith brought his
6 personal stuff?
7 A. That's correct.
8 Q. And what about the accounting work
9 for -- is it Reed, is that the other ---
10 A. Jeff Reed.
11 Q. Jeff Reed. Do you do his work?
12 A. Yes.
13 Q. Tell me how long you've done Jeff
14 Reed's work.
15 A. Well, I think that started about
16 2005.
17 Q. Do you handle accounting for Jeff
18 Reed's other businesses?
19 A. Yes.
20 Q. What are the names of those
21 businesses?
22 A. There may be quite a few, and if it's
23 possible that I could slip out and get a printout
24 of ---
25 Q. Yes, that's fine, if that's easier

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1 for you, I will accept that.
2 A. -- that would be the fastest way for
3 me to answer your question.
4 Q. Okay.
5 A. All right. Do we limit him to a
6 period of time or do you ---
7 Q. Any accounting work you've done for
8 Jeff Reed's companies, so any companies that
9 you've worked for for him.
10 A. Okay. Do you want me to get that
11 now?
12 Q. If that's okay?
13 A. Sure.
14 MR. MYRICK: Maybe you
15 could ask somebody to help you with that and we
16 could continue?
17 MR. BRADHAM: Guess
18 what? At my office at the crack of two, there
19 are no other bodies.
20 MR. MYRICK: Okay.
21 (Off the record briefly.)
22 BY MR. MYRICK:
23 Q. Just hand those two sheets to me, if
24 you want.
25 A. Okay. This has his personal

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1 as opposed to the other work you're doing for Mr.
2 Reed or Murrell Smith?

3 A. Well I'll just talk out loud about
4 the process. I think there was probably a phone
5 call from Mr. Smith and the conversation was
6 that, and then a quote, "the Connellys are not
7 going to pay the hundred thousand dollars. We're
8 going to be held liable and we've got to pay it."
9 And he said "it's a lot of money."

10 And I said, "yes, but you need to
11 understand that the sales tax is not all that
12 we're talking about here. The overstatement of
13 the value of the business is the more -- is the
14 real money, not the relatively small amount of
15 sales tax."

16 And so that was the back and forth
17 conversation that led us down this sort of
18 report.

19 Q. Okay. And is the root of the
20 difference in value, the total value of the
21 business, is the root of that the difference in
22 the sales tax issue?

23 A. Yes, sir.

24 Q. Okay. And so if we ---

25 A. You're almost there.

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1 Q. Yes, I think I understand what you're
2 saying that if you look at it sort of in that
3 smaller sense of what the sales tax issue then
4 you look at the value of the business over time
5 because the formula that you would apply would
6 extend the life of the business and you would
7 look to see what impact that would have, it would
8 grow.

9 A. And it grew not just by that simple
10 omission, but because we've projected that sales
11 are going to go up at this substantial rate,
12 we've made the error worse by projecting it
13 forward. There was nothing to support that
14 projection going forward and it was wrong.

15 Q. Okay. So in a way there are the two
16 different roles. Well, there are three roles.
17 The first role was doing the work as their
18 trusted accountant for both Reed and Smith.

19 A. Yes.

20 Q. The second role is when they asked
21 you to step in and help with the due diligence
22 analysis of this deal where you had to go to the
23 bank to get funded, and I think you mentioned
24 this. Well tell us -- help us do the due
25 diligence on the acquisition of numbers and

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1 acquisition of this company Abacare; correct?

2 A. That's accurate.

3 Q. And then the third role is now as
4 expert witness where you would come in and say
5 I've looked at this in a master sense after we
6 determined that this hundred thousand dollars Mr.
7 Smith told you had to be paid. And you've
8 analyzed it and come up with this report that is
9 in the materials that we've been discussing?

10 A. I'm going to add one more part to
11 that.

12 Q. Okay.

13 A. They bought this company and nothing
14 that was predicted to happen took place. The
15 company was a dismal failure. They were losing
16 their money -- losing money hand over fist and
17 they stopped and say why are we losing money?
18 And they come to find out that basically they had
19 paid too much for the -- for the business and
20 then they began to understand why they had paid
21 too much for the business.

22 Q. And in your words, why have they paid
23 too much for the business?

24 A. And in my words?

25 Q. Yes.

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1 A. Well I think that this projection was
2 wrong.

3 Q. From Burkett & Burkett?

4 A. Right. Not because of the work that
5 Mr. Burkett did, but because of the information
6 that was provided to him and that he relied on.

7 Q. Okay. In your -- when they were
8 asking you to look at the deal, 2008; right?

9 A. (Witness nods).

10 Q. You have to say yes or no.

11 A. Oh, I'm sorry, yes.

12 Q. When they were asking you to look at
13 the deal and do a due diligence on your part, did
14 you speak with anybody and the elderly lady, Mrs.
15 Connelly, was she still alive at that time?

16 A. I have no idea, but I didn't talk to
17 anyone from the -- from the seller's side.

18 Q. Okay. So I would take from that that
19 you didn't speak with a woman named Donna Cash?

20 A. I did not.

21 Q. Have you ever spoken with a woman
22 named Donna Cash?

23 A. Not that I'm aware of.

24 Q. Have you even spoken with Mrs.
25 Connelly?

1 A. Not that I'm aware of.
2 Q. Okay. Did you speak with Mr.
3 DeClemente who's here today?
4 A. I'm sure, but I can't recount
5 conversations or emails or -- or phone calls.
6 There were -- there were conversations.
7 Q. Okay. Generally what was the topic
8 of those conversations with Mr. Clemente?
9 A. Well let me rephrase your question if
10 you don't mind. My primary contact in this was
11 Kim Cuce.
12 Q. Okay.
13 A. And she and Mr. DeClemente were the
14 leading forces in the acquisition of this
15 business.
16 Q. Right. Okay. And do you have emails
17 with Ms. Cuce or was it mostly by telephone?
18 A. I don't know the answer to that.
19 Q. All right. And you said they were
20 the leaders in the acquisition of it. They came
21 to you in their capacity as purchasers?
22 A. Ms. Cuce was a partial owner in what
23 was called Reliable at that time. And my
24 recollection of the transaction was we found this
25 wonderful business in Charleston called Abacare.

1 We have an inside person, Phillip DeClemente,
2 he's running the business. He knows the
3 business. We think this is a great acquisition.
4 And -- and that basically that's where it started
5 and what transpired.
6 Q. And so if you had questions about the
7 acquisition of Abacare, one of the people that
8 you would call was Kim Cuce?
9 A. Absolutely.
10 Q. And another person, because he was
11 already employed by Abacare, would have been
12 Phillip DeClemente?
13 A. I don't know that I had contact with
14 him before the acquisition. I could have. I
15 don't know.
16 Q. Okay. All right. If you had
17 questions in doing the analysis doing your due
18 diligence, who would you ask about, was it Kim?
19 A. Yes.
20 Q. Okay. Do you know where she is now?
21 A. No.
22 Q. Okay. Did you ever, in your due
23 diligence period, and I will call that the 2008
24 era, did you ever talk with a man named Sam
25 Applegate?

1 A. Now was Mr. Applegate after the --
2 was he -- you're going to have to tell me who he
3 was again. He's the attorney for ---
4 Q. The Estate of -- the Connelly Estate.
5 A. I -- I don't recall talking to him,
6 no. That would have probably been a Murrell or a
7 Jeff level conversation.
8 Q. Okay. Did you feel like in doing the
9 due diligence on the acquisition that the Burkett
10 report that you had, and what was the other
11 document, you had the tax return?
12 A. Well, primarily the Burkett Report it
13 had virtually everything we would have asked for
14 in due diligence.
15 Q. Exactly.
16 A. It was there.
17 Q. So you had that and you had the 2008
18 tax return?
19 A. That wasn't done yet.
20 Q. It wasn't done yet. So really the
21 document that was in your hand when they asked
22 you to do the due diligence was the complete
23 Burkett Report?
24 A. That's correct.
25 Q. Did you feel like that that gave you

1 enough to do due diligence on your part?
2 A. I did because I felt like the CPA
3 firms that were associated with this were
4 reputable, they were -- I had no reason to
5 believe that they weren't top notch.
6 Q. Right. Do you remember when the
7 first time it was that you got the minutes from
8 Abacare's meetings? Are they in there? Are
9 they in Mr. Burkett's report?
10 A. No, sir.
11 Q. No. You didn't get those until
12 later?
13 A. That's correct.
14 Q. But we're not sure exactly when you
15 got those?
16 A. I -- I have no -- I don't know.
17 Q. Okay. But that -- those minutes are
18 important to you because those minutes to you are
19 what show that David Selander had information
20 that had not been conveyed to Burkett?
21 A. I couldn't put it better.
22 Q. Isn't that what my understanding of
23 the problem?
24 A. You're saying it perfectly, yes, sir.
25 Q. Okay. When you were asked to do the

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1 due diligence in 2008, did it occur to you or
2 cross your mind or did you have any sort of
3 present idea at that time well maybe I should
4 look elsewhere? Maybe I should call some of
5 these other people? Maybe I should call the
6 Estate of Connelly or speak with DeClemente or
7 speak with I don't know who else you would have
8 contacted? But did that occur to you at the time
9 or did you look at that Burkett Report and say
10 this is complete?

11 A. I looked at this report and felt that
12 it was complete and accurate.

13 Q. Yes. Right. And they've got offices
14 all over the State; right?

15 A. Well they're a highly respected firm.

16 Q. Yes. I want to talk to you now a
17 little bit more specifically about the sales tax
18 issue. In your own words, what was the sales tax
19 issue?

20 A. Which company are we going to talk
21 about?

22 Q. Abacare. The idea that it wasn't
23 sufficiently reported, it didn't come into the
24 Burkett & Burkett Report.

25 A. Okay. They took a very aggressive

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1 position with respect to this court case. They -
2 - they took -- there were -- it seemed that
3 among the statewide organization, there were two
4 groups. One group said we think we're going to
5 be absolved of paying sales tax on this entirely
6 and so we're not going to set up any reserves,
7 we're not going to do anything. We think we're
8 going to win.

9 And then there was another group that
10 said you know we might not win. If this court is
11 going to the Supreme Court we might better be a
12 little more conservative.

13 Q. Right.

14 A. Abacare took the least amount of
15 money out of pocket now. That's one issue. The
16 second issue is per Mr. Selander, they were doing
17 some things on those sales tax returns that
18 benefited the current checkbook. I don't have to
19 pay sales tax this month, nobody's standing there
20 checking behind me and the accounting did not
21 match up with what was being reported on the
22 sales tax return. Mr. Selander told them that
23 loud and clear.

24 So there are two completely separate.
25 One's a technical, will we be taxed on this? Do

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1 we have an obligation to set something aside?
2 And the second is, are we accurately preparing
3 our sales tax returns? Forget about the court
4 case.

5 Q. Got it. Was the issue regarding --
6 and I'm going to break that up because I
7 understand the distinction that you're drawing.

8 On the sales tax issue that relates
9 to whether CPAP, BIPAP fits into the exemption,
10 on that issue was Reliable facing those same
11 issues in 2007-2008?

12 A. I would say yes.

13 Q. Okay. Is that your memory?

14 A. That's my memory, yes, sir.

15 Q. Okay. And how was Reliable handling
16 it? Were they in the more aggressive camp where
17 they were saying we're not even -- we're riding
18 bareback. We're not going to put anything --
19 money in reserve. Or were they more conservative
20 where Reliable said we're going to put money
21 aside in an escrow account?

22 A. I don't know the answer to that. I
23 know they were very, very concerned about that
24 and that they were anticipating that --- I think
25 it was that we hope for the best but we're going

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1 to play for the worst. No, there was no escrow
2 account, but I think that they were paying tax on
3 some of these items.

4 Q. Okay. And you said, I think you said
5 that you didn't do the sales tax returns for
6 them, somebody else had that charged?

7 A. They did that internally.

8 Q. They did that internally. Okay. And
9 who in their company would know for sure how they
10 were handling it?

11 A. I would say either Jeff Reed or
12 Martha Jo.

13 Q. Okay. Does Martha Jo -- she was in
14 here today; wasn't she?

15 A. Yes.

16 Q. Does she have a tax background?

17 A. She's an attorney.

18 Q. She's an attorney.

19 (Off the record briefly.)

20 BY MR. MYRICK:

21 Q. Let's go to the second issue and
22 this one I understand less well. That there was
23 an under reporting in addition to the sales tax
24 issue, that there was some sort of under
25 reporting of monies coming into the business that

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1 mean that it's acceptable behavior. And Mr.
2 Selander's being absolutely professional in his
3 advice here.
4 Q. So let me ask you this question.
5 Have you spoken with Mr. Selander at all about
6 this paragraph in the minutes?
7 A. No.
8 Q. Do you know if his take on what he
9 was representing is the same as yours?
10 A. No.
11 Q. Do you know what he thought about Mr.
12 DeClemente's position?
13 A. No.
14 Q. At some point were you called upon to
15 help Reliable or maybe ATMES or maybe Abacare go
16 to the South Carolina Department of Revenue and
17 attempt to reduce the amount the South Carolina
18 Department of Revenue said was owed?
19 A. Yes.
20 Q. Tell me a little bit about that.
21 A. I did a lot. What I -- first of all
22 when they got the notice of examination, I went
23 to the ATMES folks. I didn't have anything to do
24 with Abacare. Abacare said we're going to hire
25 our own experts. And we said fine.

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1 Went to the ATMES people and said
2 "Here's what you're facing." This is a
3 documentation game. And I prepared them, I
4 continued to go back and say you need these
5 proofs, you need this documentation, you need
6 these reports. This is a records and proofs kind
7 of examination.
8 Second, I think there was a letter
9 that we talked about here earlier in the day in
10 which I wrote Roger Watson, who I've had good
11 relationships with years and he's a fair and
12 equitable person with the DOR and said, "Look,
13 they didn't comply with the amnesty period, but
14 how about -- how about giving it to us anyway?"
15 I don't remember what happened, but I
16 think that they did.
17 Q. Yes. Okay. And remind me. because I
18 know, but is it ATMES and underneath that
19 Reliable and Abacare?
20 A. Currently, yes.
21 Q. Okay. All right. So when you say
22 you undertook it on behalf of ATMES, wouldn't
23 that necessarily mean taking it on behalf of
24 Abacare as well?
25 A. Well, here's what happened. When the

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1 examination notice came down, Murrell Smith got
2 it and said well, you know, we didn't -- you
3 know, okay guys, how do you want us to handle
4 this because all of the records through the North
5 Charleston through a certain period are down
6 there. And all the records for this -- for the
7 rest of this operation for this period of time
8 are down here.
9 Well the Department of Revenue said
10 that ain't our problem. We're going to make an
11 assessment as a whole and you two can fight it
12 out. You, meaning the current owners of Abacare,
13 which was ATMES, owe the whole amount. And you
14 two can fight out who owes what portion. And
15 they hired their own folks to represent them on
16 the sales tax for their part and ---
17 Q. Do you know who Abacare hired?
18 A. I've seen it, but I can't recall.
19 Q. Okay. Do you have somewhere a giant
20 SCDOR ATMES controversy file.
21 A. I think that was what was uploaded to
22 the drop box was the -- the whole file.
23 Q. Okay. That's the whole file?
24 A. Who ---
25 Q. That would probably be my paralegal.

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1 A. Okay.
2 Q. Debbie Fisher?
3 A. I'm not sure. I know Ms. Diaz.
4 Murrell's paralegal got it up on the drop box
5 finally and from there I don't know who got it.
6 Q. Got it. Okay.
7 A. Well, we get -- the entire file is
8 there, everything.
9 Q. Let me ask you some questions just
10 briefly about the Burkett Report. What was the
11 purpose, the original purpose of the Burkett
12 Report?
13 A. It was my understanding they wanted
14 to sell the company. Whether they were going to
15 sell it to Mr. DeClemente or they were going to
16 sell it to a third party, this valuation was done
17 to aid them in a sale.
18 Q. Okay. And I've understood what
19 you've said was these things get away from people
20 and it could end up in the hands of somebody who
21 did rely on it. I understand that part of your
22 testimony.
23 A. It's in my hands.
24 Q. But let me ask you this, couldn't it
25 be true that that Burkett Report was prepared for

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1 Mr. DeClemente and Ms. Connelly for their
2 education in determining a sales price for them
3 to ask as opposed to something a purchaser would
4 use?

5 A. I certainly understand your point and
6 your question. The problem is it may -- whatever
7 its intention whatever was intended it ended up
8 going to NBSC and supporting the loan that ATMES'
9 folks bought the company with. I got it. If it
10 wasn't intended for me to get it, how did I get
11 it?

12 Q. I understand. And it sounded like
13 when you were approached in 2008 to do the due
14 diligence on valuing the business and you looked
15 at the Burkett Report, from where I was sitting
16 over there it sounded like your involvement
17 really had to do with creating a package for the
18 lender because the lender is the one that wants
19 to know if there is financial support for this
20 deal. Am I understanding that properly?

21 A. I think you've got the idea exactly.
22 There are two -- we had -- Kim Cuce, who's a
23 force of nature if you've not met her and she's a
24 very powerful woman. And she had decided that
25 she wanted to do this deal. And she came and she

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1 says well we can get the bank to loan us the
2 money and I said they asked me, "Well can we pay
3 for this?"

4 And Kim kept coming back with
5 financial projections and forecasts and that sort
6 of thing that would support that this -- this was
7 a viable business and that the Charleston market
8 was wide open and they were just going to make
9 tons and tons of money.

10 I didn't -- of course, I didn't care
11 whether they bought it or they didn't buy it.
12 I'm just trying to protect my clients from making
13 an error. The financial statements did support
14 purchasing this business.

15 Q. The financial statement being the
16 Burkett Report?

17 A. The Burkett Report, the subsequent
18 projections that we prepared for the bank. But
19 again, you can prepare -- if you prepare
20 projections on the wrong information you get what
21 you ---

22 Q. So Kim Cuce was coming in with these
23 projections saying this is the deal we, Reliable,
24 want to do because Kim Cuce was a part of
25 Reliable at that time?

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1 A. Yes.

2 Q. So what was her link up with Phillip
3 DeClemente? He wasn't in Reliable at that time;
4 right?

5 A. I don't know.

6 Q. But was she accessing information
7 through Phillip DeClemente? Did she ever tell
8 you how she was getting information about the
9 company?

10 A. I -- I don't have any comment on
11 that.

12 Q. Okay. You don't know? It is under
13 oath if you do know.

14 A. It was my understanding they were
15 having an affair.

16 Q. Okay. So there was a relationship
17 between, and I understand you've said you're not
18 saying that you know that first hand, you're just
19 saying that's what you understand. But that
20 provided a conduit of information between
21 Reliable and Abacare?

22 A. Yes.

23 Q. Okay. It would be so helpful if I
24 could always read my writing. It really would,
25 I'm just saying. Do you know this -- tell me

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1 about when these evaluations like this are
2 created, is there any other purpose for them that
3 you know of, aside from helping determine a
4 price?

5 A. No, sir, it's strictly a price
6 oriented thing. One value -- you do valuations
7 for estate purposes, either estate planning, et
8 cetera for sales. To justify loan applications,
9 although banks have gotten to where they don't,
10 you know, you got the collateral or you don't
11 have anything.

12 Q. Yes.

13 A. But generally it's estate planning
14 and sale.

15 Q. Okay. And who ---

16 A. And divorce.

17 Q. What is the name of the banker that
18 was involved in lending the money on this deal?

19 A. Melissa White with NBSC.

20 Q. And she's here in Sumter?

21 A. Yeah, she's the city exec, I believe.

22 Q. Okay.

23 A. She's first rate by the way.

24 Q. Earlier you mentioned that you had
25 testified as an expert in some other lawsuits.

1 from the purchaser. The purchaser was exempt.
2 South Carolina was extracting sales tax from the
3 purchaser that -- from the seller that they had
4 never collected. Does that make sense?
5 Q. Yes.
6 A. Normally sales tax -- you buy
7 something for a dollar and they charge you eight
8 cents sales tax and well you send it in. In this
9 case they came along and retroactively said this
10 is taxable and the people said, but we didn't
11 collect the sales tax. And they said we don't
12 care, we need the money. And that was the
13 political solution. So that's why this all hurt
14 so bad, it went straight from the top to bottom.
15 Q. Because the money was never
16 collected?
17 A. That's correct.
18 Q. I see. That does teach me. Do you
19 know this, do you know if Reliable's method for
20 handling sales tax changed in any way after the
21 Supreme Court decision in Home Medical Services,
22 Inc. versus SCDOR?
23 A. My -- I would suspect, knowing Martha
24 Jo that it's being done absolutely according to
25 the law.

1 Q. Yes. But my question is a little
2 different. Do you know if it changed? And I
3 know you said you don't know how they were
4 behaving in 2008. Now I'm just asking separately
5 do you know if their behavior on the issue
6 changed?
7 A. I do not know.
8 Q. Okay. Was it Murrell -- I guess it
9 was Murrell and not Reed that approached you to
10 do the due diligence on the purchase of Abacare?
11 Is that what you told me that it was Murrell and
12 not Reed?
13 A. I will tell you the way the deal came
14 about that this was Kim's -- Kim and Phillip's or
15 Kim's idea and that basically she talked Murrell
16 and Jeff into doing it.
17 Q. But -- and then who said to you do
18 the due diligence? Who said that?
19 A. That would probably have been Kim.
20 Q. That would have been Kim. And the
21 bank didn't -- they didn't ask you to do it, they
22 didn't pay you to do it, it was done at the
23 behest of Kim probably for Reliable?
24 A. Yes.
25 Q. Okay.

1 A. Now Murrell and Jeff were absolutely
2 involved in this. I mean there wasn't a -- she
3 was running a solo act or anything. They knew,
4 but she was the lead.
5 Q. All right. Was she under any sort of
6 time constraint?
7 A. I don't know.
8 Q. Were you?
9 A. Everybody had their hair on fire.
10 They wanted it done right away.
11 Q. Yes. And do you remember a little
12 bit more about that? Was it a short period of
13 time in which it had to be done or they just
14 wanted it ---
15 A. I don't know whether there was some
16 time deadline or whether it was just an urgency
17 created by desire.
18 Q. And what did that do in terms of your
19 role? Did that put pressure on you to get it
20 done fast?
21 A. You don't press me -- you don't push
22 me to do things faster than I'm willing to do
23 them. I'm going to do it at -- you know, if you
24 want me to do it, I'm going to do it and I'm
25 going to do it my way. So if I'm answering your

1 question is I don't -- if you wanted it done
2 before now you should have started sooner.
3 Q. Okay. How did you acquire the
4 Burkett Report in the first place?
5 A. I don't know.
6 Q. Who put it in your hands?
7 A. I do not know.
8 Q. Do you ever remember making calls to
9 get it or did Kim present it to you maybe?
10 A. I do not know.
11 Q. Okay. Do you believe -- this is
12 tough, but you're a straight shooter. Do you
13 believe that it is sufficient due diligence to
14 look just at this valuation report by Burkett in
15 order to give them an opinion? Do you think
16 that's sufficient?
17 A. I'm -- I'm pulling from your question
18 is it my -- my -- am I responsible for this screw
19 up because I didn't do -- because I didn't do
20 enough due diligence? And I'm sorry but I'm
21 going to reject that.
22 Q. Fine. So you think that it is enough
23 to rely on the Burkett Report?
24 A. Especially based on the foundation of
25 Hood & Selander and Burkett I had no reason.

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1 They're top notch firms, no reason to doubt them.
2 Q. Yes. Got it. Did you travel
3 anywhere in doing the due diligence? Did you go
4 to Charleston?
5 A. No, sir.
6 Q. Did you look at the Abacare building?
7 A. No, sir.
8 Q. Did you look at any back-up financial
9 documentation at all from Abacare?
10 A. No, sir.
11 Q. Did anybody on the purchaser's side
12 of the equation and not you necessarily, but did
13 anybody go back and harvest the minutes from
14 Abacare to figure out what the issues the
15 business was facing during the couple of years
16 ahead of acquisition?
17 A. I don't know the answer to that.
18 Q. Okay. One thing I just want to seek
19 some clarity on that -- you've asserted
20 challenges against Hood & Selander but none as
21 against Burkett, Burkett & Burkett. What is the
22 distinction in your mind?
23 A. Okay. And -- and I covered that in
24 this report.
25 Q. Okay. That's the one I got today?

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1 A. Yes, sir.
2 Q. Okay.
3 A. And essentially just to -- just to --
4 I've read Mr. Burkett's report. He followed
5 industry standards. In my opinion he did what
6 was required based on the information that he was
7 provided. I don't have a quarrel with his report
8 based on the information that he was provided.
9 But if they had disclosed the sales tax issue, it
10 could have been dealt with simply and easily. He
11 -- he's quite competent and capable of making an
12 adjustment to take that uncertainty into account
13 in doing his calculation. But he was not made
14 aware of it. That's all they had to do.
15 It's not unusual at all when you do
16 an evaluation for them to tell you oh, we got
17 some things over here on the, you know, on the
18 side. There are some issues that are unresolved
19 and you're going to find. And you put in a
20 valuation allowance or a provision or you make
21 some adjustment for that because there are things
22 that we just don't know what the outcome of it
23 will be.
24 Q. A lot of these questions have been
25 asked so I'm not going to ask them again. It

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1 just takes me awhile to go through and make sure
2 I'm being complete.
3
4 MR. MYRICK: What's the
5 next number.
6
7 COURT REPORTER: Seven.
8
9 +++++++
10 (LETTER FROM BRADHAM
11 TO WATSON DATED
12 12-9-09 WAS MARKED FOR
13 IDENTIFICATION AS
14 DEPOSITION EXHIBIT
15 NUMBER 7)
16 +++++++
17 BY MR. MYRICK:
18 Q. I made a request of Murrell Smith for
19 all documents that he has that related to
20 Reliable. And he said he didn't have documents
21 and he pointed the request to you and you
22 complied for me, Mr. Bradham, and sent me a
23 family of documents. This is in that subset.
24 This is a letter dated Wednesday, December 9th,
25 2009. It's to Roger Watson. Who is Roger
Watson?
A. He's -- I don't know if he still is,
but he was the head of the Florence office for

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1 sales tax. Super guy.
2 Q. Okay. And what is this letter about?
3 A. What we're doing here is -- there was
4 a amnesty period for penalties. I believe it
5 was.
6 Q. That you referred to earlier?
7 A. That's right.
8 Q. Right.
9 A. And I was making the case to Mr.
10 Watson that for a variety of good and valid
11 reasons that the company did not comply with the
12 amnesty and here's why and would they consider
13 granting amnesty in arrears if you will.
14 Q. Okay. And of this letter I'm just
15 going to ask you about a few sentences. I'll
16 read it and then I'll just ask you for a little
17 insight.
18 Second paragraph, "Reliable Medical
19 is a durable medical equipment supplier and was
20 affected by the confusion in application of sales
21 tax to their products."
22 What do you mean by confusion in
23 application of sales tax? What did you mean when
24 you wrote the letter?
25 A. When the -- the two cases came along

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1 there was a decision and if I cite this
2 incorrectly someone please correct me, that all
3 this stuff was not taxable; all right. And the
4 case was immediately appealed to the Supreme
5 Court and the Supreme Court sometime later
6 decided that it was taxable.
7 And so that as we've talked about
8 there was a period of time in which DME Suppliers
9 were kind of up in the air. All well, great we
10 don't have to pay tax on this anymore and another
11 group said it's not yet decided. So there was a
12 period of time in which there was no this is the
13 law. That was the confusion.
14 Q. Okay. And when were you first aware
15 of the confusion?
16 A. I don't know the answer to that.
17 Q. Okay. 2007-2008 in your role for
18 Reliable or you just don't know?
19 A. I just -- I flat don't know.
20 Q. Okay. Because I know you didn't do
21 their sales tax you told me that.
22 A. That's right.
23 Q. The second sentence I'll ask you
24 about, first sentence of the next paragraph, "The
25 taxation of DME Products has been subject to

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1 A. The purpose of this letter was to
2 build a support for the Reliable ATMES group
3 should have done something within a timeframe
4 that they did not. They didn't get an email that
5 -- I mean in other words there was an email that
6 went out that notified them of this and I was
7 making the point that I didn't think that was
8 proper notification, et cetera, et cetera and
9 that he had the authority to grant some relief.
10 Q. It's a good letter. If I had the
11 authority I would have responded favorably to
12 that letter.
13 A. Thank you.
14 ++++++
15 (ENGAGEMENT LETTER
16 FROM BRADHAM DATED
17 10-19-09 WAS
18 MARKED FOR
19 IDENTIFICATION AS
20 DEPOSITION EXHIBIT
21 NUMBER 8)
22 ++++++
23 BY MR. MYRICK:
24 Q. All right. Let's go now to Exhibit
25 8. Similar thing, it's a letter from you ---

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1 strong controversy over the past few years with
2 taxpayers taking positions that nothing is
3 taxable to fully taxable and no guidance has been
4 available until he South Carolina Supreme Court
5 reversed an earlier decision of an administrative
6 law judge in 266-38 Home Medical Systems versus
7 SCDOR filed April 20th, 2009."
8 When you wrote the letter, this
9 letter in December of 2009, had you recognized
10 that there had been a controversy about this
11 thing over the past few years?
12 A. I was aware that there was -- there
13 was -- of the status of the case. That they had
14 a case, that they won and they were all
15 celebrating. And then the second that it was
16 appealed the celebration quieted down.
17 Q. Right.
18 A. So ---
19 Q. Do you remember the celebration when
20 they won in 2007?
21 A. I do.
22 Q. Okay.
23 A. My position was you ain't won
24 anything yet. This ain't over.
25 Q. Okay.

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1 A. These letters will trip you up every
2 time.
3 Q. Then this one is a little different.
4 This is October -- the first letter is December
5 9th, 2009, so they're not in chronological order.
6 This one is called engagement letter and it's
7 dated Monday, October 19, 2009, to Martha Jo.
8 A. Yes.
9 Q. It's very -- the woman who had joined
10 us here today earlier, sister of Murrell Smith
11 employed at Reliable. What is this letter?
12 A. When ATMES group received the
13 notification of the sales tax they were up in
14 arms, what do we do. And I generally don't work
15 by the hour. And so what I said is I will
16 undertake all these tasks with the understanding
17 that my compensation, if any, will be based on
18 the reduction in sales tax that I might be able
19 to achieve. By the way, I lost my shirt on this
20 deal.
21 Q. Okay. So you were engaged. Martha
22 Jo Johnson signed and accepted your offer where
23 you said look I'll go and see if I can get you
24 some of this sales tax back from SCDOR or you're
25 not obligated to pay it? And I'll take it --

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1 I'll do it on a contingency. You don't have to
2 pay me anything unless I succeed for you and then
3 it will be eighteen percent of the tax amount
4 reduced; is that accurate?

5 A. That's correct. Yes, sir.

6 Q. Now what I didn't find anywhere is
7 your presentation to the South Carolina
8 Department of Revenue about why these monies
9 should not be assessed against your client.

10 A. Well what we did, the actual services
11 rendered were (1) preparing them for this
12 examination. They were totally without a clue.

13 Q. Preparing whom?

14 A. The ATMES folks. The internal
15 accounting staff, they had no clue what they
16 needed to get, how they presented it. We went
17 over iteration after iteration of no, no you're -
18 - you're dealing with someone that doesn't want
19 to understand this has got to be clean and simple
20 and we just went through and again they were
21 going through the information and I was helping
22 them put it in a form and format that it could be
23 examined, that we might have favorable results
24 and then arguing if there were cases, you know,
25 points that we might have some position to argue

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1 with the agents that were involved. And then
2 lastly trying to reduce any penalties that might
3 be involved.

4 Q. Okay. Did you ever take the position
5 with SCDOR, hey, these are -- this is an
6 exception for prosthetic devices. Prosthetic
7 devices have evolved. A CPAP or a BIPAP is
8 something, it's a new way of -- it's a new
9 machine to help replace the function of the lung.
10 These other things like the nebulizer are in the
11 same area. And so this assessment should fall in
12 the exemption. Did you ever take that position
13 with the Department of Revenue?

14 A. It was my understanding at this time
15 that this audit was done that issue had been
16 decided by the Supreme Court. So I'm not going
17 to go and say the Supreme Court is wrong, Mr.
18 Auditor. You know, they decided -- they came
19 down and made it an error. I don't -- don't
20 believe that's a good idea.

21 Q. And I agree with you. So I guess my
22 question is, what possible service could you
23 provide to them that might even result in a
24 victory to them? If the Supreme Court has said
25 all these monies are due, what did you do to

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1 attempt to earn this contingency fee?

2 A. Ninety-five percent of any
3 examination is preparation. It's not point of
4 law. It's not you're right and I'm wrong and
5 it's according to code section so and so. It's
6 getting -- you've got hundreds of -- perhaps
7 hundreds of thousands of documents, but certainly
8 thousands of documents that are in tumultuous who
9 knows where shape. The auditors, if you hand
10 them that, they're going to write you a ticket
11 and walk out the door.

12 So my job first was to prepare the
13 client to get them ready to be examined. And the
14 auditors in this were very appreciative of the
15 work that was done so they could do their job and
16 get on down life's road. And I think that's
17 reflected in the results that they got. They --
18 they didn't give them a thing that they weren't
19 entitled to, but they didn't go out of their way
20 to hammer this company which they could of just
21 because of the lack of preparation.

22 Q. So what I'm hearing you say is you
23 helped them organize the documents so that the
24 Department of Revenue wouldn't have to do it so
25 to make the process smoother? You really didn't

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1 have an argument to make on the merits because
2 the Supreme Court had made that decision.

3 A. There's more to it than just that one
4 issue. There's here's our general ledger that
5 shows this much in gross income, here's our sales
6 tax. Do we have the support for the exemptions
7 we claimed in the form and format that the
8 Department of Revenue is looking for? Can we
9 reconcile our income to our sales tax returns?
10 Prove it.

11 Sales -- the Department of Revenue
12 wanted here's your bank deposits, here's what you
13 reported on the tax return, why are there
14 differences? Okay. Just exactly what we were
15 talking about with the Abacare case. So we
16 needed to be able to explain each and every
17 difference between what went in the bank and what
18 was reported on the sales tax return. We claimed
19 we didn't -- that this particular customer even I
20 think Tuomey Hospital, some of their operations,
21 some were exempt and some were not. There's so
22 many inconsistencies in this tax -- tax law.
23 It's -- it's not a simple law.

24 Q. Did the period for the assessment
25 that you were arguing against, this \$187,838 did

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1 it cover a period while Abacare was not owned by
2 the Reliable Group out of Sumter?
3 A. I think that this is just related to
4 Reliable and not -- not the Abacare overflow
5 issue, but I'm not certain of that. I think this
6 is just the Reliable side of the house.
7 Q. And did Reliable -- was Reliable
8 based on your experience there, was Reliable
9 facing the same challenge that they had to pay
10 back sales tax because they thought an exemption
11 was going to apply and the Supreme Court says no
12 an exemption doesn't apply?
13 A. That's true.
14 Q. So from this can we deduce that Mary
15 Jo did not deduct those monies in 2008-2007?
16 A. I'm not sure I understand the
17 question.
18 Q. Well we talked about the fact that
19 Reliable was facing the same issue.
20 A. I'm going to generally agree with
21 that statement, but there was a lot more to it
22 than just that singular you didn't pay sales tax
23 on these items. There were customers are taxable
24 or non-taxable, you know. Use tax on software,
25 there were all kinds of issues that -- so you

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1 can't just narrow it down and say it's the
2 Supreme Court. It's the application of the
3 Supreme Court decision. There was more to it.
4 Q. Do you believe in your analysis that
5 Abacare might have similar issues with whether
6 customers are exempt or whether software usages
7 might have been categorized in the way you just
8 described them when it presented its valuation to
9 Reliable? When it had the valuation done by
10 Burkett, Burkett & Burkett, that's what I should
11 say.
12 A. Would they have had similar issues?
13 Q. Yes.
14 A. More than likely, yes, sir.
15 Q. Okay. We talked about the fact that
16 in 2007 you were aware of the celebration about
17 hey, they finally recognized that DME is not --
18 fits under the exemption for let's just say for
19 example, respiratory devices. There was a
20 celebration in 2007; you remember that?
21 In 2008, you were called upon to help
22 them evaluate another business that they're going
23 to draw into their family of businesses that is
24 also durable medical equipment. Did you bring to
25 their attention having remembered that

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1 celebration when you told them look, this isn't
2 over. When you were looking at valuing bringing
3 in Abacare, did you talk with Murrell Smith and
4 say there maybe risk here because remember you've
5 got that administrative law court decision, but
6 you don't have a Supreme Court decision yet.
7 A. I would say no, sir. That was --
8 that was not the only risk and I would definitely
9 tell you no, I didn't say hey, you know you might
10 have a sales tax issue here. I was worried about
11 you're paying eight hundred thousand dollars for
12 a company that's never shown a profit, or shown
13 minimal profit.
14 Q. So you were worried about kind of
15 bigger things?
16 A. The bigger issues.
17 Q. The bigger issues. Okay, things like
18 that because it hadn't shown a profit?
19 A. Exactly.
20 Q. Is what you said. Is that true that
21 Abacare had not shown a profit by the time it
22 came in?
23 A. Well, let's give me just a minute. I
24 apologize this writing is in about two font. But
25 if you look at the bottom lines you can see how

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1 erratic the profits were.
2 Q. Page 19 of 55 of the Burkett Report.
3 And these are -- the title is -- the page title
4 is Abacare Home Medical, Inc. historical income
5 statements adjusted for the years ending and then
6 it goes 2004, 2005, 2006, 2007, 2008.
7 And the columns at the bottom, 2004
8 negative eighteen thousand, I'm rounding. Year
9 2005, negative fifty-five thousand, year 2006,
10 ninety-six thousand. That would be rounded to
11 ninety-seven thousand. 2007, negative eleven
12 thousand. And annualized for 2008 a positive
13 one, twelve, five-thirty.
14 A. Now the annualized is the point I've
15 been trying to make. They took four months and
16 disregarded all the losses from all the prior
17 years and said oh, well it'll be different in the
18 future based on these four months.
19 And then the way they valued this
20 company is they took that annualized net income
21 and they exploded it forward and said this
22 company in the year -- let's see -- if I'm
23 belaboring this y'all tell me to be quiet. But
24 they exploded it forward to projected income of
25 like two and three hundred thousand dollars. And

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1 and correct, what I've attempted to do was to
2 take that four thousand dollars a month out of
3 the Burkett calculations.
4 Q. Okay.
5 A. And if you follow those through I
6 believe that will -- that will make all the way
7 through using his same capitalization rate,
8 marketability discounts and others.
9 Q. Were there any other liabilities
10 other than the potential for this sales tax
11 liability?
12 A. Yes, sir. They had notes payable. I
13 think they had leases payable.
14 Q. Were there any other liabilities that
15 were misstated?
16 A. Not that have come to our attention.
17 Q. That's what I ---
18 A. Sorry.
19 Q. Okay. Thank you.
20 MR. MARSHALL: Can we take a
21 break before you rest your examination?
22 MR. HOWSER: I was through,
23 but anyway.
24 MR. MARSHALL: Can we take a
25 break and maybe you leave your option open.

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1 BY MR. HOWSER:
2 Q. Let me refer you to Exhibit 7. If
3 we look at the third paragraph down, and this is
4 the paragraph that discusses the Home Medical
5 Systems case. In the last sentence of your
6 letter it says this court case established the
7 taxability and a the number of DME products that
8 have long been considered non-taxable. Did I
9 read that correctly?
10 A. The reversal did.
11 Q. Yes.
12 A. Right.
13 Q. Okay. And then you say in the next
14 paragraph as a result of "the victory in the
15 Supreme Court case, SCDOR began a process to
16 offer taxpayers an opportunity to voluntary
17 report and correct any errors"; correct?
18 A. Yes, sir.
19 Q. The fourth paragraph says, "As a
20 result of the victory in the Supreme Court, SCDOR
21 began a process to offer taxpayers an opportunity
22 to voluntarily report and correct any errors as a
23 result of the 'changed'" -- the quote being my
24 quote, "taxation due to the case."
25 Do you agree with that?

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1 A. That is what I wrote, yes, sir.
2 Q. All right. Do you agree that that's
3 a correct statement? Not just of what you wrote,
4 but is it a correct statement as you understand
5 the situation to exist on December the 9th, 2009?
6 A. Well, let me restate it in case what
7 I've said here is not accurate. I felt that the
8 South Carolina Department of Revenue having won
9 the case was trying to be magnanimous and offer
10 these taxpayers some means to come clean, get the
11 taxes paid and offer -- and they offered a
12 clemency period via email. That's -- that was
13 what that paragraph was meant to say regardless
14 of how it's being read today.
15 Q. And that was because of a changed
16 taxation due to the case?
17 A. The DOR wanted to clean up all this
18 process. The taxation changed, yes.
19 Q. And insofar as Reliable was concerned
20 you don't know, as I understand it, how they were
21 handling the sales tax that might be due and
22 payable because you just simply got from them
23 figures?
24
25 MR. SMITH: Object to
the form, but go ahead and answer.

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1 THE WITNESS: I agree
2 with that, yes.
3 BY MR. HOWSER:
4 Q. And with regard to the valuation
5 report of Burkett & Burkett, do all of your pages
6 of the report, which I believe are fifty-five
7 pages?
8 A. This isn't my report. This is
9 Mr. ---
10 Q. The report you have in your
11 possession.
12 A. It -- it says fifty-five pages and
13 I've got fifty-five.
14 Q. And all of the pages have draft ---
15 A. Stamped all over it, yes, sir.
16 Q. Did you ever get a final report from
17 Burkett, Burkett & Burkett?
18 A. I did not, no, sir.
19 Q. Did you ever ask anybody why you only
20 had a draft report and not a final report from
21 Burkett, Burkett & Burkett?
22 A. I did not ask.
23 Q. Were you curious about that?
24 A. Yes.
25 Q. All right. And why were you curious

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1 about it?

2 A. There are some CPA firms that are

3 under the belief that if they issue a draft

4 report they don't have responsibility for what

5 they wrote. It was just a draft. I don't know

6 whether that was the logic here or not.

7 Q. Did you ever think about calling

8 Burkett, Burkett & Burkett and asking them if

9 they had issued a final report?

10 A. I was not in a position to

11 independently pick up the phone and call Mr.

12 Burkett and say I've got a document I wasn't

13 supposed to have and whatever. So, no.

14 Q. Did you consider that you had a

15 document you weren't supposed to have?

16 A. I had it. When I got it, it's too

17 late.

18 Q. Well did you consider that you had a

19 document that maybe you shouldn't have?

20 A. No, sir. When it's in general

21 circulation, how it got to me is -- I -- I got

22 it. The bank got it, everybody had it.

23 Q. All right. How did the bank get it?

24 Did the bank get it from you?

25 A. No, sir, not that I'm -- I don't

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1 think so.

2 Q. How did the bank get it?

3 A. I don't know. Well, I'd ask the

4 question how did it get out of the Connelly's

5 possession?

6 Q. Mr. DeClemente's possession?

7 A. Well, is it addressed to him? Yes.

8 I -- I don't know how it got out of their

9 possession. I know that Mr. DeClemente was

10 attempting to become a twenty-five percent owner

11 in this new entity, as was Ms. Cuce. So I assume

12 there was some motivation.

13 Q. And I believe you told me you don't

14 know how you got the report?

15 A. I do not.

16 MR. HOWSER: Okay.

17 Thank you.

18 MR. SMITH: Anybody

19 else? Has this been marked yet, the report?

20 ++++++

21 (DRAFT REPORT:

22 VALUATION OF THE

23 COMMON STOCKS OF

24 ABACARE DATED 7-14-08

25 FROM BURKETT,

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1 BURKETT & BURKETT, CPAS

2 WAS MARKED FOR

3 IDENTIFICATION AS

4 DEPOSITION EXHIBIT

5 NUMBER 9)

6 ++++++

7

8 MR. SMITH: Gentlemen,

9 what I have marked thus far to keep everybody in

10 order I'm going to try to go fairly quickly. But

11 I -- Number 9, Exhibit 9 is the draft report from

12 Burkett.

13 Ten is the 2008 return prepared by

14 Hood & Selander for Abacare.

15 ++++++

16 (2008 TAX RETURN

17 FOR ABACARE

18 WAS MARKED FOR

19 IDENTIFICATION AS

20 DEPOSITION EXHIBIT

21 NUMBER 10)

22 ++++++

23 MR. MYRICK: It's the

24 one page?

25 ++++++

(AFFIDAVIT OF

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1 MR. BRADHAM

2 WAS MARKED FOR

3 IDENTIFICATION AS

4 DEPOSITION EXHIBIT

5 NUMBER 11)

6 ++++++

7 MR. SMITH: One page,

8 yes. Eleven is the affidavit of Mr. Bradham

9 which you all have seen.

10 ++++++

11 (EMAIL, SELANDER

12 TO BRADHAM

13 WAS MARKED FOR

14 IDENTIFICATION AS

15 DEPOSITION EXHIBIT

16 NUMBER 12)

17 ++++++

18 MR. SMITH: Twelve is

19 an email from David Selander to Mr. Bradham.

20 ++++++

21 (MEETING MINUTES

22 BY HOOD & SELANDER

23 WAS MARKED FOR

24 IDENTIFICATION AS

25 DEPOSITION EXHIBIT

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

Assistive Technology Medical
Medical Equipment Services, LLC,

Plaintiff,

vs.

Case No.: 2011-CP-10-8011

Hood & Selander, CPAS, LLC,
Donna C. Cash, as Representative
of the Estate of Dorothy Connelly,
W.E. Applegate, III, as personal
Representative of the Estate of
James B. Connelly, Kimberly Cuce,
and Phillip Declemente,

Defendants.

TRANSCRIPT OF PROCEEDINGS
HEARD BEFORE JUDGE J.C. NICHOLSON, JR.
ON DECEMBER 16, 2013

ROLAYNE M. VOLPE, CCR, RPR
Post Office Box 342
Summerville, South Carolina 29484

A P P E A R A N C E S

For the Plaintiff:

JAMES E. SMITH, JR.

For the Defendants:

CAMERON L. MARSHALL
R. DAVIS HOWSER
JAMES D. MYRICK

Reported By:
Rolayne M. Volpe, CCR, RPR

I N D E X

1

2

DESCRIPTION

PAGE

3

4

PROCEEDINGS

4

5

REPORTER'S CERTIFICATE

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6

7

8

9

E X H I B I T S

10

DESCRIPTION

PAGE

11

(No exhibits were offered during the proceeding.)

12

13

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Reported By:
Rolayne M. Volpe, CCR, RPR

1 The above-styled cause came on for hearing on
2 the 16th day of December, 2013, at 11:36 a.m., before
3 Judge J.C. Nicholson, Jr., Active/Retired Judge,
4 presiding over the Circuit Court for the County of
5 Charleston, when the following proceedings were had and
6 entered of record, to wit:

7 PROCEEDINGS

8 THE COURT: Okay. What do we want to hear
9 first?

10 MR. SMITH: Your Honor, I think the issue of
11 default and maybe their request to be -- I guess they
12 filed a Motion to Extend the Time --

13 THE COURT: There's a motion to it -- you filed
14 an Affidavit of Default, but there's never been an Order
15 of Default. And they filed a Motion to Extend Time to
16 Answer. I think they have answered. And you've got a
17 Motion for Default; right?

18 MR. SMITH: Well, it would be actually for a
19 damages hearing. Our position, of course, the Court
20 has -- the Court has entered a default and the question
21 would be relief from the default.

22 THE COURT: There's never been an Entry of
23 Default. All that's been filed is an Affidavit of
24 Default. Okay?

25 MR. SMITH: Yeah, but --

 Reported By:
 Rolayne M. Volpe, CCR, RPR

1 THE COURT: And what does -- an Affidavit of
2 Default's been filed, the clerk or judge has never
3 actually entered the default.

4 MR. SMITH: All right. Well, I would have a
5 little bit different position on that, your Honor,
6 because --

7 THE COURT: What's your position?

8 MR. SMITH: I think it's pretty clear that it's
9 a -- the position is --

10 THE COURT: I'm not arguing with whether it's
11 in default or not. All I'm telling you, in the file,
12 there's an Affidavit of Default, and that's the only
13 thing that's in the file.

14 MR. SMITH: Right.

15 THE COURT: Okay?

16 MR. SMITH: And the clerk can file --

17 THE COURT: All right. At that point in time,
18 either the clerk can enter a default or the Court can,
19 or you can wait and have a damage hearing. It's your
20 choice. But none of that's been done.

21 MR. SMITH: But our position is, your Honor, I
22 don't think there was any discretion under the Rule and
23 under the Court decisions that once the Affidavit of
24 Default is filed, that the clerk has no discretion but
25 to enter a default. And so the standard is under

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1 Rule 55. And I do think that's important to get that
2 settled before --

3 THE COURT: Well, I'll agree with you it's
4 probably Rule 55, not 60.

5 MR. SMITH: Okay.

6 THE COURT: And that's really the crux of the
7 issue on whether I'm going to let them answer or not.

8 MR. SMITH: That's correct, your Honor.

9 THE COURT: I mean, that's really the
10 bottom-line argument.

11 MR. SMITH: That is correct. I just wanted to
12 make sure we were on the same field that it would be --

13 THE COURT: One thing I was trying to make
14 sure, is that you realized there was nothing that had
15 been filed as a result of your Affidavit of Default, is
16 what I'm trying to make sure you understood.

17 MR. SMITH: I did. And my position is that
18 there would be nothing required to be filed. It's
19 entered in the file book, by the clerk, as the entry.
20 And the -- but I can address that in my argument. But I
21 think we're on the same page as far as the standard --
22 Rule 55 standard.

23 THE COURT: All right. I believe -- is it
24 Declemente that's in default?

25 MR. MARSHALL: Yes, sir, Judge.

Reported By:
Rolayne M. Volpe, CCR, RPR

1 THE COURT: You have answered; is that correct?

2 MR. MARSHALL: Yes, sir.

3 THE COURT: You got a copy of his Answer?

4 MR. MARSHALL: I think it was in August of
5 2012. So we did at the same time that we answered and
6 counterclaimed and made reference to our nine
7 meritorious defenses in the action, one of which is a
8 covenant not to sue, that Mr. Smith's clients entered
9 with my client, that was ignored when they filed the
10 suit against my client. But there are numerous
11 meritorious defenses. Under 6(b), if we have good cause
12 for an extension of time in which to answer, then that's
13 within the Court's discretion --

14 THE COURT: Well, when was your client served?
15 I mean, the first thing is the timing, then the
16 meritorious defense, and then the degree of prejudice.

17 MR. MARSHALL: He was served January 6th --

18 THE COURT: January 6th?

19 MR. MARSHALL: -- 2012. January 6th. So the
20 Answer was due February the 6th, 2012. At that time,
21 Judge, he --

22 THE COURT: So he was served on January the
23 6th; is that correct?

24 MR. MARSHALL: Yes, sir.

25 THE COURT: What's the date of the Affidavit of

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1 Default?

2 MR. SMITH: Your Honor, that's March 30th, and
3 I would --

4 THE COURT: March the 30th?

5 Let me just get the dates down. Then we'll
6 listen to your arguments. Okay?

7 MR. SMITH: Thank you, your Honor.

8 THE COURT: All right. Affidavit of Default's
9 on 3-30-12.

10 MR. SMITH: Yes, sir.

11 THE COURT: When did you file your Answer?

12 MR. MARSHALL: The Answer was filed August 9th.
13 My client --

14 THE COURT: All right. August the 9th.

15 And when did you file a motion to expand the
16 time or take yourself out of default, whichever you want
17 to call it?

18 MR. MARSHALL: At the same time that we filed
19 the Answer and Counterclaim.

20 THE COURT: So we're talking about --

21 MR. MARSHALL: August 9th. I was hired by
22 Mr. Declemente in May. He had been --

23 THE COURT: So you're talking about seven
24 months after service; right?

25 MR. MARSHALL: That's correct.

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Rolayne M. Volpe, CCR, RPR

1 MR. SMITH: And, your Honor --

2 THE COURT: Let me just get the dates down.
3 I'll listen to y'all's argument. Okay?

4 MR. SMITH: They're not right, your Honor.
5 That's what I'm --

6 THE COURT: Okay. Well, you can --

7 So approximately seven months there was an
8 Answer and a motion filed; is that correct?

9 MR. MARSHALL: Yes.

10 THE COURT: When were you hired?

11 MR. MARSHALL: I was hired, I believe, it was
12 May the 9th. My client had been involuntarily
13 hospitalized at the Medical University of South
14 Carolina. You may -- this story was all over the news,
15 even in --

16 THE COURT: Well --

17 MR. MARSHALL: -- I believe. My client was
18 the man who blocked the bridge, who drove his car to the
19 top, had some writing on his car, saying: Back away.
20 Everybody in Charleston was furious at him because he
21 had kept everybody from getting home on time. But he
22 was suffering serious psychiatric illness at the time.
23 He was involuntarily committed to MUSC four days prior
24 to the date that his Answer was due. And he remained
25 over there --

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1 THE COURT: And if I remember correctly, he was
2 admitted on February the 2nd; he was discharged on
3 February the 16th. The diagnosis was bipolar, was
4 placed on lithium and Risperdal. Apparently he was
5 admitted again on February the 22nd, discharged on March
6 the 6th, bipolar, with lithium. And in May, he hired
7 you.

8 So if he was served on January the 6th, he was
9 admitted within the 30 days to the hospital, and he was
10 admitted again in February, hired you in March, and
11 nothing was done until August; is that basically
12 correct?

13 MR. MARSHALL: Hired me in May, Judge.

14 THE COURT: Right. Hired you in May.

15 MR. MARSHALL: And nothing was filed until
16 August. I was working on this case. It's fairly
17 complex. There are --

18 THE COURT: Well, it's not complex as to
19 whether there's good cause for him not answering or not.
20 It's just basically three issues; right? The time of
21 the motion, the meritorious defense, and the degree of
22 prejudice of the Plaintiff. I mean, that's the issue
23 we're here on -- on the Motion; right?

24 MR. MARSHALL: I agree with that, Judge.

25 THE COURT: All right. Let me hear you, why I

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Rolayne M. Volpe, CCR, RPR

2011-CP-10-8011
December 16, 2013

1 should open up the default.

2 MR. MARSHALL: Well, first of all, there hasn't
3 been an Order of Default as your Honor has --

4 THE COURT: Well, if you read the rule, okay --
5 and I'll read it to you: And that the fact is made to
6 appear by affidavit or otherwise the clerk shall enter
7 the default.

8 That hasn't been done. That procedure hasn't
9 occurred. But you're still in default. You've still
10 got to get yourself out of default whether the clerk's
11 done it or the Court's done it. I just wanted to clear
12 something up with Mr. Smith. But he's right. That's a
13 procedural issue that the clerk could have done or the
14 Court could have done. Okay? But you're in default.
15 You don't wait eight months and send an Answer in and
16 that gets you out of default. Is that right, or is that
17 wrong?

18 MR. MARSHALL: Well, I think if there's good
19 cause --

20 THE COURT: Well, that's what we're talking
21 about. Tell me your good cause.

22 MR. MARSHALL: Good cause is that he was
23 involuntarily hospitalized twice, that he was not in the
24 position to --

25 THE COURT: Well, do you have any medical

Reported By:
Rolayne M. Volpe, CCR, RPR

1 records to that effect, any doctors' statements, or
2 anything to give to me?

3 MR. MARSHALL: Oh, yes, sir. I submitted --
4 I'm sorry. I thought the last time that I was here, I
5 submitted the memorandum --

6 THE COURT: You submitted a memorandum, but I
7 don't remember if any medical records were attached to
8 it.

9 MR. MARSHALL: Yes, sir, they were attached.
10 But I can hand up another copy.

11 THE COURT: All right. Do we have them?

12 (The Judge speaks with the Clerk off the
13 record.)

14 THE COURT: All right. Summarize the medical
15 records for me. Have they said he doesn't know what
16 he's doing, or he doesn't have the capacity to deal with
17 his own affairs? Do I need to appoint a guardian for
18 him, or what's going on?

19 MR. MARSHALL: Not at this point, Judge. He's
20 doing okay. But if you look at the discharge note in
21 Exhibit 2, dated March the 6th, this is from his second
22 involuntary hospitalization, March the 6th of 2012, it
23 says: Bipolar disorder with psychotic features.

24 And he was put on Risperdal, lithium,
25 Thorazine, some pretty heavy antipsychotics. The

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1 doctors noted insight and judgment were both
2 significantly impaired.

3 That's in Exhibit 2. It's page 1 of 3. I can
4 hand up my copy if you'd like. But the medical records
5 are replete with the evidence --

6 THE COURT: Exhibit 2 is a promissory note.

7 MR. MARSHALL: Oh, I'm sorry. You're right.
8 I've got it -- it's stamped differently. It should be
9 Exhibit 5, Judge.

10 THE COURT: Okay.

11 MR. SMITH: Your Honor, if I could just enter
12 an objection, for the record, just that there's -- this
13 isn't competent evidence right now. Normally they would
14 have to have an affidavit from a physician declaring
15 either him being incompetent or not. He's trying to
16 interpret what is in the note. And I just -- I want to
17 let that on the record, just --

18 THE COURT: All right.

19 Go ahead.

20 MR. MARSHALL: Thank you, your Honor.

21 Well, these are the normal -- medical records
22 kept in the normal course of business, and there is an
23 affidavit of authenticity with the records, so. . .

24 But, Judge, there are numerous other references
25 to the poor psychiatric condition, extremely poor, that

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1 my client was in at that time. So we submit to you,
2 Judge, that that does constitute good cause, that he was
3 involuntarily hospitalized by the police at the time
4 that his Answer was due.

5 THE COURT: I -- he was last discharged on
6 March the 6th. Still took five months to do something.

7 MR. MARSHALL: Well, I -- he was receiving --

8 THE COURT: I mean, my concern is the time
9 frame. I mean, you sit there and say he was in the
10 hospital. Yeah, he was in the hospital. He gets out of
11 the hospital, still five months later, he finally does
12 something.

13 MR. MARSHALL: Well, he was still under --

14 THE COURT: I mean, why am I supposed to give
15 him a free pass --

16 MR. MARSHALL: Well, he was still under --

17 THE COURT: -- because he was in the hospital?

18 MR. MARSHALL: He was still under outpatient
19 care for an extended period after he was --

20 THE COURT: Well, so what? I mean, do you have
21 anything saying that he didn't realize because of his
22 medical condition that he had been sued, and he didn't
23 realize the summons said 30 days?

24 MR. MARSHALL: Well, let me consult with him --

25 THE COURT: I mean, we're talking about five

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1 months after his last hospitalization before anything
2 was done.

3 MR. MARSHALL: Right.

4 THE COURT: And we haven't crossed the first
5 hurdle yet, the time frame.

6 (Mr. Marshall speaks with his client off the
7 record.)

8 THE COURT: Mr. Smith, the entry of default and
9 the judgment of default, the judgment, you have to go to
10 Rule 60 since the entry is Rule 55. I mean, that's the
11 distinction.

12 MR. SMITH: Yes, it is your Honor. Thank you.

13 THE COURT: I'm just trying to find out whether
14 -- which one you were going -- he was going on, 55 or
15 60.

16 MR. SMITH: Yes, your Honor. Thank you.

17 THE COURT: I'm concerned about the time.
18 That's the first element.

19 MR. MARSHALL: All right. I just consulted
20 with him. He said that, no, he was not aware that he
21 was missing a deadline. He says that he had -- before
22 engaging my office, he had the Mason Law Firm in Mount
23 Pleasant working on this issue, but that he was never
24 informed, or if he was, did not realize that he was --

25 THE COURT: He can't read? I mean, it's very

Reported By:
Rolayne M. Volpe, CCR, RPR

1 clear on the summons.

2 MR. MARSHALL: He reads well, Judge, but he
3 was -- he was not comprehending -- if he was reading, he
4 was not comprehending what he was reading.

5 THE COURT: Well, do you have a doctor, or is
6 there anything in his medical records saying that he was
7 not competent?

8 MR. MARSHALL: Well --

9 THE COURT: I understand he's bipolar. I
10 understand he's on -- they put him on medication. I
11 understand he had medical problems. But there's
12 thousands of people walking around the streets with
13 bipolar.

14 MR. MARSHALL: Right.

15 THE COURT: But do you have anything that says
16 he wasn't competent to handle his affairs; therefore, he
17 didn't realize he had been served?

18 MR. MARSHALL: Well, the records indicate
19 insight and judgment both significantly impaired. So I
20 would submit to you that that's --

21 THE COURT: Do they address the issue of the
22 lithium once they put him on the lithium, what happens
23 then? I would think that that would significantly
24 improve his judgment, wouldn't it?

25 MR. MARSHALL: Well, this is the discharge

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1 note, Judge. It talks about his insight and judgment
2 being significantly impaired. And then he did
3 continue --

4 Well, how long did you continue with
5 outpatient?

6 THE DEFENDANT: Oh, for about 60 days.

7 (A discussion is held off the record.)

8 MR. MARSHALL: He says that it was at least 60
9 days after this second dismissal from the hospital that
10 he was continuing with intensive outpatient.

11 THE COURT: That puts him up to May when he
12 hired you, and two months later something was filed.

13 MR. MARSHALL: That's right, Judge. I mean, it
14 was fairly complex, and we were not dillydallying around
15 about it. And if you look at the pleadings, there --

16 THE COURT: But it doesn't take very long to
17 file a motion to set aside the entry of default. We're
18 not talking about a judgment of default; talking about
19 an entry of default. That doesn't take long.

20 MR. MARSHALL: I don't think there's been any
21 prejudice to the Plaintiff in this case. The
22 Plaintiff --

23 THE COURT: Well, we hadn't got -- we're still
24 talking about the time right now.

25 MR. MARSHALL: Yes, sir.

Reported By:
Rolayne M. Volpe, CCR, RPR

1 THE COURT: Why two months?

2 MR. MARSHALL: Well, I just thought it was in
3 the best interest of my client to file everything at
4 once, this -- the meritorious defenses can be at issue
5 when you're trying to overcome an entry of default, and
6 it took some time to go through all the paperwork and
7 develop those, so I thought it --

8 THE COURT: Okay. What's your meritorious
9 defense?

10 MR. MARSHALL: Well, they're outlined in the --

11 THE COURT: Well, just tell me briefly what
12 they are.

13 MR. MARSHALL: -- in the counterclaim. But the
14 main one, Judge, is that the suit never should have been
15 brought against Mr. Declemente because -- and I've
16 submitted -- I can tell you which exhibit it is in just
17 a second.

18 But there's a stipulation that Mr. Declemente
19 would never be sued as a result of anything going on
20 with these business transactions. And it's quite
21 clear --

22 THE COURT: That was in the contract, or what?

23 MR. MARSHALL: That's in the contract that
24 I've submitted --

25 THE COURT: Contract for sale or what? What

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December 16, 2013

1 was it in?

2 MR. MARSHALL: It was along with -- no. It was
3 a separate document that was entered at the time of the
4 sale. Let me see what you --

5 THE COURT: Was he the salesman, or what's the
6 deal?

7 MR. MARSHALL: Well, he owned a local -- okay.
8 It's exhibit -- in the memo that I submitted, it's
9 Exhibit 4. It's entitled --

10 THE COURT: Exhibit 4? Okay.

11 MR. MARSHALL: -- Full and Final Release, in
12 which Mr Smith's clients promised to never sue
13 Mr. Declemente, which may be another reason that he did
14 not appreciate that he was actually being sued by his
15 former -- former associates, business owners. But he
16 owned a medical supply -- my client owned a medical
17 supply company here in town called Acme Assistant
18 Technology Medical Equipment Services. And he had
19 a -- he sold 25 percent of his ownership to Mr. Smith's
20 clients.

21 THE COURT: Okay.

22 MR. MARSHALL: And since there had been some
23 tumultuous dealings between the parties, at the time
24 that Mr. Declemente sold his interest, they entered this
25 Full and Final Release in which Mr. Smith's clients

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1 coveted never to sue my client regarding anything
2 pertaining to --

3 THE COURT: What are you referring to in this
4 agreement?

5 MR. MARSHALL: The Full and Final Release,
6 Judge?

7 THE COURT: Yeah. I mean, where does it say
8 you can't sue him as a result of the, I guess, selling
9 the 25 percent? Is that what it says?

10 MR. MARSHALL: It says in the large paragraph
11 on the first page, the bottom of the paragraph: In
12 consideration of mutual promises, covenants, and
13 payments to be made pursuant to the bill of sale,
14 confidentiality agreement, and noncompetition agreement,
15 the undersigned do intend to and do hereby individually
16 and for their heirs, executors, administrators,
17 successors, and assigns release, equip, and forever
18 discharge Phillip Declemente, as well as his agents,
19 servants, successors, heirs, executors, administrators,
20 personal -- all other persons, firms, corporations and
21 associations and partnerships of and from any and all
22 claims, actions, causes of action, demands, rights,
23 damages, costs, loss of services, expenses, and
24 compensation whatsoever which the undersigned now has or
25 which may have hereinafter accrued on account of or in

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1 any way growing out of any and all ownership, interest,
2 or employment in any event that is set forth above,
3 whether known or unknown, foreseen or unforeseen, and
4 any consequences thereof resulting or to result from
5 ownership of any of the companies referenced above,
6 employment in or with any of the entities referenced
7 above, business relationships with any of the businesses
8 or individuals referenced above, as well as any
9 negotiation, contracts, or documents executed as a
10 result of the sale of the business as referenced herein.

11 THE COURT: Okay.

12 MR. MARSHALL: So that would be the main
13 meritorious defense. My client never expected to be
14 sued by his former partners because of this document.

15 THE COURT: What's the basis of the suit, the
16 cause of action?

17 MR. MARSHALL: Well, they allege that my client
18 and the other Defendants did not accurately disclose the
19 manner in which they were withholding money for sales
20 taxes on the products that my client's business was
21 selling. So they allege that they -- Mr. Smith alleges
22 that his clients paid too much money for their interest
23 in my client's business, Acme, because it was not
24 disclosed to his clients the method in which sales taxes
25 were being withheld. And then, subsequent to Mr. Smith

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1 purchasing the company from my client, they were hit
2 with a bill -- a tax bill, of about \$100,000, and so
3 they allege damages for that reason.

4 THE COURT: Okay. Tell me about the prejudice.

5 MR. MARSHALL: Well, I don't believe that
6 Mr. Smith's clients have been prejudiced at all. I do
7 assert that my client's been prejudiced by the fact that
8 Mr. Smith's clients have not responded to the
9 Counterclaim, which was brought some 460 days ago now,
10 and that's why we have --

11 THE COURT: Well, you can't bring a
12 counterclaim without legal course. You were outside the
13 30 days. So that Counterclaim right now is basically a
14 nullity unless I allow you to enter it. You know that.

15 MR. MARSHALL: Well, that's true. Certainly
16 true.

17 THE COURT: Okay. So you can't -- don't sit
18 here and tell me they haven't answered the Counterclaim;
19 therefore, that's your client's prejudice. Your
20 client's prejudice doesn't even enter into this
21 equation.

22 MR. MARSHALL: Okay.

23 THE COURT: It's the Plaintiff's prejudice that
24 we're talking about. So tell me why the Plaintiff
25 hasn't been prejudiced.

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1 MR. MARSHALL: Well, I don't see any way in
2 which they have been prejudiced, Judge. They filed a
3 lawsuit in violation of a contract, and now they want to
4 claim that they've been prejudiced by a late Answer,
5 which was filed well over a year ago. I don't see any
6 prejudice.

7 THE COURT: Anything else?

8 MR. MARSHALL: No, sir.

9 THE COURT: Thank you so very much for
10 answering my questions. Thank you, Mr. Marshall.

11 Mr. Smith?

12 MR. SMITH: Thank you, your Honor, very much.
13 May it please the Court. I'm here on behalf of Acme's,
14 and I have with me Jeff Reed, who's one of the members
15 of the LLC, and Mr. Smith regrets he could not be here.
16 His son's been in the hospital. Otherwise, he would be
17 here. He takes this case very seriously. He apologizes
18 for his absence but knows you'll understand.

19 Your Honor, I want to begin by -- I think the
20 Court was correct in looking at the dates, and I think
21 that's important. And so I want to correct some --
22 maybe some misapprehensions on behalf of my opposing
23 counsel, Mr. Marshall. If I may approach, your Honor,
24 here's a copy of when he was served. And, you know, I'm
25 okay if the Court wanted to consider the January 6th

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1 date. It really is immaterial, but we have on the
2 record and in the court file is a December 1st service
3 date of 2011 after the filing occurred in October of
4 2011, so --

5 THE COURT: So it's actually accepted --
6 accepted the return on December the 1st?

7 MR. SMITH: Yes, your Honor.

8 THE COURT: Which was -- how did they come up
9 with the January the -- excuse me.

10 MR. SMITH: January 6th?

11 THE COURT: -- January 6th?

12 MR. SMITH: I'm not sure, your Honor. I mean,
13 it's in this affidavit of -- Mr. Declemente's affidavit.
14 You know, I don't know where that date comes from. In
15 the end, it's really not completely material if the
16 Court considers January 6th or December 1st.

17 THE COURT: Okay.

18 MR. SMITH: But I think the record is December
19 1st, which would add another 30 days or so, as far as
20 the timing goes.

21 But during that period -- and I think it's
22 very helpful to have the affidavit that Mr. Declemente
23 filed, because, as the Court knows and was inquiring,
24 the disability, in order to, you know, prevent or to
25 delay the time required to respond has to define, in

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1 fact, the Defendant who was served is incompetent.

2 THE COURT: Well, do you think -- do you think
3 he could say he was hospitalized, but for good cause,
4 there's got to be incompetence?

5 MR. SMITH: Well --

6 THE COURT: I'm not sure I agree with that --

7 MR. SMITH: I think --

8 THE COURT: -- that analysis that you've got to
9 really prove he was incompetent. All they've got to do
10 is show good cause. And if he's lying up in the
11 hospital with cancer or a heart attack, competence
12 doesn't even enter into it except maybe with medication
13 while he was in the hospital. I'm not sure he's got to
14 show incompetence --

15 MR. SMITH: Well, you're right --

16 THE COURT: -- to get around good cause on this
17 motion. Okay?

18 MR. SMITH: Your Honor, I think that's correct.
19 I was pointing in terms of the days of running you have
20 to show incompetence. But to show good cause, you're
21 exactly correct. And one of the -- one of the -- I
22 think the preliminary questions -- and as I go through
23 the time, I think it will be abundantly clear -- that
24 where we are right now is the Defendant has filed one
25 motion based upon two rules: One is 6(b) and the second

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1 is 60. There has been no motion ever filed for relief
2 from the entry of default. It is not before the Court.
3 I believe today the Court -- it's not even -- so he's
4 entered -- default has been entered. He's asked for
5 extension of time or relief from a judgment under 60(b),
6 none of which apply. So he has not to this day even
7 requested relief --

8 THE COURT: Well, I may make a -- orally amend
9 the Rule 55, because that's what we're here on.

10 MR. SMITH: I understand. I just --

11 THE COURT: I'm not going to rule against him
12 just on that issue. Okay?

13 MR. SMITH: I understand. And I don't think
14 the Court has to. I don't think -- I think there's an
15 abundant basis for the Court to uphold the default and
16 let us move to damages hearing based upon all the other
17 elements that are not there.

18 THE COURT: Why, when the man had three
19 hospitalizations over a three-month period -- and I
20 haven't read the medical records, but according to
21 Mr. Marshall, it says he was -- was having a lot of
22 mental difficulties when he was discharged, plus he was
23 handled as a outpatient for approximately a month or six
24 weeks? Why isn't that good cause to let him answer?
25 Because that's --

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1 MR. SMITH: It is not good cause because he's
2 had able assistance, other than himself, to respond to
3 the lawsuit. And, your Honor, what you have in the way
4 of information is not competent in terms of evidence to
5 consider. One, there's been no showing from the
6 standpoint of an affidavit of the judge -- I mean, of
7 the doctor that says that that's an accurate assessment
8 of his condition.

9 THE COURT: Well, it's the medical records, and
10 I think the medical records would probably be admissible
11 on their face. I don't know. I haven't looked at them
12 from that aspect yet. Okay?

13 Go ahead.

14 MR. SMITH: If I could continue, your Honor, I
15 think that, knowing the timing, the Court doesn't even
16 have to get that far.

17 But the only period of time after they were
18 served, your Honor, when the affidavit was filed, it was
19 120 days. We waited 120 days. We were -- you know, we
20 didn't wait until the 31st day and go drop an affidavit
21 of default. There was an abundance of opportunity there
22 for him to answer. In fact, I just learned through
23 opposing counsel that apparently the Mason Law Firm had
24 this lawsuit and was assisting him at some point prior
25 to his involvement.

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1 But we know that a period of time has gone by
2 of 120 days and no action was taken. And all we know is
3 that there was some indication of a mental illness which
4 was treated. There was only a two-week period, 14 days,
5 out of the 120 days in which he was involuntary
6 committed, but he's had at least two law firms involved.

7 Now, your Honor, we have the appearance of
8 Mr. Marshall --

9 And if I may approach, I think the Court has
10 this, but I just --

11 (Document is handed to opposing counsel and the
12 Judge.)

13 MR. SMITH: Now, this is Mr. Marshall's letter
14 of May 14th filed with the Court, saying, you know, I
15 represent Mr. Declemente, and I'm -- tell me when the
16 default judgment, which, of course, we know, and we
17 talked earlier the difference between an entry of
18 default or being in default and a default judgment.
19 That was March 14th.

20 Your Honor, it was after that period --

21 MR. MARSHALL: May 14th.

22 MR. SMITH: I mean -- I'm sorry. May 14th.
23 Thank you.

24 THE COURT: May 14th.

25 MR. SMITH: May 14th.

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1 To also further correct the record, the motion
2 to extend time was filed 87 days after that letter. The
3 correct date -- and that was on August 9th.

4 (Document is handed to opposing counsel and the
5 Judge.)

6 MR. SMITH: The Answer itself, contrary to what
7 was provided in terms of the dates by opposing counsel,
8 the Answer wasn't filed until August 21st, according to
9 Mr. Marshall's letter.

10 So the accurate timeline has a service in
11 December 1st, 2011. He goes in and out of treatment for
12 a total 14 -- the only period, according to his
13 affidavit, of involuntary incarceration was 14 days,
14 February 2nd through February 16th. 120 days later, we
15 file our affidavit. Then it's not until 165 days, after
16 apparently the Mason Law Firm was involved, does
17 Mr. Marshall make an appearance. 87 days after the
18 letter of appearance by Mr. Marshall, the motion to
19 extend time is filed under 6(B) and Rule 60, not seeking
20 relief under Rule 55. Then 101 days later --

21 THE COURT: Well, he did address -- I assume
22 that the letter of May the 14th says he wants to appear
23 when he filed for the motion of default judgment. So I
24 assume he knew it was -- hadn't been reduced to a
25 judgment yet.

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1 MR. SMITH: Exactly. But, also, he knew
2 that -- then, also, he should have known that it's in
3 default, that he had to move to be relieved from
4 default --

5 THE COURT: I understand. He --

6 MR. SMITH: -- and no action was taken.

7 THE COURT: -- obviously knew it was in default
8 at that time.

9 MR. SMITH: Yes. And no action under Rule 55
10 has been taken up until today to your allowance of him
11 adding that. But to this day, that has not been
12 undertaken. And I think that's important. I think
13 that's important in terms of what's allowed in terms of
14 discretion. I understand the Court's ruling --

15 THE COURT: Well, a lot of people -- in my
16 opinion, a lot of lawyers get confused between 55 and
17 60; when you're supposed to use 55 and when you're
18 supposed to use 60. I think that's a common trait
19 throughout the legal community. Everybody sort of
20 merges them together.

21 MR. SMITH: Yes, sir.

22 THE COURT: I've asked a lot of lawyers, you
23 moving on 55 or 60, and they look like a deer in the
24 headlights.

25 MR. SMITH: Right. I understand. But it's a

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1 significant difference in terms of standards and --

2 THE COURT: There is. I agree with you.

3 MR. SMITH: Yes. So at that point, your Honor,
4 it's -- solely on the basis of time, the Motion should
5 be denied. It's even assuming you say the prejudicial
6 was filed solely on the basis --

7 THE COURT: Well, tell me about his meritorious
8 defense. What's your argument there?

9 MR. SMITH: Well, it's interesting, your Honor,
10 that that would be considered the most meritorious
11 defense when it has to do with a settlement agreement
12 that is separate and apart entirely from the
13 transaction.

14 THE COURT: Well, it's a -- for lack of a
15 better word. It's a -- I guess a covenant. Though
16 that's not really a covenant. But it says, you can't
17 sue him --

18 MR. SMITH: Right.

19 THE COURT: -- and they signed it.

20 MR. SMITH: It's a separate -- entirely
21 separate process, separate event. What we're talking
22 about is a negligence and failure to disclose during the
23 transaction of the purchase of the property. I don't
24 know that it even is applicable. I mean, that would be
25 something we would -- I guess they would raise --

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1 THE COURT: You'll have to argue about that
2 later.

3 MR. SMITH: Yeah. I mean, we would. But I --
4 I mean, I'm surprised that that is the strongest
5 defense --

6 THE COURT: But don't you think that would be
7 meritorious, at least from his perspective? That's a
8 pretty good argument saying, Hey, I've got a contract
9 that you can't sue me. I understand that you may have
10 an argument against that, but doesn't that make it
11 meritorious?

12 MR. SMITH: It's an argument.

13 THE COURT: I'm not saying it's correct.

14 MR. SMITH: It's an argument. It may be one
15 prong of -- of --

16 THE COURT: Well, I guess a better question is,
17 does -- isn't that a meritorious argument on his behalf?

18 MR. SMITH: I will concede that.

19 THE COURT: Okay.

20 MR. SMITH: I will concede that that -- but I
21 think that, in terms of that low threshold, under
22 Rule 55, which was not brought until today, yes, that
23 is -- that would be considered --

24 THE COURT: Tell me about your prejudice.

25 MR. SMITH: Well, your Honor, I guess -- I

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1 want -- I want -- I will talk about that. And part of
2 it is in this entire process, your Honor, which we find
3 ourselves here today. You know, your Honor, we kept
4 advising this -- we were prejudiced in the fact that
5 this would be a very different case in terms of its
6 litigation if he was, in fact, participating in the
7 trial -- or participating in the litigation. You know,
8 we would treat things differently. And the two years --

9 THE COURT: Well, who are the -- educate me a
10 little bit about the parties. Who is Hood & Selander --
11 Selander, and who is the Connelly?

12 MR. SMITH: Exactly. Let me give you a little
13 bit of background here. So Hood & Selander is a CPA
14 firm who's represented by Mr. Howser, who was involved
15 in --

16 THE COURT: That goes to sales tax issue?

17 MR. SMITH: It does. They were -- we have some
18 evidence that shows that they were aware of the failure
19 to report sales tax, it was a liability, and they --
20 your Honor, it affected the value of the business --

21 THE COURT: All right. Who's Dorothy Connelly
22 and James B. Connelly?

23 MR. SMITH: They are previous owners of the --
24 of that -- of the company. They were the previous
25 owners.

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1 THE COURT: They owned it with Mr. Declemente?

2 MR. SMITH: Correct. He had a percentage
3 ownership.

4 THE COURT: And who's Kimberly Cuce?

5 MR. SMITH: Kimberly Cuce is also -- was
6 involved as an owner, but she is since in default. She
7 is in default.

8 THE COURT: So Phillip Declemente and the
9 Connellys owned it together?

10 MR. SMITH: He owned a small percent. It was
11 like 25 percent, or somewhere --

12 THE COURT: Mr. Declemente had 25 percent?

13 MR. SMITH: Right.

14 THE COURT: Okay.

15 MR. SMITH: And so his knowledge of that
16 information of the --

17 THE COURT: Okay. Go ahead with your
18 prejudice. I just wanted to find out who the parties
19 were because I didn't know.

20 MR. SMITH: No, that's very helpful because it
21 does help to show that if he, in fact, you know, is
22 allowed to appear, first of all, the other prongs were
23 not met. But if he's allowed to appear, it affected
24 entirely how we've chosen to litigate this matter over
25 the period of time. We would be prejudiced in that

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1 respect. And --

2 THE COURT: How would you be prejudiced? I
3 mean, other than you're going to have to address his
4 defenses. I mean, how is it going to affect the -- how
5 is the litigation going to be prejudiced, because I
6 think that's what you've got to look at?

7 MR. SMITH: Well, it is. But, I mean, we would
8 have done things differently had he been -- had he shown
9 up and appeared timely, which is the whole point of the
10 prejudice, your Honor. If he had done what his
11 obligations are under the Rule, this past two years of
12 litigating this case would have been done very
13 differently; with the decisions we made, the course of
14 conduct that we made, and how we proposed to pursue the
15 matter, would have been very different had he been a
16 participating party. But because he failed to discharge
17 his duty, not just slightly failed, not just by a small
18 measure failed, but by a gulf of failures -- failed to
19 respond timely, then failure to pursue the proper relief
20 in order to respond -- we didn't do things in terms of
21 the litigation of this matter that we might have done
22 differently.

23 And, you know, as a result, that is the
24 prejudice that would result. And that's why we have a
25 default process and why there's a proper process to seek

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1 relief.

2 THE COURT: Well, you would probably have to go
3 back and redo a lot of your discovery.

4 MR. SMITH: We'd have to do some things
5 differently. But we -- you know, we -- it does impact
6 how we make -- and also some of the settlement
7 discussions that we've had, it does impact the case. It
8 impacts the course going forward of our ability to
9 achieve a result that we would like to achieve or a
10 potential settlement in the future. It impacts
11 significantly the course of the case. And
12 that's -- that is material prejudice.

13 And I don't want to minimize the -- the fact
14 that he gave -- 165 days where he was assisted at least
15 by one other law firm and certainly had the
16 ability -- there's no indication that he didn't have the
17 ability or reason to answer. You know, I mean, if the
18 Court says, okay, he's been -- he had trouble with
19 bipolar, maybe he gets 60, 80, 90, 100 days. But 165
20 days, there's no -- in our position, going to answer. I
21 think timing is -- is not met in terms of the timeliness
22 of his conduct. And not -- and that's exclusive of any
23 involvement by Mr. Marshall.

24 Then, with Mr. Marshall present, there was
25 never the proper relief sought; and as the Court is

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1 looking in the deposition transcript, we were very clear
2 several times also in discovery responses to say, you
3 know, you were in default, and we are not --

4 (Document is handed to opposing attorney and
5 the Judge.)

6 MR. SMITH: -- nor are we required to respond
7 to your discovery requests until such time as you're
8 relieved. And, your Honor, that -- that request has
9 never been made until today.

10 So if all they've got is some supposed
11 agreement that -- which I don't believe applies, and we
12 concede that that would be under the lowest threshold of
13 meritorious argument -- I think there's clearly
14 prejudice upon my client should they be allowed to enter
15 in this case so late after they've been in default for
16 so long. And also the timing alone does not, and his
17 condition, does not excuse 165 days up until
18 Mr. Marshall's appearance, and then 101 days after that
19 was the Answer filed. So we're talking 266 days before
20 the Answer was ever filed. And I just -- I think the
21 Rules -- at some point, within the Court's discretion,
22 obviously --

23 THE COURT: Whose deposition was this? I'm
24 sorry.

25 MR. SMITH: That was Mr. Smith's deposition,

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1 your Honor, my client. Mr. Smith's deposition was taken
2 on October 31st, and Mr. Declemente's lawyer,
3 Mr. Marshall, appeared, and this would certainly go to
4 prejudice. We were --

5 THE COURT: So Mr. Marshall appeared to ask
6 questions?

7 MR. SMITH: Yes. And, your Honor, I think it
8 is important to note, you know, he would now, if the
9 Court wants to come back, you know, would, I'm sure,
10 seek to have a -- my client's deposition taken again --

11 THE COURT: Well, did he ask any questions?

12 MR. SMITH: He sought to ask questions. As the
13 record indicates, I objected to that fact --

14 THE COURT: So you -- because you say he was in
15 default. Okay.

16 MR. SMITH: And he's limited solely to damages.
17 I think all they are allowed to do is to cross-examine
18 my damages' expert on that sole issue. And so I didn't
19 offer to allow him to answer questions on that sole
20 basis. But --

21 THE COURT: All right. Let me just say one
22 thing. As far as the time frame, from when he filed it
23 in August up to now, it's been scheduled numerous --
24 several times. Okay?

25 MR. SMITH: I don't disagree.

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1 THE COURT: I'm not going to consider any time
2 from the time he filed it in August up through now.
3 Okay?

4 MR. SMITH: I agree.

5 THE COURT: I don't think that has
6 anything -- because he's done everything he could to get
7 it scheduled.

8 MR. SMITH: I'm 100 percent agreeing with that,
9 your Honor. That's not the -- what is operative in
10 terms of the Court's decision.

11 THE COURT: Right.

12 MR. SMITH: I totally agree with you.

13 THE COURT: And that time frame doesn't have
14 anything to do with the mediator.

15 MR. SMITH: No, it does not. It does not.
16 It's purely up until the time of the filing. And I
17 think there's ample evidence and there's ample time
18 there for the Court to make a determination that it was
19 not timely.

20 THE COURT: Okay.

21 MR. SMITH: Thank you, your Honor.

22 THE COURT: Thank you.

23 Mr. Marshall?

24 MR. MARSHALL: Well, Judge, I'm glad you
25 clarified that issue about the seven continuances that

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1 Mr. Smith had requested.

2 THE COURT: Well, that's not --

3 MR. MARSHALL: We're not talking about --

4 THE COURT: -- that's not even in the equation.

5 Okay?

6 MR. MARSHALL: It's not in the equation, right,
7 because I did want to address that, but there's no need
8 to do so, because the Court certainly appreciates that
9 it's not relevant.

10 Judge, the fact that my client was sued in
11 violation of a contract is certainly relevant. It goes
12 to the meritorious defense. And when you --
13 interestingly, when you question Mr. Smith about
14 specifically what prejudice is your client suffering
15 here, he couldn't answer that question directly. He
16 just said: Well, we would have done some things
17 differently. But there was no specific answer to that
18 question. So there's been no showing of prejudice.

19 The prejudice has been to my client because his
20 clients owe my client in excess of \$150,000. There's no
21 question about it. We've -- they've admitted it. We've
22 filed for summary judgment on that issue. It didn't get
23 scheduled for today, but I guess it will be scheduled
24 soon.

25 So all of the prejudice is to my client,

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1 Judge, not to his. And the delay between the hire --
2 Mr. Declemente hiring me in May, and then the Answer in
3 August, was due to gathering documents, of which there
4 were quite a few, and formulating the proper strategy
5 for defending him. I don't believe that it was an
6 excessive amount of time, Judge. And not only did we
7 have to answer a Complaint that's about -- I can't
8 remember -- 20 or 30 pages long, there are four parties,
9 four law firms involved in this, so it was rather
10 complex. And then I did go ahead and file a
11 Counterclaim at that time. And I submit to you, Judge,
12 that my motion for an enlargement of time in which to
13 answer and citing Rule 6(B) -- we're not really even to
14 a Rule 60 analysis yet, depending on what the Court does
15 here today, that is still an option for my client,
16 certainly under Rule 60.

17 But, Judge, I'm asking you to go ahead and
18 let's get this lawsuit moving. Certainly, my client, in
19 my opinion, is entitled to defend himself and entitled
20 to collect the money that he's owed. I would ask that
21 you please grant him the right to do that as he did way
22 back 460 days ago when he answered, Judge.

23 THE COURT: Okay. Thank you, Mr. Marshall.

24 MR. MARSHALL:

25 Mr. Howser, Mr. Myrick, you probably don't --

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1 well, since you're here, is there anything you want to
2 say on this motion? I'll be glad to hear it. I know
3 y'all don't have a dog in that fight particularly, but
4 I'll be glad to hear anything that --

5 MR. MYRICK: We really don't. I think you
6 asked all the questions.

7 THE COURT: Mr. Howser?

8 MR. HOWSER: That's my position as well.

9 THE COURT: All right. Thank y'all very much
10 for being here.

11 All right. Give me an opportunity to read
12 these medical records, which I have not done. I want to
13 take a look at these medical records on what they
14 actually say because I haven't read them, and I'll give
15 you a decision very shortly.

16 Mr. Howser, can I see you on another case from
17 years ago?

18 (A discussion is held off the record.)

19 THE COURT: Let's go back on the record.

20 MR. MARSHALL: Apparently there's some E-mails
21 that go to that issue, and there were apparently some as
22 I -- if I'm understanding my client correctly, some
23 discussions between someone from Mason's firm, and
24 who --

25 Mr. Smith's firm?

Reported By:
Rolayne M. Volpe, CCR, RPR

1 THE DEFENDANT: Mr. Smith's firm.
2 MR. MARSHALL: I'll have to get clear on --
3 THE COURT: Let's do this. Okay? Submit the
4 two affidavits: An affidavit from your client when
5 he -- when he first contacted Mason, and some affidavit
6 from them when they were first contacted. Okay?
7 MR. MARSHALL: Okay.
8 THE COURT: All right. Get me an affidavit.
9 MR. MARSHALL: Yes, Judge.
10 THE COURT: And get it to me in ten days.
11 We're going to take a short break.
12 (The hearing of this cause concluded
13 at 12:22 p.m., on December 16, 2013.)
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Reported By:
Rolayne M. Volpe, CCR, RPR

R E P O R T E R ' S C E R T I F I C A T E

STATE OF SOUTH CAROLINA)
) ss.
COUNTY OF BERKELEY)

I, ROLAYNE M. VOLPE, Certified Court Reporter, CCR,
and Registered Professional Reporter, RPR, do hereby
certify that the transcript of the foregoing proceedings
accurately reflects the events that occurred before me
to the best of my ability at the time and place set out
on the caption hereto, the witnesses having been duly
cautioned and sworn, or affirmed, to tell the truth, the
whole truth, and nothing but the truth.

I FURTHER CERTIFY that I am neither counsel for,
related to, nor employed by any of the parties to the
action in which these proceedings were taken or to any
attorney or counsel employed by the parties hereto, nor
financially interested, directly or indirectly, in the
outcome of this action.

CERTIFIED AND SIGNED on this 11th day of August,
2014.

ROLAYNE M. VOLPE, CCR, RPR
Certified Court Reporter and
Registered Professional Reporter
Commission Expires: 8/30/2021

Reported By:
Rolayne M. Volpe, CCR, RPR

State of South Carolina)

County of Charleston)

Assistive Technology)
Medical Equipment)
Services, LLC,)

2011-CP-10-8011

Plaintiff,)

Deposition

v.)

of

Hood & Selander, CPAs,)
LLC, Donna C. Cash, as)
Personal Representative)
of the Estate of Dorothy)
Connelly, Kimberly Cucé)
and Phillip DeClemente,)

Jeff Reed

Defendants.)

Date: April 25, 2016

Time: 10:06 a.m.

Location: James E. Smith, Jr. PA

1422 Laurel Street, Columbia, South Carolina

Reported by
Sandra J. Ayers

1 whatever, and we -- and we didn't either.

2 Q Yeah.

3 A So I would've loved to have had that be the truth
4 and made it all the way, but it got overturned, and
5 then they came back after Abacare for not paying --

6 Q But here's --

7 A -- to the full extent.

8 Q Here's what I want to ask you about, what we've
9 just -- this was a hot issue in the business in
10 2008, before November 2008, right? Because you had
11 the earlier decision, but you didn't have the last
12 one from the Supreme Court yet, right?

13 A Okay.

14 Q Okay. So it's a hot issue in the business.
15 Doesn't that send up a red flag that somebody
16 should be checking that on the books of the company
17 to be acquired?

18 A Well, we did check it, and it was understated on
19 what they've paid. And then what -- when it was
20 then audited, it turns out that they owed. And my
21 thing is Abacare may have been -- you know, they
22 may have tried their best to do it right, but then
23 when it was audited, the State of South Carolina,
24 through the information David got for them, said,
25 "You owe."

1 And David, through his own admission, has
2 said, "I knew that was going to happen." He may
3 have -- he knew maybe this was coming down the pike
4 and said, "Nope. Y'all got to do it right," and
5 didn't.

6 All we simply asked when it all came down,
7 "Pay us," and nobody wanted to pay us. And then,
8 through Phillip's information, it said, hey, he
9 knew about it. And we didn't know that until 2010
10 or whatever the case -- that e-mail --

11 Q Okay.

12 A -- from the minutes --

13 Q And the --

14 A -- and that's why -- I think he --

15 Q When you say "he" knew about it, do you mean
16 Phillip knew about it --

17 A Well, I mean, if --

18 Q -- or David?

19 A No. That David knew about it --

20 Q Yeah.

21 A -- and Phillip proved it --

22 Q Okay.

23 A -- by sending an e-mail.

24 Q All right. And just to save time, if you could
25 answer these --

1 clear. So . . .

2 Q Okay. Did Reliable have similar unpaid taxes that
3 were later assessed against it?

4 A Sure did.

5 Q Were they, in part, for the same reason?

6 A No.

7 Q Wholly different reasons?

8 A I think it -- well, "in part's" a fair word. Yeah.

9 I -- I can tell you what ours were. We -- we
10 didn't --

11 Q And let me back you up for a minute.

12 A Yes, sir?

13 Q You say "in part" is a fair word, so that it is, in
14 fact, true that, in part, it was for the same
15 reason that these assessments were levied against
16 Reliable?

17 A Yeah. I mean, it --

18 Q And now explain.

19 A I'll clarify --

20 THE DEPONENT: (To Mr. Howser) And I'll use
21 your CPAP example.

22 A -- Mr. Myrick. We felt like anything dealing with
23 respiratory was tax deductible, and 99 percent of
24 the people did that, and they wrote off. When they
25 came back and did the audits, they said, "Oh, by

1 the way, mask or not. Just the machine." So when
2 you've been in business and you're doing it for two
3 years and you do three or four hundred CPAPs a
4 month, that can add up to a -- to a high figure.
5 I'm going to make an assumption that when Martha Jo
6 and David did those numbers and came up with it,
7 they -- those were some of the things that also --
8 you know, there aren't as many CPAPS. So that's
9 where I'll say, "in part."

10 Q Uh-huh.

11 A Now, the other part of how you went about
12 structuring the -- the sales and -- and all that,
13 that's something that we didn't have a problem
14 with. In fact, that's when I met -- when I met
15 with David and said, "This is how" --

16 And he was like, "You're right." And that's
17 when he divulged to me that this is -- they've been
18 doing it wrong all the time -- all along. So . . .

19 Q Did Reliable treat sales of durable medical
20 equipment as exempt under the statute --

21 A No.

22 Q -- in 2007?

23 They did not?

24 A No. What -- what -- what -- what was tax
25 deductible for us and why we might do more dollars

1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
2 COUNTY OF CHARLESTON) CASE NO. 2011-CP-8011
3
4 Assistive Technology)
5 Medical Equipment)
6 Services, LLC,) Transcript of Record
7 Plaintiffs,)
8 vs.)
9 Hood & Selander, LLC,) Date: September 19, 2016
10 et. al.,)
11 Defendants.)

12 * * * * *

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15 B E F O R E:

16

17 The Honorable DEADRE JEFFERSON

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23 * * * * *

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Denise J. Lauder, RPR

Ninth Judicial Circuit

1 A P P E A R A N C E S

2

3 REPRESENTING THE PLAINTIFF:

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5 James E. Smith, Jr., P.A.

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7 Columbia, SC 29201

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15 REPRESENTING THE DEFENDANT DONNA C. CASH AS

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17 CONNELLY:

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20 & Rice, LLP

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22 Charleston, SC 29401

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1 REPRESENTING THE DEFENDANT HOOD & SELANDER:

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3 Howser, Newman & Besley, LLC

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5 Columbia, SC 29201

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(No exhibits were offered or
marked for identification.)

1 (The following proceedings were had
2 9/19/2016, Charleston County Common Pleas Court, at
3 10:23 a.m.)

4 THE COURT: Assistive Technology
5 Medical Equipment v. Hood.

6 MR. SMITH: Morning, Your Honor.

7 THE COURT: Good morning, Mr. Smith.
8 How are you?

9 This is the Assistive Technology
10 Medical Equipment, Services, LLC v. Hood &
11 Selander, S-E-L-A-N-D-E-R, CPAs, LLC,
12 Donna C. Cash, as Personal Representative of the
13 Estate of Dorothy Connelly, Kimberly Cuce, C-U-C-E,
14 and Phillip Declemente, D-E-C-L-E-M-E-N-T-E,
15 2011-CP-10-8011.

16 It is before the Court on several
17 motions, and we will take them in the order they
18 were filed. So I have, let's see, Defendant
19 Marshall's motion to compel -- I don't know if
20 that's correct. Let me make sure. It must be a
21 lawyer's name, not a party's name. That is a
22 lawyer's name.

23 So which Defendant filed a motion to
24 compel on 7/21/2016?

25 MR. SMITH: Your Honor, I think that

1 was Mr. Howser's motion. I don't know if it's
2 still --

3 THE COURT: Let me see here. Bear with
4 us one moment, I apologize.

5 The next motion I have is a motion for
6 joinder, Defendant Donna C. Cash, as Personal
7 Representative of the Estate of Dorothy Connelly's,
8 Joinder in Motion to Compel Discovery Responses
9 from the Plaintiff.

10 So I assume then that's -- you've
11 joined the motion filed that I just referenced that
12 we're looking for.

13 MR. MYRICK: That's right, Your Honor.
14 Jim Myrick; how are you?

15 THE COURT: I'm fine. How are you?

16 MR. MYRICK: I'm fine. Thank you very
17 much.

18 THE COURT: So my question becomes, do
19 we still need to deal with these motions to compel
20 or have they been resolved?

21 MR. SMITH: I believe they've been
22 resolved, Your Honor. We provided responses some
23 months ago and haven't heard any issue with those.

24 THE COURT: So can I mark it as
25 withdrawn or resolved the motion to compel filed

1 3/18, filed 7/20 and 7/21.

2 MR. MYRICK: Your Honor, they resolved
3 the case, but there's still that outstanding
4 discovery involving tax returns. We need
5 compliance with those -- with those sales tax
6 returns is what we need, because what Mr. Smith has
7 said, well, we didn't file returns for that period.
8 But what he did file was an extension and he filed
9 later, so it kind of goes a little bit around it.
10 We need those sales tax returns.

11 Further, Your Honor, when looking back
12 at this, I joined the motion as far as Hood &
13 Selander's requests were made; but I would also
14 note back in February of 2013, as I was getting
15 ready for here today, we had interrogatories and
16 request for production.

17 I think Mr. Smith, correct me if I'm
18 wrong, but he said he was going to give me that
19 stuff. I don't think that I've ever received it.
20 I'm not saying that he didn't, but if he hasn't, I
21 would ask that it be produced. I don't think he
22 had an issue with that, and if not, I would ask
23 that it be produced.

24 THE COURT: Mr. Smith.

25 MR. SMITH: Yes, Your Honor. May it

1 please the Court?

2 You know, I think whatever we have I'm
3 happy for him to have. This is just the first
4 issue that I've heard that there is any remaining
5 issue on discovery.

6 THE COURT: What exactly is it that
7 you're seeking to compel, Mr. Myrick?

8 MR. MYRICK: If you look at his
9 discovery responses, he's asked a series of
10 questions about sales tax returns. This becomes
11 important --

12 THE COURT: Well, I think maybe you
13 need to clarify for Mr. Smith what it is you're
14 looking for so he can determine whether he's
15 already provided it or whether it needs to be
16 provided and if there is any issue in providing it.

17 MR. MYRICK: Okay. The first one --
18 I'll take the low-hanging fruit first. That's my
19 earlier discovery request. I think you said you
20 would supply those to me. If you just need to send
21 me another copy so I have it --

22 MR. SMITH: Sure. I would be glad to
23 do that.

24 MR. MYRICK: The second thing,
25 Mr. Howser asked for sales tax returns that were

1 filed by one of the companies that Mr. Smith
2 represents. And the idea behind that is, how did
3 you report your sales tax? Did you report it on
4 the number that you charged, or did you report it
5 on the amount of money you actually got in?

6 And that's a fundamental issue in this
7 case. And in answer to the question, Mr. Smith
8 said, well, we didn't file them during the period
9 that you're talking about. Well, Mr. -- the
10 request, as I understood it, was for that tax
11 period.

12 Even if you ask for an extension -- you
13 still have to report as to that period, even if you
14 get an extension at a later date. And that's the
15 nature of the inquiry, and those were not supplied
16 or answered.

17 THE COURT: Mr. Smith, what is your
18 position on providing that information?

19 MR. SMITH: Just want to know what
20 company Mr. Myrick is talking about.

21 THE COURT: Okay. Which company are
22 you talking about, Mr. Myrick?

23 MR. MYRICK: The ones articulated in
24 the request.

25 MR. SMITH: I just want to make sure

1 it's right. ATMES or Abacare or Reliable --

2 MR. MYRICK: I'm pretty sure it was for
3 Reliable, isn't it? Or both? I'm checking on that
4 right now.

5 MR. SMITH: Your Honor, I can provide
6 ATMES because ATMES is a party. I cannot provide
7 Reliable because they are not a party and would be
8 required to be subpoenaed. So if he's talking
9 about ATMES, I can take another look at that. If
10 he's seeking Reliable's return, then --

11 MR. MYRICK: Those will have to be
12 subpoenaed, is that what you said?

13 THE COURT: Yeah. Whose returns are
14 you looking for?

15 MR. MYRICK: I'm looking for ATMES, to
16 see how they were -- what they recorded their sales
17 tax as regarding.

18 THE COURT: So who do you represent,
19 Mr. Smith?

20 MR. MYRICK: I will subpoena Reliable's
21 if that's the response.

22 MR. SMITH: Your Honor, I represent
23 ATMES. And to make sure that I get this correct, I
24 just want to make sure I understand. What years
25 are we talking about?

1 MR. MYRICK: The sales tax returns for
2 those periods.

3 THE COURT: So you don't have a problem
4 providing the returns for your client; is that
5 accurate?

6 MR. SMITH: I do not. To the extent
7 that it is available, it will be provided. If they
8 say it exists, we will --

9 THE COURT: And who was the other
10 person you were asking for, Mr. Myrick?

11 MR. MYRICK: I'm asking about Reliable,
12 too, which is another --

13 THE COURT: They're not a party.

14 MR. MYRICK: They're not a company and
15 so I will just subpoena those.

16 THE COURT: Yeah. You will need to do
17 that. Okay. So I'm going -- I will mark all of
18 those motions to compel resolved.

19 MR. SMITH: Yes, Your Honor.

20 THE COURT: That leaves us with the
21 Defendant Donna Cash's motion to amend, filed
22 8/1/16, and the Defendant Howard and Selander --
23 Hood & Selander's motion to dismiss based on
24 summary judgment. Is that accurate?

25 MR. HOWSER: That's correct, Your

1 Honor.

2 THE COURT: Okay. Well, Mr. Myrick --
3 before we do that, let's -- James Smith is
4 appearing for the Plaintiff?

5 MR. SMITH: I am, Your Honor.

6 THE COURT: Mr. Myrick is appearing for
7 the Defendant Donna C. Cash; is that correct?

8 MR. MYRICK: That's correct, Your
9 Honor.

10 THE COURT: Mr. Howser is appearing for
11 Hood & Selander.

12 MR. HOWSER: That's right, Your Honor.

13 THE COURT: And Mr. Marshall is
14 appearing for Phillip Declemente?

15 MR. MARSHALL: Yes, ma'am.

16 THE COURT: Did I leave anybody else?
17 Are there any Defendants I didn't cover? Who is
18 representing Kimberly Cuce?

19 MR. SMITH: She's in default and has
20 not made any appearance in the case.

21 THE COURT: What about -- let's see.
22 We have the Estate, we have Hood & Selander, Donna
23 Cash --

24 MR. MYRICK: Applegate has been
25 dismissed.

1 THE COURT: -- and Phillip Declemente.
2 That's only the original pleadings. I don't have
3 him on the docket so that must have -- the caption
4 I think already reflects that.

5 Happy to hear from you, Mr. Myrick,
6 regarding your motion to amend.

7 MR. MYRICK: Thank you, Your Honor. Do
8 you mind if I talk from the podium?

9 THE COURT: Not a worry, if you would
10 like to do that. Be careful. That shelf falls.

11 MR. MYRICK: Okay. I brought you this
12 extra copy of documents that I'll be referring to.
13 You will see as I go through them -- I'll try to
14 articulate.

15 I'm here today on my motion to amend
16 our Answer and Counterclaims. That's what this is
17 about. And very clearly I want to be direct with
18 you about what I'm seeking to do, to allow my
19 clients to assert their claims against Abacare,
20 which was an entity acquired --

21 THE COURT: Can you spell that?

22 MR. MYRICK: Uh-huh, A-B-A-C-A-R-E.

23 And that was an entity that was
24 acquired by a company called Assistive Medical
25 Technology. And -- Medical Equipment Services. So

1 that's shortened to ATMES. So I'll call it ATMES.

2 ATMES is the parent company. They
3 acquired stock of Abacare. And that has led to a
4 goodly bit of confusion in this matter because our
5 position is we're engaging in a corporate shell
6 game. It's very confusing as to corporate
7 identities and who is acting in what capacity.

8 Now, why is this important? Let me
9 tell you a little bit of the back story that
10 provides the reason for what we're asking for.

11 My client, the Estate of Connelly, is
12 really just a landlord. It's very simple. They
13 have a building at 17 North in Mt. Pleasant. A
14 nice building across from Boone Hall where they
15 have the farm. It's a commercial building. It's a
16 commercial space.

17 My client leased that property from
18 2008 to 2012 to this company called Abacare. What
19 Abacare does is they sell like wheelchairs,
20 breathing apparatus. That's the type of thing they
21 do. It's durable medical equipment, and it's a
22 specialized field of sales that has certain
23 government overlays to what they can sell to get
24 recompense from the federal government and things
25 like that. So that's what it is; they are medical

1 providers.

2 ATMES is the company that acquired
3 Abacare, and Abacare is the company that sold its
4 stock. Abacare also sells this medical equipment.
5 ATMES also sells this medical equipment. And in
6 2008, ATMES came along and they said, we want to
7 acquire Abacare. So they purchased the business.
8 They purchased that business Abacare.

9 THE COURT: What's the name of the
10 company that purchased Abacare?

11 MR. MYRICK: ATMES or Assistive --

12 THE COURT: Oh, that's your acronym.
13 Okay. I've got it now, I'm sorry. I was a little
14 slow.

15 MR. MYRICK: It's a common thing in
16 this case because it gets confusing. So in 2008,
17 ATMES entered into a document called a stock
18 purchase and assignment agreement. The reason for
19 that was, ATMES, who is out of Sumter, wanted to
20 keep that Mount Pleasant location for Abacare. It
21 was a good location and they wanted to share that
22 space too, ATMES, for their business.

23 And so they secured in that acquisition
24 agreement in writing, as part of that stock
25 purchase agreement, a right to continue in that

1 space for that five years under that lease. They
2 wanted to secure that lease for my client. And,
3 mostly, Your Honor, that happened.

4 I'm looking for my darned -- beg the
5 Court's indulgence.

6 I want to make sure that I take you
7 through these documents.

8 THE COURT: Oh, I'm going to read
9 everything that you submitted to me. If you just
10 want to cut to the heart of your argument --

11 MR. MYRICK: Okay. I will do that. So
12 in that first matter, the first document I have in
13 that grouping you will see is a collection of
14 checks. And if you just want to scan with me, I
15 will show you what I'm talking about.

16 Right now ATMES says, oh, wait a
17 minute. You only have Abacare responsible in that
18 space, but my contention to you is it's a shell
19 game and ATMES took over that space and the
20 obligations under the lease. And let me show you
21 how.

22 The first document in your stack of the
23 checks for rent, the first two checks for rent are
24 from Abacare, and you will see that at the top.
25 Very simply they are all paid out of Abacare. Then

1 you get down to about the fifth page, and you will
2 see the source of the checks start to change.

3 Up in the left-hand corner it goes to
4 Assistive Technology Medical Equipment Services,
5 but note it's signed by the same signature. That's
6 Phillip Declemente's signature.

7 So while they're using a different name
8 for that document, all of the next documents for
9 about four years, four years' time, comes from
10 ATMES, from Assistive Technology Medical Equipment
11 Services, signed by the same person for the same
12 space.

13 So my point in telling you --

14 THE COURT: I need you to get to the
15 heart of why you're asking to amend. Why is it
16 necessary? Why are they a necessary party or a
17 necessary cause of action? That's really what I
18 need to know.

19 MR. MYRICK: Here's what happens. On
20 June 13th, you will see a second document in your
21 group which is an affidavit for Murrell Smith. And
22 that is what my opponent with ATMES said. They
23 abandoned the lease. They left us holding the bag
24 for between 80- and \$100,000. And this is what he
25 says, and I'm quoting from my opponent's affidavit

1 for ATMES.

2 On June 23, 2012, ATMES wrote the
3 Estate saying it was abandoning the lease. Now,
4 today they're going to argue that it's just Abacare
5 responsible for the lease, but how in the world --

6 THE COURT: Who signed the lease
7 agreement?

8 MR. MYRICK: Abacare to start. And
9 then ATMES acquired Abacare.

10 THE COURT: But who originally signed
11 the lease?

12 MR. MYRICK: Abacare.

13 THE COURT: And they're a separate
14 entity?

15 MR. MYRICK: Yes, they were.

16 THE COURT: Who signed it for what
17 lease term? 2008 to 2012 lease term?

18 MR. MYRICK: Yes. But what happens is,
19 there becomes an overplay between those corporate
20 entities, and that's what I'm here to tell you
21 briefly about. So it's not Abacare who writes and
22 says, we're terminating the lease. It's ATMES who
23 writes and says, we're terminating the lease. This
24 is according to their own affidavit I just told you
25 about.

1 ATMES wrote the Estate stating it was
2 abandoning the lease due to misrepresentations by
3 the Estate not disclosing unreported sales tax. In
4 order to mitigate the damages, ATMES would abandon
5 the lease by July 1, 2012.

6 That's in an affidavit from my opponent
7 who is saying the corporations were always done
8 separate. I'm saying they weren't.

9 THE COURT: I'm trying to figure out
10 why are they necessary to this cause of action, and
11 what -- what -- what -- I guess I'm trying to
12 figure out why wouldn't you just sue them
13 separately.

14 MR. MYRICK: Well, I'm trying to bring
15 them in here.

16 THE COURT: Yeah, but why?

17 MR. MYRICK: Because it's part of one
18 controversy. It's all about the breach of the same
19 space, the same lease, the same people are
20 involved. They're all the same officers. It's all
21 the same matter, and the matter's been in
22 litigation. You don't have to start up --

23 THE COURT: Wouldn't that get a little
24 confusing for a jury based on these causes of
25 action and the counterclaim that's been filed?

1 MR. MYRICK: But, Your Honor, I think
2 we would be allowed to amend under Rule 15 to add
3 them because --

4 THE COURT: Well, if they're necessary.
5 And it is a very liberal standard, but I'm thinking
6 ahead to when you present this to a jury. It gets
7 very confusing when you're dealing with a breach of
8 contract that deals with a certain set of facts and
9 then you have a separate issue which is the lease.

10 I'm trying to figure out how you're
11 prejudiced by filing a separate cause of action and
12 proceeding on this lease; and if, in fact, you feel
13 there was some onus on this lease to your client
14 how you're shortchanged, I guess, for lack of a
15 better way of putting it.

16 MR. MYRICK: Because what they're going
17 to say is it's outside the statute of limitations.

18 THE COURT: How is it going to relate
19 back in this case? They're going to say the same
20 thing.

21 MR. MYRICK: Well, 15(b) says you can
22 relate back --

23 THE COURT: Well, it's a whole
24 different standard on a relation back. There's a
25 whole line of cases dealing with relation back. So

1 them raising that issue is not going to change
2 whether you add them in this case or if you file a
3 new case.

4 MR. MYRICK: But I can relate it back,
5 but if I don't bring them in in this case, I will
6 lose that statute of limitations argument. I'll be
7 damaged and my client won't be able to have
8 redress.

9 I agree with you; I have to make it
10 simple and clear about how ATMES acquired Abacare
11 and then blurred all those lines between the two by
12 taking over that lease, making those rent payments,
13 saying they're terminating the lease when it's
14 really Abacare.

15 If I'm not allowed to do that, then
16 I'll lose that right forever. So I have to be able
17 to amend inside the facts under Rule 15. And
18 that's part of my memorandum.

19 THE COURT: Well, in adding a party I'm
20 not going to determine whether it relates back or
21 not. They're just going to make a motion under the
22 statute, and some other judge will decide whether
23 it relates back and whether you're barred or not.

24 MR MYRICK: I think that's probably the
25 exactly right thing to do. That's the way the law

1 expects it to happen. I'll let you amend, Jim, to
2 add them, but beware. A judge can come later on
3 and look at a motion to dismiss or a motion for
4 summary judgment if you are not able to show that
5 overlap to them. And I think that's the right way
6 to handle it.

7 But I've got to be able to assert it
8 first or else I will lose it entirely. So the
9 downside to me is huge. They'll have their chance
10 to make their argument. They're clearly going to
11 have their chance to make their argument about
12 statute of limitations if they want to, but, here,
13 we're just here about the motion to amend.

14 And there is a case that is cited in
15 the materials you will hear about it. It's called
16 Hughes. And the judge looked at a similar issue in
17 Hughes, and I have that in the materials. And the
18 judge said, look, I think there was enough covert
19 culprit overlap here. There was enough question
20 about corporate identity. I'm -- it does relate
21 back, I will let you amend it.

22 THE COURT: Yeah. I'm not going to
23 make any decision about whether it relates back. I
24 think you overextend your authority. There are two
25 separate issues, and I'm not going to muddle them.

1 When you make a motion to amend, it's purely that.
2 Whether it relates back or not is a whole other
3 issue because it deals with an affirmative defense
4 they have regarding the statute of limitations.

5 Oftentimes, they get muddled and the
6 Court gets sort of pulled in to that to make that
7 decision, but I'm not going to do that. I don't
8 know whether it -- I don't know --

9 MR. MYRICK: Well, then let's just --

10 THE COURT: -- back or not. So the
11 only thing I'm concerned with is whether it meets
12 the element of amendment.

13 MR. MYRICK: Let's go directly to that.
14 Rule 15: Rule 15 on amendments says, leave to
15 amend shall be freely given where justice so
16 requires and does not prejudice the other party.

17 Our Court has said this, as you know,
18 this rule strongly favors amendment and the Court
19 is encouraged -- that's their word -- encouraged to
20 freely grant leave to amend. That's Parker v.
21 Spartanburg Services, 262 S.C. 276.

22 So the rule encourages the Court to
23 grant the motion to amend. Any opponent must show
24 the burden and that they would have the burden of
25 proof to show how they were prejudiced. Here ATMES

1 nor Abacare, neither can show prejudice. And why
2 not? Because a lack of notice is absent; in other
3 words, they've had plenty of notice.

4 We've been litigating this matter for
5 years.

6 THE COURT: It's 2011. You're not on a
7 trial docket yet?

8 MR. MYRICK: Hopefully, we will get it
9 tried in November, but this is --

10 THE COURT: How could you get it tried
11 in November if they're added as a party?

12 MR. MYRICK: Well, it may bounce out
13 past that, Your Honor, but I have to make sure
14 they're on that --

15 THE COURT: Have you had a status
16 conference yet to see where you're going to be on
17 the trial --

18 MR. MYRICK: We talked to the judge
19 about going in late November.

20 THE COURT: Did he actually set it for
21 late November, or are you just telling him that's
22 when you think you would be able to try it?

23 MR. MYRICK: I think you said, Judge,
24 he would be willing to --

25 THE COURT: Have you-all made any

1 attempts to mediate this case? I'm just curious.

2 MR. MYRICK: Yes, we have.

3 THE COURT: Who mediated it?

4 MR. HOWSER: Tommy Cooper.

5 THE COURT: And you weren't able to
6 come to a meeting of the minds?

7 MR. HOWSER: Part of it got settled,
8 Your Honor.

9 THE COURT: I was just curious, I'm
10 sorry.

11 MR. MYRICK: We'll keep at it.

12 But let me give you nine reasons why
13 they're not prejudiced, and I promise you they're
14 brief.

15 Number one: ATMES and ABACARE are
16 owned by the same people, Jeff Reed and this
17 fellow, Declemente, and Murrell Smith during the
18 time period.

19 Two: The breach of lease concerns the
20 same operative facts for ATMES and ABACARE. Who,
21 when, why, it's all the same.

22 Three: ATMES and ABACARE shared this
23 Highway 17 space.

24 Four: ATMES and ABACARE had the same
25 people in management at the location, Phillip and

1 Kim Cuce.

2 Five: They had identical business;
3 they were all selling durable medical equipment.

4 Six: They serviced the same clients.

5 Seven: I showed you that -- I wanted
6 to remark to you about that termination letter, and
7 I understand your ruling, Your Honor, about this is
8 a motion to amend. I'm not going to get into the
9 question of whether they overlap. That's for the
10 next phase. And, frankly, I agree with that, but I
11 do want to show you this letter that's in your
12 materials just as an example of what I'm talking
13 about.

14 THE COURT: It's in these materials?

15 MR. MYRICK: Yes.

16 THE COURT: I'm going to read
17 everything that's in there.

18 MR. MYRICK: ABACARE is listed at the
19 head, but if you look at the head of where they say
20 they're going to terminate the lease, they use the
21 address on the letterhead for ABACARE, which is the
22 parent company, which is 914 Broad Street. They
23 use the identical telephone number for ATMES. All
24 of the checks have been coming from ATMES, and they
25 made payments for four years under ATMES.

1 So, in summary, just amendment if you
2 allowed it today would prevent a shell game about
3 who is technically breaching the lease and who
4 should -- we want to get everybody to the table to
5 get resolution all at once.

6 They will have their remedy to try to
7 get out under statute of limitations. So the
8 motion to amend, you get to that first. This
9 prevents a second trial as to ABACARE. It's much
10 more efficient to handle this. They are free to
11 assert any defense that they have and they will
12 have their day.

13 And, finally, the court system wants,
14 prefers, encourages the naming of all potentially
15 responsible parties here to prevent duplicate
16 litigation.

17 So in light of those points, Your
18 Honor, I think at this threshold stage where it's
19 just to amend, we should go ahead and do that.
20 Because if it's not done, it's draconian as to me;
21 whereas, if you grant it, they have all of their
22 arguments still available to them they can go
23 through.

24 And I would like to address any points
25 Mr. Smith has, but I will sit down now, Your Honor.

1 You wanted me to keep that tight.

2 THE COURT: Yes, sir. We have some
3 more motions I have to dispose of.

4 Mr. Smith.

5 MR. SMITH: Thank you, Your Honor.

6 THE COURT: You're welcome.

7 MR. SMITH: May I approach?

8 THE COURT: Yes, sir.

9 MR. SMITH: I have a brief memo in
10 opposition. Most of that is exhibits, so -- and I
11 will just go right to the point. We oppose this
12 motion to amend, and I outlined what are
13 indisputable facts in my memorandum.

14 This lease, the lease at issue, was
15 signed January 1st, 2008. The parties to that
16 lease are Mr. Connelly and ABACARE. ABACARE is a
17 separate corporation in good standing. I provided
18 an exhibit from the Secretary of State's office.

19 ATMES is not a party to this lease. It
20 is important when ATMES purchased this -- and I
21 also provided as an Exhibit C, the purchase
22 agreement. In paragraph 3C, it was very clear that
23 the corporation, meaning ABACARE, following the
24 closing, meaning after the closing it will continue
25 to lease the building.

1 There was no document anywhere where
2 any duties or obligations or debts pertaining to
3 the lease were adopted or assigned to ATMES. It
4 doesn't exist, it never happened. The only party
5 to this lease that has ever been a party to the
6 lease are ABACARE and the Estate of
7 James B. Connelly.

8 Your Honor, respectfully, this case has
9 been going on a long while and to make this
10 addition now would be, I believe, legally
11 prejudicial to ATMES because it would require a
12 delay in the trial of this matter, which we are
13 trying to complete by the end of this year.

14 Essentially, Your Honor, they've had
15 this information. In our reply to their
16 counterclaim -- to the counterclaim we indicated
17 that this lease was not enforceable as to ATMES,
18 that we were not -- statute of frauds applied to
19 it. We were not bound by it. We indicated then --
20 and that was way back in May 30th of 2014.

21 We, then -- December 8, 2015, my client
22 Mr. Smith filed an affidavit in opposition to their
23 motion for summary judgment on that counterclaim
24 against us, which was never heard because they
25 withdrew that motion once they received the

1 affidavit, but it clearly indicated, again, that
2 the corporation ATMES is the party -- excuse me,
3 the corporation ABACARE has always been the party.

4 And keep in mind, these are all
5 documents within the possession of Ms. Cash and the
6 Defendants here. This is not information that they
7 didn't have even prior to the beginning of our
8 lawsuit. They've had all the information about who
9 the company was that was on the hook for the lease,
10 and nowhere at any time did ATMES adopt or was
11 assigned ABACARE's obligations in the lease.

12 THE COURT: Let me interrupt you one
13 second.

14 MR. SMITH: Yes, Your Honor.

15 (Off-the-record conference.)

16 THE COURT: Go ahead. I'm listening.

17 MR. SMITH: Thank you. So for the
18 purposes of amendment, we do think we would be
19 legally prejudiced to add them --

20 THE COURT: Tell me how you would be
21 prejudiced.

22 MR. SMITH: And on top of it, although
23 I understand the Court will not get into the
24 relation back, but it's abundantly clear on the
25 face of these documents they cannot possibly be

1 within the statute of limitations given the
2 termination date of the lease.

3 Rule 15 does not allow for relation
4 back when it's an addition. And I know this may be
5 taken up --

6 THE COURT: Well, there are actually
7 two -- and I've had to deal with this recently.
8 Several times I was doing nonjury in several
9 different counties and it came up in each county
10 that I went. So, as a result, I had to do a lot of
11 research. And there is actually a case on point
12 out of the Court of Appeals that deals with the
13 standard for when it relates back, when it is, in
14 fact, an addition versus basically amending and
15 ongoing controversy.

16 And I'm paraphrasing what they said,
17 which is probably inarticulate, but...I'm going off
18 of memory.

19 MR. SMITH: And I cited those cases in
20 my brief.

21 The one last thing I would just offer
22 to the Court is a complete copy of Mr. Smith's
23 affidavit. I think it's not included in the
24 exhibits, but all parties have a copy.

25 THE COURT: Tell me -- the prejudice

1 defined by Rule 15 is a lack of notice and a lack
2 of opportunity to be heard. So why would your
3 client be prejudiced by the amendment when you
4 would have the ability to file a motion to dismiss
5 based on the statute of limitations and your
6 contentions that these allegations do not relate
7 back?

8 MR. SMITH: We certainly do, and I
9 think it's clear on the face and so much -- as much
10 as Mr. Myrick admitted that's a serious issue,
11 we're prejudiced because in order to add them would
12 delay the trial in this matter.

13 THE COURT: Well, technically, would it
14 really? If it were granted today, you really could
15 file your motion tomorrow and it could be heard --
16 when is the next nonjury term, Caroline?

17 THE CLERK: The week of October 31.

18 MR. SMITH: We could come back then,
19 Your Honor.

20 (Off-the-record conference.)

21 MR. SMITH: Your Honor, thank you for
22 -- I do have those cases, but I will hold on to
23 those, and I appreciate the Court's time today.

24 THE COURT: Not a worry.

25 Okay. Now, we will move on to the

1 Defendant Hood & Selander's motion for summary
2 judgment dealing with the counterclaim of Phillip
3 Declemente.

4 MR. MYRICK: May I interrupt you for
5 one second, Judge, to address those cases that he
6 talked about?

7 THE COURT: I'm going to read
8 everything. You know, you telling me about it, I
9 don't have a point of reference. I haven't read
10 them; it's not going to really help me. I'm not
11 trying to be untoward. I'm going to read
12 everything.

13 I'm not going to make a decision -- you
14 just gave me this stuff. I haven't had a chance to
15 read everything and I'm going to do my own
16 research.

17 MR. MYRICK: Thank you.

18 THE COURT: Yes, sir.

19 MR. HOWSER: May it please the Court.
20 I'm Dave Howser and I represent Hood & Selander.

21 THE COURT: Yes, sir.

22 MR. HOWSER: Let me first address
23 exactly why we're here. We're here on a motion for
24 summary judgment addressed to a cross-claim --

25 THE COURT: I'm sorry, I meant to say

1 cross-claim, not counterclaim.

2 MR. HOWSER: -- which Phillip
3 Declemente has asserted against Hood & Selander. I
4 would point out that the claim is for equitable
5 indemnity. We did, as we pointed out a few minutes
6 ago, mediate the case in June with Judge Tommy
7 Cooper as the mediator.

8 At that mediation, we reached a
9 settlement, that is Hood & Selander reached a
10 settlement with the Plaintiff.

11 THE COURT: Okay.

12 MR. HOWSER: I would hand to Your Honor
13 a copy of the settlement agreement and direct you
14 to paragraph 3, if I may. As part of that
15 settlement agreement, the Plaintiff agreed they
16 would not pursue any claim for which Hood &
17 Selander might allegedly be responsible.

18 Having said all that, let me say to
19 Your Honor that I did file a memo that is dated, I
20 think, September 14th. I don't know if Your Honor
21 received that.

22 THE COURT: What is the date again?

23 MR. HOWSER: September 14th. I can
24 hand you another copy.

25 THE COURT: Yeah. This file is very

1 large. I'm not certain -- let me make sure that --
2 oh, I take it back. I do have it. You sent it to
3 my office, a copy, on September 14th, but you all
4 need to make sure --

5 MR. HOWSER: I sent a copy to the clerk
6 as well as a copy to you.

7 THE COURT: I do have a copy.

8 MR. HOWSER: By way of background, I
9 want to keep it really as it relates to the
10 cross-claim. Plaintiff ATMES was a seller, as
11 Mr. Myrick has said, of durable medical equipment.
12 ATMES purchased ABACARE, who was Mr. Myrick's
13 client. They purchased it in two ways. They
14 purchased 80 percent of the stock through the
15 Estate of Connelly, the Connelly's Estate, and
16 20 percent of the stock from Phillip Declemente.

17 As a result of the purchase, ATMES
18 contends that it overpaid for the stock in the
19 company ABACARE because ABACARE underreported its
20 sales tax liability. What the discovery in this
21 case has established is that most of the companies
22 like ABACARE would report their sales tax based on
23 monies they received, rather than on what they
24 sold.

25 In addition, there was a question of

1 whether or not the equipment they sold, that is
2 this durable medical equipment, qualified as being
3 sales tax exempt. Many of the companies were
4 taking the position that that was a prosthetic
5 device, and that went through the administrative
6 court and, ultimately, got reversed by the Supreme
7 Court holding, no. To be a prosthetic device it
8 had to be something that replaced a body limb such
9 as an artificial leg or artificial arm.

10 The point is, as a result of the way it
11 was reported, ATMES contends that it overpaid by
12 like \$100,000 for the stock and the interest of
13 Mr. Declemente in ABACARE.

14 We can hand Your Honor a summary of
15 sales tax returns, actually got some returns there,
16 and you will see that Mr. Declemente actually was
17 responsible for a number of these sales tax
18 returns, for preparing and submitting them. So he
19 knew what the story was on the way that the sales
20 tax was reported. This becomes significant when we
21 focus in on equitable indemnity.

22 But before we reach that we have to
23 understand what the posture was. Mr. Smith, on
24 behalf of ATMES, sued the Defendants, which Your
25 Honor has indicated earlier in reading the caption.

1 Mr. Declemente did not answer the complaint and was
2 found to be in default.

3 As a result of that, Judge Nicholson
4 passed an order saying that he had no right to file
5 an answer, counterclaim, and cross-claim.

6 THE COURT: In which case?

7 MR. HOWSER: In this particular case,
8 ATMES v Hood & Selander, Cash --

9 THE COURT: In 2011?

10 MR. HOWSER: The 2011 case.

11 THE COURT: -- 8011.

12 MR. HOWSER: That's right.

13 THE COURT: He actually said that in
14 his order.

15 MR. HOWSER: It's attached to my memo.
16 His order says --

17 THE COURT: All right. You may
18 continue.

19 MR. HOWSER: At the bottom of page 4
20 and top of page 5, Judge Nicholson said that
21 Mr. Declemente was in default failing to file an
22 answer. He had actually asserted a cross-claim.

23 There was a question of whether or not
24 the cross-claim was answered and whether or not
25 that cross-claim was in default. So he said, look,

1 you have no right to file an answer, cross-claim,
2 or counterclaims.

3 Our position is that one of the bases
4 for the motion for our summary judgment is that is
5 law of the case. And that is, since the judge has
6 ruled that he couldn't assert an answer,
7 counterclaim, or cross-claim, he cannot continue to
8 pursue this matter against us.

9 In addition, because he was the one
10 responsible for actually filing these sales tax
11 returns and was the actual manager of ABACARE, he
12 knew what was going on. If something should have
13 been disclosed, then Mr. Declemente should have
14 disclosed it or at least participated in the
15 nondisclosure.

16 If we might, we would like to hand Your
17 Honor a copy of the case of Addy v --

18 THE COURT: You can give me a case
19 citation.

20 MR. HOWSER: -- 257 S.C. 28, 183 S.E.2d
21 708; the case of Inglese v. Biel, 403 S.C. 290, 742
22 S.E.2d 687; and Stoneledge at Lake Keowee Owners
23 Association v. Clearview Construction, 413 S.C.
24 615, 776 S.E.2d 426, which is --

25 THE COURT: I assume these are all in

1 your memo?

2 MR. HOWSER: I think I refer to them.

3 I can hand you --

4 THE COURT: We're just going to recycle
5 them. We do everything on the computer. I
6 appreciate you providing the Court with a copy.
7 We're trying to go as green as possible.

8 MR. HOWSER: Basically, what Addy v.
9 Bolton says, ordinarily, if one person is compelled
10 to pay damages because negligence imputed to him as
11 a result of a tort committed by another, he may
12 maintain an action for indemnity against the person
13 whose wrong has thus been imputed to him, but this
14 is subject to the proviso that the personal
15 negligence of his own -- that no personal
16 negligence of his own has joined in causing the
17 injury.

18 And taking it in the light most
19 favorable to Mr. Declemente, his own personal
20 negligence has joined in the causing of the injury.
21 And as South Carolina law has long recognized,
22 there is no right to indemnity among joint
23 tortfeasors.

24 Assuming that Hood & Selander did
25 something wrong, that's assuming that, from

1 Mr. Declemente's standpoint, they would be a joint
2 tortfeasor. We don't concede they did anything
3 wrong, but if they did, they would be a joint
4 tortfeasor with them and, therefore, a joint
5 tortfeasor is not entitled to contribution -- I
6 mean, or indemnity. Not entitled to indemnity.

7 Equitable indemnity requires that you
8 have clean hands. And, in this case, under the
9 evidence presented, he cannot have clean hands.

10 I have brought with me the depositions
11 of Mr. Smith who was the Rule 30(b)(6) deposition
12 of ATMES and the deposition of Jeff Reed and the
13 deposition of Art Bradham, who was a CPA for ATMES.
14 They are voluminous, but I have cited in my memo
15 reference to those depositions and given you the
16 pages.

17 And if nobody objects, I would submit,
18 Your Honor, that rather than burden the record with
19 the entire depositions that it just be limited to
20 that, those pages. But I have them here if you
21 would like them.

22 THE COURT: All right. Would you like
23 to respond?

24 MR. MARSHALL: Yes. Thank you, Judge.

25 THE COURT: You're welcome.

1 MR. MARSHALL: Cameron Marshall on
2 behalf of Phillip Declemente.

3 Your Honor, we submit that -- the fact
4 that Mr. Declemente defaulted and answered the
5 Plaintiff's complaint at the time does not mean
6 that he is not permitted to bring cross-claims
7 against co-defendants.

8 We believe the law is clear that he
9 retains his legal authority to defend himself on
10 the issue of damages despite the fact that he was
11 held in default. And that decision by Judge
12 Nicholson was appealed and the Court of Appeals
13 said the appeal was premature.

14 THE COURT: It might be moot.

15 MR. MARSHALL: There had not been any
16 determination as to whether Mr. Declemente was ever
17 going to be ordered to pay any damages in this
18 case.

19 THE COURT: Uh-huh.

20 MR. MARSHALL: And, Judge, we had --
21 when we had our pretrial conference with Judge
22 Young, Mr. -- the issue was raised by Mr. Howser
23 about this motion that was coming up. Frankly, I
24 thought that perhaps since Judge Young had been
25 scheduled to try this case November 28th, he might

1 hear this, but he clearly indicated he thought that
2 Mr. Howser's motion was premature and that his --
3 his client is an indispensable party.

4 And the reason for that is, David
5 Selander of Hood & Selander --

6 THE COURT: You don't have to look
7 puzzled, because that was my question, too. I
8 thought it was a little premature until it all
9 plays out what jeopardies your client's really in
10 until it all becomes right.

11 I want to hear the rest of what he's
12 going to tell me, then I want to hear what you tell
13 me and then we'll -- yeah. Because this order
14 technically, which I'm anticipating what this
15 argument is going to be, only relates to the
16 parties that it addresses in the order. It doesn't
17 say that his client is precluded.

18 It says that one party -- that
19 Mr. Declemente is precluded from doing anything in
20 response to Ms. Cash. It does not -- there may be
21 some argument that on -- as it relates to judicial
22 estoppel; in other words, that he's precluded from
23 making an argument contrary to the fact that he's
24 been found in default and, therefore, he cannot
25 make any contrary assertions factually, but that

1 doesn't mean necessarily that it shouldn't play out
2 factually. I'm just not certain of that point. I
3 think he might be estopped from making any
4 assertions that are contrary to the default
5 finding.

6 In default he has been found to have
7 admitted the factual assertions. He can still
8 challenge damages because they're not liquidated,
9 but I don't know that it precludes it from playing
10 itself out. I think you might be able to raise
11 that he can't take a position contrary to the
12 default.

13 MR. HOWSER: Well, that's --

14 THE COURT: But if there's no judgment,
15 I mean, it's all sort of premature, isn't it?

16 MR. HOWSER: But that's one of the
17 points I make in my memo, that if he can't contest
18 liability or the allegations of the complaint he's
19 bound by, then his equitable estoppel argument goes
20 because, you know, he's found at fault.

21 THE COURT: Yeah. But I don't know
22 that it should be resolved at this juncture. I
23 think it may have to play itself out.

24 MR. HOWSER: And what Judge Young said,
25 and I think Mr. Smith will back me up, is maybe the

1 cross-claim being tried with the main action was
2 premature, but nothing --

3 THE COURT: Well, you know, I tell you
4 what. We say a lot of things while we're sitting
5 here thinking sometimes. And I'm the worst
6 culprit; I think out loud. So unless I reduce it
7 to writing, it really don't matter.

8 And I do that sometimes; I think
9 through arguments when I'm talking to lawyers, but
10 once I actually start putting pen to paper, you
11 know, I probably regret some of the things I say,
12 but it is what it is.

13 You-all help me think. Sometimes I
14 just think through things, and while you're here
15 present able to answer it for me, I take advantage
16 of it. But you may continue, Mr. Marshall.

17 MR. MARSHALL: Thank you, Your Honor.

18 THE COURT: You're welcome.

19 MR. MARSHALL: So regarding Judge
20 Nicholson's order which has been submitted by
21 Mr. Howser, you will note, Judge, that he neither
22 struck nor dismissed Mr. Declemente's cross-claims.
23 He did strike his answer and his counterclaims
24 against the Plaintiff, but the technical language
25 he uses is, he did not permit entry of the

1 cross-claims at that time, which if the Court feels
2 that I need to bring a motion on my client's behalf
3 to permit entry officially at this point --

4 THE COURT: Well, I don't know. Judge
5 Nicholson's language is pretty clear. I find that
6 because Defendant Declemente is not relieved from
7 default, he could not enter answer, counterclaims,
8 and cross-claims and cannot pursue default
9 judgement against the Plaintiff for counterclaims
10 that have never been permitted to be asserted.

11 Defendant Declemente's motion for
12 default judgment against the Plaintiff is denied
13 and the Defendant's answer and counterclaims are
14 stricken.

15 He only ruled -- he did what judges do;
16 we rule on what is before us. But that doesn't
17 mean that that's -- still doesn't -- you know,
18 where you have a set of facts that are so
19 intricate, how is he going to be able to assert
20 something contrary when he's been found in default,
21 which means he has admitted the substantive
22 allegations of this complaint.

23 MR. MARSHALL: Well, he goes -- he
24 specifically uses the language of stricken as it
25 regards the answer and the counterclaims. He does

1 not use stricken --

2 THE COURT: I understand that, but what
3 I'm saying is that he is now in default. He is --
4 the judge has found that he admits the substantive
5 allegations of the complaint. He cannot take a
6 position contrary to that. So as it relates to
7 your client and Mr. Howser's client, how is that
8 going to affect your client's claim, and are you
9 really entertaining an exercise in futility?

10 Even if you present your case, you're
11 going to be judicially estopped from taking a
12 position opposite to what is in that complaint,
13 substantively that Mr. Smith has alleged your
14 client did wrong.

15 Because he's in default. He admitted
16 -- the Court has said he admitted those facts. So
17 you can't -- you're going to be precluded, you're
18 going to be judicially estopped from taking any
19 position that is opposite to that.

20 MR. MARSHALL: Well, it goes again to
21 the damages as the Court of Appeals acknowledged;
22 just because someone has been found in default
23 doesn't mean that there's ever going to be a
24 damages award against that person, so --

25 THE COURT: Well, pretty much. If the

1 substantive allegations of the complaint are
2 admitted, you're going to get some damages. The
3 only thing he's going to get to contest is the
4 amount of damages, the reasonableness of the
5 damages, and the damages he can prove, or she can
6 prove, or they can prove by the preponderance of
7 the evidence.

8 It just simply means it's not
9 liquidated. It hasn't been reduced to a sum
10 certain. It doesn't mean that they're not going to
11 get damages.

12 MR. MARSHALL: Well, it does mean that
13 --

14 THE COURT: That would defeat the whole
15 principle of default. Why would people push for
16 default if they weren't going to get any money?

17 MR. MARSHALL: Well, as contemplated by
18 the contribution of the tortfeasors act, the jury
19 by law has to have all of the potentially
20 responsible parties in front of it so that it can
21 apportion liability.

22 THE COURT: But that relates to a jury.
23 Not to the Court when it sits as the finder of fact
24 in default. You can move for apportionment later,
25 but he is found to have admitted the substantive

1 allegations of that complaint, but to the extent
2 that Mr. Smith's client can provide proof of those
3 damages, they're going to be awarded. You're going
4 to have a judgment against you.

5 I mean, he gets to come in and
6 cross-examine the witnesses, but he doesn't get to
7 basically try his case factually.

8 MR. MARSHALL: That's right; there's
9 already a judgment against him. He's already been
10 found liable. It's just, what are his damages?
11 And so our position is that there is no way that
12 damages can be apportioned unless a jury has Hood &
13 Selander in front of it at the trial as well.

14 Now, Hood & Selander, Your Honor, was
15 the CPA, the accounting firm for my client and his
16 company, ABACARE. They were in charge of doing all
17 the tax returns.

18 And before I forget, Judge, I want to
19 make sure that you --

20 THE COURT: Yeah. But you know what a
21 CPA firm does with the information which you give
22 them. When I go to my CPA to do my taxes at the
23 end of the year, she works on what I give her.
24 She's not coming to my house and looking through my
25 records. That's not what CPAs do. They to a

1 certain extent rely that the information you give
2 them is going to be accurate.

3 Now, as a professional, they will say,
4 are you sure that's correct? I think this might be
5 a scrivener's error. I think based on the years
6 that I've dealt with you, this figure might be
7 inaccurate. This is lower than last year. This is
8 higher than this year. It's in the realm of
9 certain possibilities you're flagging yourself with
10 the IRS. That's what a good CPA does.

11 So now why would they have the duty to
12 determine if the information your client provided
13 was accurate? Their job is basically to fill out
14 forms, determine tax liability, fill out the
15 appropriate forms to the IRS, and write checks to
16 the IRS for you, unless you come and write them
17 yourself, and just have them deposited in the mail
18 for you.

19 MR. MARSHALL: Well, Selander was my
20 client's employee and he was in a fiduciary duty,
21 and his duty was to know the law and how sales
22 taxes for durable medical equipment should be
23 reported to the South Carolina Department of
24 Revenue. My client counted on him to do that.

25 THE COURT: But to the extent that any

1 of those allegations are admitted in that
2 complaint, he's not going to be able to say
3 anything opposite of that. If the complaint
4 alleged -- and I read the complaint, and it has
5 many pages, and I'm not going to pretend that I
6 remember it all, but if the Plaintiff alleges that
7 he was fraudulent in reporting these amounts, he's
8 estopped from taking a position opposite that.

9 He's stuck with that position. He's
10 stuck factually with that if the Court has found
11 him in default.

12 MR. MARSHALL: Well, right. But if a
13 jury wants to consider -- if they want to -- if
14 they want to say that Mr. Declemente acted
15 fraudulently, that doesn't preclude Mr. Selander
16 from having acted fraudulently too, and perhaps to
17 a far greater extent.

18 THE COURT: What evidence do you have
19 of that?

20 MR. MARSHALL: Well, I submitted -- did
21 you get the memo I submitted Thursday, Judge --

22 THE COURT: If you sent it Thursday, I
23 didn't.

24 MR. MARSHALL: We sent it to your
25 chambers and I filed it.

1 THE COURT: It probably hasn't made its
2 way up to me yet. I know it's -- like, when I run
3 into the mail guy, he has like ten of those boxes
4 of mail they have to sort like every day and
5 distribute it to us. And if you sent it Thursday,
6 I doubt that I've gotten it yet.

7 MR. MARSHALL: Well, I would just ask
8 that --

9 THE COURT: Oh, I'm going to read
10 everything.

11 MR. MARSHALL: But the evidence that I
12 submitted, to answer your question directly, in
13 that memo and about 15 pages of deposition
14 transcript from Jeff Reed, one of the owners of
15 ATMES, which is the Plaintiff in this case, and
16 repeatedly in that deposition Jeff Reed says, we
17 don't blame Phillip Declemente for this. We blame
18 Hood & Selander for this.

19 THE COURT: Yeah, but the Court's
20 already found him in default. So he's already
21 negligent as a matter of law and he can't take the
22 position opposite that.

23 Now, at the end of this case if there
24 is some liability attributed to him, he can appeal
25 it because then the matter would be ripe and the

1 controversy would be ripe because then it would
2 amount to a final judgment.

3 I mean, I don't want to speak for the
4 trial judge. I think he's going to be judicially
5 estopped from taking a position opposite of that.
6 He's not going to be able to absolve himself from
7 liability by arguing that their liability was
8 greater than his.

9 So at best by that finding, he starts
10 off in a deficit. You're going to have to prove
11 that they did something. The Court's already said
12 he did something.

13 MR. MARSHALL: Right. And that's the
14 jury's job to apportion liability and --

15 THE COURT: You're going to have to be
16 very careful how you argue that. He's going to
17 argue that you're judicially estopped and the Court
18 is going to say, you are. So you're in a very
19 difficult posture in this case.

20 MR. MARSHALL: I certainly recognize
21 that, Judge.

22 THE COURT: Factually, you are.

23 MR. MARSHALL: It's a difficult case.
24 And Mr. Howser's --

25 THE COURT: Technically, they can go

1 ahead with their damages hearing against your
2 client. They don't have to wait for a jury trial.

3 MR. MARSHALL: I wanted to point out in
4 one of the cases that Mr. Howser cites in his memo,
5 which is Jourdan v. Boggs, he cites some language,
6 but he doesn't -- in our opinion, he doesn't cite
7 some of the critical language. And this is a
8 general concept which covers our position.

9 And here the Court of Appeals wrote,
10 clearly, the right to recover -- and this is
11 talking about from another -- another tortfeasor or
12 a co-defendant -- while it exists does not ripen
13 until decided by the finder of fact. Consequently,
14 dismissal on the basis of the Rule 12 motion was
15 premature. The allegations of the complaint are
16 not determinative of the right to indemnity.
17 Rather, such a determination is based on the
18 evidence and the facts found by the fact finder.

19 That's the general concept which
20 governs this whole argument that we're having here
21 today. And that's why it took Judge Young about 30
22 seconds to say, Mr. Howser, I think that you're
23 premature on that. And he was absolutely right.

24 Now, that's not an official ruling, but
25 it's just such a general concept of law that he

1 didn't need to hear much to know that that's what
2 applies.

3 The other thing that -- in one of
4 Mr. Howser's cases that he cites, which is the
5 Scott v. Fruehauf case, this case makes it clear
6 that -- it says, parties that have no legal
7 relation to one another and who owe the same duty
8 of care to the injured party share a common
9 liability and are joint tortfeasors without a right
10 of indemnity between them.

11 But that's not what you have here. You
12 have a legal relationship. Mr. Selander was my
13 client's employee hired to do tax returns properly.
14 I have seen those tax returns. I would submit to
15 you, Judge, they were, I believe, prepared by
16 Mr. Selander and signed by my client.

17 Because a CPA, as we all know -- you go
18 to your CPA, they do your taxes and they say, all
19 right. Here it is. You have to sign it.

20 THE COURT: Based on the information
21 you've given them.

22 MR. MARSHALL: That's right. That's
23 the law.

24 THE COURT: They all feed it into a
25 computer. It's not like they do it manually.

1 They're all programs that they use to prepare your
2 tax returns.

3 MR. MARSHALL: So, you know, this case
4 that Mr. Howser cites, the Scott v. Fruehauf makes
5 it clear that my client does have a right of
6 contribution should he be hit with a big damages
7 award by a jury from Selander with whom he had a
8 legal relationship; employer, employee, fiduciary
9 and client.

10 THE COURT: Well, his argument is that
11 you-all are now joint tortfeasors because of the
12 default finding and you don't have any right to
13 indemnity. That's a legal argument, not an
14 apportionment argument. I need you to address
15 that.

16 Why would you not be -- why would you
17 not -- why would his argument not be valid that
18 you-all are now joint tortfeasors based on that
19 default?

20 MR. MARSHALL: Well, I just read it.

21 THE COURT: If I misstated your
22 argument, Mr. Howser, please correct me.

23 MR. HOWSER: I would say I'm thoroughly
24 familiar with Scott v. Fruehauf; that was my case.
25 I tried it in Hampton County. I lost more money in

1 that case than I have lost in my entire legal
2 career, and I was with another firm then.

3 And I had a great appellate lawyer, and
4 the case was at the Supreme Court 23 months between
5 oral argument and final decision, interest running
6 at 14 percent.

7 THE COURT: That's a long time.

8 MR. MARSHALL: Well, then Mr. Howser
9 certainly knows what this case stands for. And,
10 again, it says, parties that have no legal relation
11 to one another and owe the same duty and care to
12 the injured party share a common liability and are
13 joint tortfeasors without a right of indemnity,
14 which means that parties that do have a legal
15 relation to one another don't owe the same duty to
16 the injured party and are not joint tortfeasors. I
17 mean, the case speaks for itself.

18 You can then go on to look at the
19 contribution among tortfeasors statute, and I think
20 it's important to do so.

21 THE COURT: Yeah, I'm familiar with the
22 statute. There's a whole line of argument that
23 even when people settle out or they're in default
24 that a jury should still be presented with
25 apportionment.

1 You know, judges look at it differently
2 since there's really no clear articulation of the
3 statute as to how it should be done. I have some
4 colleagues that present it to the jury; I have some
5 that don't. The Court of Appeals nor the Supreme
6 Court has really taken it up. I think some cases
7 have been appealed, but we really haven't had any
8 clear authority on it yet.

9 Some people take the position that once
10 you're settled out, you're done. There is no right
11 to apportionment because they are no longer a
12 party. Some people take the position that
13 regardless of that, you're still entitled to
14 apportionment.

15 And in line with that, that's basically
16 where your argument falls, which is that even if my
17 client is in default, he's still entitled to some
18 level of apportionment.

19 And I'm just not certain whether there
20 is -- I don't know. I'm sort of torn on the issue,
21 to be frank, and I need to study it a little bit.
22 I'm not certain -- I'm just not certain about that
23 in this context because he's in default.

24 MR. MARSHALL: Well, the absence of
25 Hood & Selander at the trial --

1 THE COURT: Which is kind of no
2 different than somebody that settles out because,
3 by settling out, you basically admitted some level
4 of liability although the release says you are
5 admitting nothing. You're just writing a check and
6 getting out of the case.

7 MR. MARSHALL: What would happen if
8 Hood & Selander were not present at the trial
9 pursuant to the cross-claim that my client was
10 entitled to bring against them, and which has not
11 been stricken, which has not been dismissed? But
12 the absence of Selander, you know, should a jury
13 award damages to the Plaintiff, then that's going
14 to mean that those damages are going to fall on my
15 client because he's the one that's there.

16 So, you know, the law provides for him
17 to later bring a separate action against Hood &
18 Selander, but our point is that doesn't promote
19 judicial economy -- and the settlement, I guess
20 upon which Mr. Howser is basing his argument, I
21 haven't seen anything typed so I've got -- at the
22 mediation they came up with something --

23 THE COURT: I guess I'm a little
24 confused as to how your client would even present
25 that case to a jury because I assume Mr. Smith's

1 client is going to move forward with a damages
2 hearing. So what are you going to present that
3 already is a matter of law and your client's been
4 found to have damages in this particular amount and
5 he's already been found to have admitted the
6 allegations?

7 It just becomes very troublesome in
8 even presenting that to the jury in that matter.
9 You'd have to work out a stipulation because it's
10 the law of the case at this point. So what defense
11 can you really mount? You're not going to be able
12 to shift it. You understand what I'm saying?

13 The best you're going to be able to
14 argue is they did something wrong and then ask the
15 Court to do an apportionment verdict form. And who
16 knows? That's a toss-up whether he's going to do
17 that or not.

18 MR. MARSHALL: Well, we believe the
19 rules of civil procedure clearly --

20 THE COURT: So it might even be better
21 to be bifurcated to some extent.

22 MR. MARSHALL: Judge, we believe that
23 not only do they permit us to require Hood &
24 Selander's presence at trial, but they require it.
25 Rule 13(g) -- under Rule 13(g) Selander is or may

1 be liable for all or part of the claims asserted
2 against Mr. Declemente. And, you know, if -- if --

3 THE COURT: That's in a perfect world
4 where you would really be able to present a full
5 defense, but you're not going to be able to.
6 You're going to be stuck with those facts that are
7 in that complaint, and you're not going to be able
8 to argue anything that's opposed to those facts in
9 that complaint.

10 MR. MARSHALL: Respectfully, Judge, I
11 don't know that I agree with that because --

12 THE COURT: Well, you're estopped from
13 making any argument from anything that he's --
14 where he's been found in default. It basically
15 amounts to a stipulation of facts against your
16 client once the judge finds he's in default.

17 He cannot -- just because he gets to
18 argue damages doesn't mean he gets to argue
19 substantive facts in the complaint. He's found and
20 deemed to have admitted all of them and he cannot
21 argue against them. The only thing he can do is
22 argue about the measure of damages and whether they
23 have met their measure of damages proof by
24 preponderance of the evidence.

25 They don't have to wait for trial to do

1 that. They file a motion to have the damages
2 hearing heard any time they want to and have it
3 disposed of.

4 MR. MARSHALL: So what could happen --
5 say there's \$100,000 in damages. My client, since
6 Selander would not be present at the trial because
7 he owes \$100,000 in damages, and this is the guy
8 that's sitting there, so we're going to stick it on
9 him when, in fact --

10 THE COURT: I have found juries to be
11 far more discerning than that.

12 MR. MARSHALL: -- when, in fact, if
13 Selander were present and the jury knew that he was
14 the CPA hired by my client and my client's company
15 to know the tax law and to properly report sales
16 taxes, then I think there's a high likelihood they
17 would say, oh, yeah.

18 THE COURT: I don't know. Again, I
19 can't remember offhand what the facts are alleged
20 in the complaint. To the extent that it's --
21 anything you're saying is different from that,
22 you're not going to be able to argue that. You're
23 stuck with the facts in the complaint at this point
24 because your client is in default.

25 MR. MARSHALL: Well, the case that I

1 referenced earlier, Judge, which is the Jourdan v.
2 Boggs case, says that the right to recover,
3 indemnity your contribution while exists, does not
4 ripen until decided by the finder of facts.
5 Consequently, dismissed on the basis of Rule 12 is
6 premature.

7 THE COURT: This isn't a Rule 12
8 motion.

9 MR. MARSHALL: No, I understand. The
10 allegations of the complaint are not determinative
11 of the right to indemnity.

12 THE COURT: This is not a default case.
13 The facts of that case are not a default case.

14 MR. MARSHALL: That's correct.

15 THE COURT: So you can't -- every case
16 turns on its individual facts. This is a default
17 case. Your client is deemed to have admitted those
18 allegations. He cannot say -- he's between a rock
19 and a hard place. He cannot now say, I didn't do
20 this or that.

21 The only thing he can contest is the
22 amount of damages and whether they can meet their
23 burden of proof by a preponderance of the evidence.
24 That's it.

25 MR. MARSHALL: The law nowhere, Judge,

1 precludes my client from pointing a finger at third
2 parties or multiple --

3 THE COURT: You're correct. He can
4 point the finger, but they can come back and say
5 he's judicially estopped from doing it because the
6 Court has found that your client is guilty and
7 culpable of this behavior and these particular
8 facts. So you're not going to be able to argue
9 anything contrary to that.

10 MR. MARSHALL: But to what extent,
11 Judge?

12 THE COURT: To the full extent of what
13 is said in that complaint. You're stuck.

14 MR. MARSHALL: And in the complaint the
15 Plaintiffs are saying that four other people are
16 also responsible.

17 THE COURT: It doesn't matter. They
18 can still argue that and they can still pursue
19 their theory of damages against them; but as far as
20 your client is concerned, they can file a motion
21 for damages next week and have it heard and get an
22 order before you can go to trial.

23 MR. MARSHALL: I'm not sure -- you
24 know, I was getting ready to talk about the
25 handwritten settlement, which is the only one I've

1 seen, but what it says is that as a result of their
2 settlement, Mr. Howser and the Plaintiffs, to the
3 extent of the payment above, Plaintiff will
4 indemnify and hold harmless Hood & Selander and
5 David Selander for any amounts paid to
6 Phillip Declemente arising out of any alleged acts,
7 errors, or omissions on conduct of Hood & Selander
8 and David Selander in connection with and relating
9 to the matters asserted in their suit.

10 So the language of their settlement
11 considers the situation in which recovery in which
12 Phillip Declemente -- in which the Plaintiffs --
13 because Mr. Declemente has filed a separate lawsuit
14 against them -- in which the Plaintiffs pay money
15 to Mr. Declemente.

16 To that extent, the settlement absolves
17 Selander of any requirement to pay a portion of any
18 money paid by Plaintiffs to Mr. Declemente, but the
19 situation that Mr. Declemente seeks to protect
20 himself from is a situation where a jury orders him
21 to pay damages to the Plaintiffs. Exactly the
22 opposite. So --

23 THE COURT: Well, that agreement only
24 applies to the people that are parties to it. It
25 doesn't apply to your client. I don't know that

1 the language is dispositive of anything. It
2 doesn't change his posture in this case.

3 For whatever reason, he didn't answer
4 within the appropriate time, and Judge Nicholson
5 found that he didn't have -- didn't meet the level
6 of excusable neglect. That he had, you know -- and
7 we know what the order says, and so he's in
8 default. There's really no way around it.

9 I mean, once the case plays out, you
10 can appeal it and a court may say that he really
11 wasn't in default and you start over again. At
12 this point, he doesn't get to relitigate the facts.
13 And, I don't know -- you know, I can't make a
14 decision about whether a judge would allow
15 apportionment under these circumstances.

16 I have no idea, nor would I attempt to
17 make that kind of decision for a trial court that
18 is going to try the case, because cases develop
19 different once you start trying them.

20 MR. MARSHALL: And that's why -- that's
21 why all the potential liable parties need to be
22 present. That's the reason for the Rule and that's
23 the reason for Rules 19 and 14 and --

24 THE COURT: But that's really not his
25 position. His position is that your client is not

1 a joint tortfeasor and, therefore, he doesn't have
2 any rights to indemnity pursuant to their agreement
3 or under any equitable theory. And it's really a
4 legal argument that he's making.

5 MR. MARSHALL: But he's not a joint
6 tortfeasor. His client was my client's employee.

7 MR. MYRICK: Your Honor, that's --

8 THE COURT: We're going back and forth
9 and I need to read everything and we have far
10 exceeded our time.

11 Yes, sir.

12 MR. SMITH: May I briefly, Your Honor,
13 place a matter on the record?

14 THE COURT: Sure.

15 MR. SMITH: As the Plaintiff in this
16 matter, I just want to say we join in the request
17 of the relief that's been filed by Hood & Selander
18 and David Selander. And I just want to note for
19 the record, as it has been the case, the answer,
20 counterclaims and cross-claims really have never
21 been filed. They have never been properly asserted
22 to this day. They really don't exist as a matter
23 of law.

24 MR. MARSHALL: They were filed. I have
25 a filed copy and were --

1 MR. SMITH: But they have never been
2 allowed to be entertained by the Court, and that's
3 what's been clear. If he's going to seek to pursue
4 those, he would need to request permission --

5 THE COURT: I will tell you what is
6 really problematic, and what I've sort of been
7 stuck on is the language in Judge Nicholson's
8 order. Although it applies to Ms. Cash and
9 Mr. Declemente, the language in the order clearly
10 says that he's precluded from filing an answer,
11 counterclaim, or any counterclaim.

12 And that's kind of problematic for your
13 client because it seems the Court is saying he's
14 precluded from filing any responsive documents.
15 And I don't know whether the -- whether the
16 intention was -- because he wouldn't file -- he
17 would file a counterclaim against Ms. Carson --
18 Ms. Cash -- I don't know why I keep calling her
19 Carson -- Ms. Cash, but he certainly would not have
20 filed a cross-claim against Ms. Cash, would he?
21 Unless she filed --

22 MR. MARSHALL: We did file a
23 cross-claim against Cash.

24 THE COURT: And then they got
25 dismissed.

1 MR. MARSHALL: No. That's still --

2 THE COURT: Well, no, it couldn't be
3 because Judge Nicholson struck them all. So they
4 couldn't be pending.

5 MR. MYRICK: That's my point, Your
6 Honor.

7 MR. MARSHALL: He didn't strike them,
8 Judge. The language in the order --

9 THE COURT: And the counterclaims are
10 stricken.

11 MR. MARSHALL: Answer and counterclaims
12 are stricken.

13 THE COURT: But then in the previous
14 paragraph he says he cannot enter his answer,
15 counterclaim and cross-claims, and cannot pursue
16 default judgment against the Plaintiff.

17 MR. MARSHALL: But not permitting entry
18 of the cross-claims at that point --

19 THE COURT: I don't know. You-all may
20 need to go back to Judge Nicholson for clarity on
21 the language and what he intended as his order.
22 It's a little vague, yes. Because in one paragraph
23 he precludes you from doing any of it and then in
24 another -- and maybe he worded it that way because
25 the other document had not been filed.

1 When a judge says you can't file any of
2 these things, I think that's what he means. You
3 can't file any of these things. And at the point
4 of your client being in default, you'd have to get
5 leave from the Court to file them anyway.

6 MR. SMITH: Your Honor, that's my
7 point. And the only reason why it wasn't included,
8 we were the only ones seeking relief at the moment,
9 that's why the order only dealt with the
10 counterclaims, but it has the same effect, Your
11 Honor.

12 That pleading has never been allowed to
13 be entertained in this court and thus both --

14 THE COURT: So really it doesn't exist
15 because it hasn't been filed and you need leave of
16 the Court to file it. So we're sort of talking
17 about a fictitious pleading at this point.

18 MR. SMITH: That's correct, Your Honor.

19 MR. MARSHALL: I don't agree with that,
20 Judge.

21 THE COURT: Well, you know, that's your
22 prerogative, but the rules are the rules. We all
23 sing from the same hymnal. The rules say when and
24 where you can do things. If your client is in
25 default, you need leave of the Court to file

1 anything. You can't file any pleadings. You can't
2 file any responsive pleadings once he's been found
3 in default.

4 I don't even know that Judge Nicholson
5 needed to articulate it in an order.

6 MR. MARSHALL: Judge, these claims were
7 filed months and months and months before my client
8 was found at default.

9 THE COURT: Did he file it within the
10 30-day window of being served with the summons and
11 complaint?

12 MR. MARSHALL: No. And that's why he
13 was in --

14 THE COURT: Unless his time to enlarge
15 has been granted, he has no pleadings in this
16 court. If you don't file within the 30 days, you
17 have to get leave to enlarge the time to file.
18 Your client's motion was not granted. As far as
19 we're concerned, there is no responsive pleading
20 that has been filed. You didn't get leave of the
21 Court to file it.

22 MR. MARSHALL: A third-party claim can
23 be brought at any time within the applicable
24 statute on the case and that's all this is. These
25 cross-claims are third-party claims and they were

1 certainly --

2 THE COURT: I think you need to look at
3 the Rules and then decide what the Rules say you
4 can and can't do.

5 MR. MARSHALL: To make one more point
6 and then I'm through, Judge. Thank you for your
7 time.

8 THE COURT: Yes, sir. Thank your
9 colleagues. They've been patient. They've been
10 waiting.

11 MR. MARSHALL: Let me just point out
12 that as much as Mr. Howser wants to argue on his
13 client's behalf that there should be no indemnity
14 between his client and mine, he pled indemnity in
15 his cross-claim against my client.

16 THE COURT: Well, he has to because
17 isn't it an affirmative defense? Doesn't he have
18 to? I don't think he means there's validity. I
19 think it means he has to do it or he forecloses it
20 and waives it. So if he's prudent, he would.

21 MR. MARSHALL: All right. Thank you,
22 Judge.

23 THE COURT: You're welcome.

24 Mr. Howser, if you can provide me with
25 a proposed order in ten days and provide me with

1 any case law and factual findings that support your
2 position on summary judgment. I'm taking it all
3 under advisement because I need to read everything
4 you-all have given to me.

5 MR. MYRICK: If that logic applies to
6 Mr. Howser's client, it would also apply to my
7 client, Ms. Cash, as it concerns any cross-claims
8 for indemnity, and I would request at this point,
9 if the Court is of the mind to grant that based on
10 the idea that no pleadings --

11 THE COURT: Based on my what?

12 MR. MYRICK: Based on your idea that if
13 he didn't seek leave to plead the cross-claims,
14 then there are no pleadings before the Court. And
15 if they are out as to Mr. Howser, they should be
16 out to Ms. Cash, too.

17 MR. HOWSER: May I just hand this one
18 thing up?

19 THE COURT: I think you have to give
20 him notice that that's what you're seeking. I
21 don't think I can do that the way you requested it.
22 So if you want to file a motion after it becomes
23 applicable, after I rule, you are certainly welcome
24 to do that.

25 Thank you. Have a great day.

1 (These proceedings were concluded at
2 11:40 a.m.)
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1 CERTIFICATE OF REPORTER
2

3 I, Carol Denise Lauder, Registered
4 Professional Reporter and Notary Public for the
5 State of South Carolina at Large, do hereby certify
6 that the foregoing transcript is a true, accurate,
7 and complete record.

8 I further certify that I am neither related
9 to nor counsel for any party to the cause pending
10 or interested in the events thereof.

11 Witness my hand, I have hereunto affixed my
12 official seal this 12th day of May, 2018 at
13 Charleston, Charleston County, South Carolina.
14
15
16

17 2/Denise Lauder
18 Carol Denise Lauder
19 Registered Professional
20 Reporter, CP
21 My Commission expires
22 February 27, 2028
23
24
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1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
2 COUNTY OF CHARLESTON) CASE NO. 2011-CP-10-8011

3
4 Assistive Technology)
5 Medical Equipment)
6 Services, LLC,) Transcript of Record
7 Plaintiffs,)
8 vs.)
9 Hood & Selander, LLC,) Date: November 1, 2016
10 et. al.,)
11 Defendants.)

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B E F O R E:

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The Honorable Deadre Jefferson

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Denise J. Lauder, RPR

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Ninth Judicial Circuit

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A P P E A R A N C E S

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1 (No exhibits were offered or
2 marked for identification.)
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1 (The following proceedings were had
2 11/1/2016, Charleston County Common Pleas Court.)

3 THE COURT: Assistive Technology
4 Medical Equipment Services v. Hood & Selander.

5 I have a motion for summary judgment by
6 Plaintiff. That's been resolved; is that correct?

7 MR. SMITH: Yes, Your Honor, it has.
8 We settled with --

9 THE COURT: You settled that portion of
10 the case?

11 MR. SMITH: That's correct.

12 THE COURT: So who is settled out?

13 MR. MYRICK: So that's -- how are you,
14 Judge?

15 THE COURT: I'm well. How are you?

16 MR. MYRICK: I'm fine. Thank you.

17 You're exactly right. I'm glad to
18 report to you, as James Smith said, we settled out.
19 That's the main claim --

20 THE COURT: Tell me your client's name
21 again.

22 MR. MYRICK: Okay. I'm Jim Myrick, for
23 the record, with Womble Carlyle, here for the
24 Estate of Connelly, The Estate of Dorothy Connelly,
25 and Donna Cash is the representative in the caption

1 of that estate.

2 THE COURT: So all of that portion of
3 the case has settled?

4 MR. MYRICK: Yes. The main claim of --

5 THE COURT: So that's with Ms. Cash,
6 Ms. Connelly, but does that leave W.E. Applegate?

7 MR. MYRICK: He's out. All of them are
8 officially out of the caption.

9 THE COURT: So that leaves Kimberly
10 Cuce and Phillip Declemente and Hood & Selander.

11 MR. MYRICK: Hood & Selander are out.
12 They settled too.

13 THE COURT: Perfect.

14 Good morning.

15 MR. HOWSER: Hood & Selander have
16 settled.

17 THE COURT: And, sir, if you could
18 remind me of your name for the record.

19 MR. HOWSER: I'm Dave Howser
20 representing Hood & Selander.

21 THE COURT: So everybody has settled
22 out except Ms. Cuce, C-U-C-E, and Phillip
23 Declemente.

24 MR. MYRICK: Yes. There is -- Will
25 Smith is here who represents the Plaintiff. They

1 have signed a mutual release with my client on the
2 main claim and the counterclaim. I have my
3 client's signature on that. I had done for the
4 Court for filing a 41(a) stipulation dismissal with
5 prejudice because we both resolved it in both
6 directions.

7 I was re-reading the rule last night,
8 and it talked about all parties needing to sign
9 that, but the other parties are not involved with
10 our settlement. So I would seek -- I would like to
11 propose an order for the Court.

12 I have this voluntary stipulation
13 dismissal with prejudice that resolves it between
14 us, but belt and suspenders, I would like to
15 propose an order to the Court that resolves it as
16 to ATMES and as to my client back and forth. Would
17 you accept such an order?

18 THE COURT: Yes. Do you have it? I
19 would be glad to sign it.

20 MR. MYRICK: And that would include
21 Abacare in that they were recently added as a third
22 party.

23 THE COURT: If you-all signed a consent
24 order for dismissal with prejudice, I don't have a
25 problem with that.

1 MR. MYRICK: Okay. I will try to get
2 the signature of Phillip Declemente. I don't know
3 if he will give that or not.

4 THE COURT: Does he need to sign it?
5 He's not a party.

6 MR. SMITH: I don't think he does, Your
7 Honor.

8 THE COURT: He wouldn't sign it if the
9 settlement doesn't involve him. It only needs to
10 be signed by those whose interests are affected.

11 MR. MYRICK: Thank you.

12 THE COURT: You're welcome. Have a
13 great day, unless you want to hang out with us.

14 MR. MYRICK: I have one more thing and
15 I'll stay here for that. I will take this up as a
16 housekeeping matter, Your Honor. I think the main
17 -- these guys are going to have a main argument
18 with you in a minute and you'll will hash that.

19 On October 17th, I filed a motion for
20 summary judgment on behalf of the Estate of --

21 THE COURT: When was that?

22 MR. MORGAN: October 18th.

23 THE COURT: Did we hear that the last
24 time?

25 MR. MYRICK: No. You heard an

1 identical motion.

2 THE COURT: Okay.

3 MR. MYRICK: And that's exactly what
4 you're remembering. Mr. Howser said, look, if
5 Mr. Declemente is in default, he cannot assert a
6 cross-claim. You said, look, that's the law of the
7 case. Judge Nicholson signed an order saying you
8 can't assert a cross-claim; therefore, it's moot
9 because there is no cross-claim to address.

10 And I said, all right, I'm identically
11 situated. And you said, file a motion to that. I
12 did file a motion exactly on those terms to seek
13 the exact same remedy, just a statement that that
14 motion clearly is the law of the case.

15 THE COURT: Well, I don't think I said
16 that in a Form 4. Or I may have just said it was
17 withdrawn. I don't remember.

18 MR. MYRICK: You said Judge Nicholson
19 said that there was no standing --

20 THE COURT: I would have to look at the
21 order. I have to look at what I signed. What I
22 said doesn't matter.

23 MR. MYRICK: You're right. Let me give
24 you a copy of it.

25 THE COURT: The observation I made was

1 that they were judicially estopped from taking a
2 separate position, which means they can appeal it
3 if they want to once the case is over if they get a
4 judgment against them.

5 I don't think I need that because you
6 settled it. Your motion is moot.

7 MR. MYRICK: I settled with them, but I
8 haven't settled with him.

9 THE COURT: Then I need to hear the
10 motion.

11 MR. MYRICK: Okay. And may I present
12 that now? Is that okay?

13 THE COURT: It's not on my docket.

14 MR. MYRICK: Do you want me to come
15 back?

16 THE COURT: You would have to check
17 with Ms. Caroline and see when it's been scheduled.
18 I'm sorry, but I kind of have a full plate or I
19 would accommodate you.

20 MR. MYRICK: I will do that. It's not
21 a problem. Thank you, Your Honor.

22 THE COURT: Yeah. I have a full plate
23 this morning or I would accommodate you. Find out,
24 check with Ms. Caroline and find out when she
25 scheduled it and then we will see when it comes up

1 on the roster.

2 MR. MYRICK: I appreciate it.

3 THE COURT: Not a worry. Have a great
4 day.

5 I have a Plaintiff's motion for a
6 damages hearing. Is the Plaintiff ready to
7 proceed, Mr. Smith?

8 MR. SMITH: Yes, Your Honor. The
9 Plaintiff is ready to proceed, and I have two
10 witnesses, Your Honor.

11 THE COURT: Okay. And the Defendant is
12 represented by Mr. Marshall, correct?

13 MR. MARSHALL: Yes, ma'am.

14 THE COURT: Okay. Are you ready to
15 proceed, Mr. Marshall?

16 MR. MARSHALL: No, ma'am, we are not.

17 THE COURT: Why?

18 MR. MARSHALL: Well, there is a number
19 of reasons, but I guess one of the main ones is
20 that Mr. Smith on behalf of his client has
21 requested a jury trial.

22 THE COURT: He requested a jury trial
23 on some issues, but once you have a default, you
24 don't have to proceed with a jury trial. That, by
25 virtue, makes that moot because you're entitled to

1 have a nonjury hearing. You never have a jury
2 hearing on a default motion.

3 As a matter of fact, they're usually
4 submitted as a package if it's liquidated you.
5 Never have a hearing.

6 MR. MARSHALL: Well, I think --

7 THE COURT: You can actually do them by
8 prepared testimony if you want to. That's what you
9 do in the master's in equity court. They don't
10 ever have hearings.

11 MR. MARSHALL: Well, if you ruled,
12 Judge, he's not entitled to --

13 THE COURT: It's his right to assert
14 and if he's withdrawn it --

15 MR. MARSHALL: But he hasn't withdrawn
16 it. That was my point.

17 THE COURT: But I don't think -- if my
18 memory is accurate on his pleadings, I don't think
19 he requested a jury trial. I think it's a moot
20 issue really, because once your client is in
21 default it's his choice as to what he wants to do.

22 MR. MARSHALL: Well, but we're entitled
23 to notice at least and to have a ruling from the
24 Court as to whether --

25 THE COURT: I don't think a ruling is

1 necessary. I think it's superfluous. Once you
2 have a default, you don't have a jury trial on
3 default. You have a damages hearing, and that's
4 generally what the order says. I'm pretty sure if
5 my clerk finds that order, it's going to say that.

6 Once the Court found that your client
7 was in default -- it says that the next part of the
8 process is a hearing on damages to be scheduled.
9 That's the usual language that it has in the order.

10 MR. MARSHALL: I can't tell you
11 exactly --

12 THE COURT: Well, I will have my clerk
13 find the order so we can find that, because he was
14 found in default by Judge Nicholson, correct?

15 MR. SMITH: It was, Your Honor.

16 THE COURT: But usually, at least if my
17 memory serves me correctly, usually most default
18 orders say that the person is in default and that a
19 damages hearing could be scheduled at a later time.
20 Or if it's a liquidated sum pursuant to the rule,
21 generally, the party will submit the package to the
22 Court, order of default will be signed, and then
23 the judgment will be signed either simultaneously
24 or two separate orders.

25 But there is no requirement to have a

1 jury trial on default.

2 MR. MARSHALL: Well, it goes back to --
3 for me, it goes back to the notice issue. I think
4 there is a legal requirement that the --

5 THE COURT: Do you have a rule that
6 says that?

7 MR. MARSHALL: -- that the request for a
8 jury trial be withdrawn. Yeah. I think it's 55,
9 Judge.

10 THE COURT: I don't think you have to
11 say that with a default. I think once somebody is
12 in default it goes without saying they're entitled
13 to do a damages hearing, because there's nothing to
14 contest.

15 Now, he can be present to be heard on
16 damages and to cross-examine the witnesses on
17 damages.

18 MR. SMITH: If I may, just to address
19 this issue, we have requested a nonjury hearing
20 before a judge multiple times in this case. As a
21 matter of fact, it was withdrawn without prejudice
22 previously in about February, and a continuance was
23 issued then based upon our agreement to come back
24 at a later date with this hearing.

25 I want to point to the Court -- and we

1 would like to move forward today. We're prepared
2 to move forward. We have brought our witnesses who
3 have come and traveled some distance to be here
4 today, and we do believe there has been more than
5 adequate notice by the Court and by us providing
6 him with --

7 THE COURT: Well, really, as a
8 practical matter, Mr. Marshall, you were on notice
9 the last time you were here that they wanted a
10 hearing on the damages because it was discussed at
11 length.

12 MR. MARSHALL: Right. And I knew that
13 they had a jury trial request.

14 THE COURT: No. They were very clear
15 to you that they wanted a hearing on the damages
16 before a judge in a default.

17 MR. MARSHALL: The motions they filed
18 doesn't withdraw the jury trial request.

19 THE COURT: I don't think it has to.
20 I've never seen anybody do that, and I hear a lot
21 of defaults in wrecks and other things too. I have
22 never seen anybody do that.

23 Now, technically, might it be something
24 that people could do that they could do? I don't
25 think it's required. But you have to give me a

1 rule or a case that says that's required for them
2 to -- to keep them from going forward today on
3 their damages hearing.

4 MR. MARSHALL: I think the applicable
5 Rules are 38 and 55. 38 talks about jury trial
6 rights, right of trial by jury --

7 THE COURT: It's their right to assert.
8 Not yours.

9 MR. MARSHALL: And they did assert it.

10 THE COURT: They don't have to pursue
11 it.

12 MR. MARSHALL: But, Judge, there is
13 case law that says that a defendant is entitled to
14 rely on the request of the plaintiff. There is a
15 number of cases that say that.

16 MR. SMITH: I think I can resolve this
17 with a case that's on point, Your Honor.

18 THE COURT: Yes, sir.

19 MR. SMITH: And this was Mr. Marshall's
20 -- originally, he's been trying to have a jury
21 trial on this issue, and the fact is the law and --
22 the case law in the rules don't allow it. I point,
23 Your Honor, to a case of Row Furniture Corp v
24 Carolina Wholesale Furniture Company. The citation
25 is 292 S.C. 575, and the language is on page 576,

1 and then the Southeastern edition is 357 S.C.2d
2 725.

3 And it states very clearly: When a
4 party is involved, as the case with Mr. Marshall's
5 client, the right to a jury trial is waived
6 pursuant to 38(d) citing that case. Rule 38(d)
7 provides that the failure of the party to demand a
8 jury trial within ten days of service from the last
9 pleading constitutes a waiver of the trial by jury.

10 This has been resolved ten days after
11 he was unable to assert his answer, and that jury
12 trial waiver took place sometime in 2012. And,
13 certainly, we have been proceeding in a multitude
14 of circumstances to have a hearing before a judge,
15 as we would normally do; and it is customary and is
16 in accordance with the rules to have our damages,
17 which are unliquidated, be reduced based on the
18 testimony of an expert witness and my client.

19 We're ready to proceed, Your Honor.

20 THE COURT: Mr. Marshall, anything
21 further in response to Mr. Smith?

22 MR. MARSHALL: Well, apparently,
23 yesterday, I guess, about 5:45 in the evening, I
24 discovered it this morning early when I got up and
25 checked the e-mails about 5:30, and I responded to

1 Mr. Smith.

2 I e-mailed him last week and I said, do
3 you object to our request for a jury trial? And I
4 got a response that, yes, he did. And I said,
5 well, could we talk about it and see if we could
6 resolve it before court. And that didn't happen.

7 But he did send me an e-mail about 5:45
8 that I saw this morning, and I immediately
9 responded that I had spoken with the clerk of court
10 last week, Don Michelle, to get clarification on
11 this.

12 THE COURT: Why would you speak with
13 Don Michelle? What clarity could he give you?

14 MR. MARSHALL: As to whether the
15 damages hearing was going forward or not. And I
16 was informed that, no, if we had a dispute over
17 whether it was going to be jury or nonjury, that's
18 what we would be hearing today.

19 And Mr. Declemente --

20 THE COURT: I don't know why you would
21 have ever relied on that. Don Michelle can't make
22 any decisions for the Court. And I'm a little
23 confused as to why you would have sought advice
24 from him, legally or otherwise, pursuant to the
25 Rules when you could have read the Rule.

1 MR. MARSHALL: Well, I asked him if he
2 had time blocked out, and he said no.

3 THE COURT: He doesn't do the nonjury
4 docket; Caroline does. She and I did the docket a
5 month ago. Caroline already did this docket more
6 than a month and a half ago. And the only reason I
7 really looked at it is because we're starting
8 Slager, and I was starting my docket late on Monday
9 to accommodate the wealth of jurors that we were
10 going to have to deal with on yesterday.

11 Caroline prepares this docket usually
12 two months ahead of time. And she told you at the
13 last hearing she was going to set it for a damages
14 hearing. She said it would be on the next docket,
15 which I have, and she told you the date.

16 MR. MARSHALL: Okay. Well, that didn't
17 clarify to me, Judge, whether or not it was going
18 to be jury or nonjury.

19 THE COURT: I don't recall you having
20 any -- any confusion as to whether it was going
21 forward at this time when Caroline said she was
22 going to set it for this date on this roster. You
23 didn't voice any confusion at that time.

24 MR. MARSHALL: Well, I voiced it since
25 by e-mail to Mr. Smith. So, at any rate, as you

1 may recall, Mr. Declemente is not permitted into
2 the State of South Carolina.

3 THE COURT: No, that's not what the
4 order says. The order says he can come here for
5 legal proceedings. There's nothing that precluded
6 him from coming here today.

7 MR. MARSHALL: Well, there is because
8 the orders I submitted -- if you recall, this was
9 initially set for yesterday. Then it was changed
10 from yesterday --

11 THE COURT: I never knew it was set for
12 yesterday. I always thought it was set for today.
13 I didn't change my Monday docket. I looked at my
14 Monday docket. The only thing I did was push the
15 docket back to 2:00. I pushed my morning docket to
16 2:00, and everything else remained as it had been
17 previously scheduled. This was never set on
18 Monday.

19 MR. MARSHALL: Well, part of the
20 motions for today were, and I have an e-mail from
21 the clerk that says, please, be aware that we are
22 consolidating all of these motions for Tuesday.

23 So Mr. Declemente's probation
24 department requires apparently three days' notice
25 and a specific --

1 THE COURT: Where is he on probation?

2 MR. MARSHALL: Florida.

3 THE COURT: That's a little confusing
4 to me because the order is very clear. He's
5 allowed here for hearings, and all you had to do
6 was show them a copy of the docket.

7 MR. MARSHALL: They won't let him
8 travel. They'll find him in violation of his
9 probation. So for every hearing that we've had in
10 this case for five years now, nearly five, I guess,
11 that he's been on probation, we have to get a
12 specific order.

13 So the order that I submitted, Judge,
14 said he was going to travel here yesterday, because
15 that's when this hearing was initially set, and
16 then it got moved to Tuesday.

17 THE COURT: Well, I'm getting my
18 original docket because I looked at it, and I don't
19 recall this ever being set for Monday. And the
20 only thing I did was remove some things -- for
21 example, like there was a motion for
22 reconsideration on that first day that I could not
23 hear because they were not my orders.

24 And the only other thing I did was move
25 everything which would have been set from 9 to

1 12:30 to 2:00. And everything else from 2:30 on
2 remained as it had been previously scheduled.

3 I'm looking at my original docket right
4 now to make sure I'm not inaccurate.

5 MR. SMITH: Your Honor, I would
6 appreciate an opportunity to address this very
7 briefly.

8 THE COURT: Yes, sir.

9 MR. SMITH: There's always been a
10 hearing in this matter on the 1st. At one time a
11 long time ago, there was a hearing on the 31st and
12 the 1st, on two separate dates. But my
13 recollection of this, as best that can be made, at
14 one time, the time was moved from 2:00 to the 9:30
15 time. That was really the only change as I
16 understand was made for this hearing, but we always
17 had this hearing scheduled on the 1st.

18 There was another summary judgment
19 motion that was made moot by settlement. That was
20 originally on another date. It was consolidated
21 for the 1st, but there was always notice of a
22 hearing to take place on the 1st.

23 So the fact that there's not an order
24 would be if it wasn't submitted because there's
25 been adequate notice we were going to be here today.

1 on the damages hearing.

2 MR. MARSHALL: Well, that's a mistake,
3 Judge. I think the damages hearing was set for
4 yesterday at 2:00, which is why we submitted to you
5 the travel order for yesterday.

6 Then I got an e-mail from the clerk
7 late last week, hey, we realize that inadvertently
8 we scheduled part of these hearings on Monday,
9 which was the damages hearing, and summary judgment
10 motion for Tuesday. We're moving them all to
11 Tuesday morning. That's the e-mail that I got.

12 THE COURT: Well, I'm still at a loss
13 as to why that would have provided any impediment
14 to you going forward today.

15 MR. MARSHALL: Because there's an order
16 that you signed off on I think I got last Thursday
17 evening by e-mail only allowing him to travel on
18 the 31st.

19 THE COURT: I didn't sign any orders.
20 The chief judge would have had to sign an order.
21 Those type of orders have to be signed by the chief
22 judge, not me. I can't do anything in advance of
23 me getting a docket.

24 MR. MARSHALL: I don't have the order
25 in front of me, Judge. I thought you had signed

1 the travel order.

2 THE COURT: The chief judge would have
3 signed it. I can't do anything related to a docket
4 until I have the docket within -- on Monday, I can
5 start dealing with the administrative things that
6 deal with my docket. Anything ahead of that, the
7 chief administrative judge has to deal with it.

8 MR. MARSHALL: Well, I remember Chanda
9 called me and said, hey --

10 THE COURT: You submitted an order, and
11 I had some questions about it because it really
12 didn't make sense to me. I read the other order
13 and it clearly allows him to travel for hearings.
14 So, for me, I felt -- I didn't see the purpose in
15 it being signed.

16 I then went on vacation. So if it got
17 signed -- I instructed my staff that the chief
18 judge would have to sign it if it was absolutely
19 necessary. And she probably called you to get
20 clarity if it was absolutely necessary and why,
21 because it really didn't make sense to me. Because
22 I was looking at the other order which clearly said
23 to come here for the hearing.

24 In my mind, all you needed to do was
25 provide them with a docket to show he's on it. And

1 they should have given him a travel pass and
2 whatever else they require in Florida. What I know
3 about their system is very minimal.

4 It seems, to me, that they would have
5 been able to allow him to travel for whatever days
6 he was on the docket.

7 MR. MARSHALL: That's what I always
8 thought when I got involved in this case, when he
9 was told that he couldn't come into South Carolina
10 except for court proceedings. They make their own
11 rules. That wasn't sufficient for them.

12 THE COURT: So we're back to the
13 original question as to why your client is absent
14 from today's hearing.

15 MR. MARSHALL: Judge, part of the
16 reason, as I just addressed, is that he doesn't
17 have the proper travel order.

18 THE COURT: So what dates were on the
19 travel order?

20 MR. MARSHALL: The 31st.

21 THE COURT: Which was Monday.

22 MR. MARSHALL: Yes, ma'am.

23 THE COURT: Was he here Monday?

24 MR. MARSHALL: No, because we didn't
25 have a hearing.

1 THE COURT: Okay. So did you make any
2 effort to send the notice of the hearing to
3 probation and let them know that it was set for
4 today and that there was an error in the order that
5 was signed?

6 MR. MARSHALL: No, I didn't do that,
7 Judge. That was -- I think I got the order
8 Thursday evening by e-mail and then I think it was
9 Friday that I was informed -- it could have been
10 Thursday -- by that e-mail from the clerk that the
11 hearing was being moved to Tuesday.

12 THE COURT: Well, the docket has been
13 out for a while because my secretary does
14 preparation for me prior to the roster. And she's
15 been working on it for a couple of weeks, so it's
16 been out for a minute. It should not have come to
17 any surprise what day you had a hearing.

18 And since my secretary has been working
19 on it, I haven't seen any changes to it, other than
20 people settling things or notifying us once they
21 got it that they didn't need their hearing, their
22 matters were resolved. Those are the only changes
23 I'm aware of.

24 MR. MARSHALL: If I had a chance, I
25 could go and search the e-mail if you would like.

1 THE COURT: I don't know that it really
2 is dispositive. I need to know why your client
3 isn't here.

4 MR. MARSHALL: Well, that's the reason,
5 Judge, because he couldn't get a travel order.

6 THE COURT: Did you make attempts to
7 get another travel order once you realized the case
8 was today?

9 MR. MARSHALL: They require more than
10 three days --

11 THE COURT: But you've had more than
12 two weeks because the docket -- my secretary has
13 had the docket for more than two weeks, and there's
14 been no changes since Caroline gave it to --

15 MR. MARSHALL: The only day he would
16 travel would be the date of the damages hearing.
17 His presence isn't necessary for what was going to
18 happen --

19 THE COURT: I understand that, but what
20 I'm saying is the docket that I have has been out
21 for more than two weeks. This is how it's been
22 scheduled. There haven't been any changes made.
23 My secretary has been working on it for more than
24 two weeks which means that's the final roster that
25 she got.

1 MR. MARSHALL: Well, Judge, I can -- I
2 can assure you that I got an e-mail saying that --
3 that the hearing scheduled initially for Monday to
4 default was now moved to Tuesday.

5 THE COURT: Well, I've had a final
6 docket for over two weeks and there's been no
7 changes made to it. So you would have had two
8 weeks' notice.

9 MR. MARSHALL: No, ma'am. I got this
10 last -- late last week.

11 At any rate, aside from that, Judge,
12 apparently, this morning I was informed that one of
13 the co-defendants, the Estate of Connelly, has
14 reached a settlement. I don't know any of the
15 particulars of that. I think in order to go
16 forward --

17 THE COURT: I don't have to consider
18 their settlement. Are you claiming that you're
19 entitled to some kind of offset?

20 MR. MARSHALL: Well, their complaint
21 alleged joint and several liability. So,
22 certainly, I think the settlement agreements
23 reached by the other two co-defendants are relevant
24 to a damages hearing.

25 Additionally, the order in which you

1 granted summary judgment to Hood & Selander is
2 under a motion for reconsideration.

3 THE COURT: I don't know if that's
4 --

5 (Off-the-record conference.)

6 MR. MARSHALL: In addition to that,
7 Judge --

8 THE COURT: How is that dispositive as
9 to their damages hearing? What does that have to
10 do with your client?

11 MR. MARSHALL: Well, I think that the
12 Court or a jury, if it's heard in the jury, needs
13 to be aware of the terms of the settlement.

14 THE COURT: I don't think it matters.
15 If he's entitled to a set-off, you just find out
16 how much it is and he gets a set-off. When the
17 jury is determining damages, they don't know what
18 the settlement is. It's not even admissible.
19 That's a matter of law for the court.

20 Damages are damages, full measure of
21 damages, and then you may be entitled to a set-off
22 and you get a set-off, but that doesn't have
23 anything -- a jury would never hear that.

24 And it appears from Judge Nicholson's
25 original notice that you've been on notice since

1 2014 that they were seeking damages hearing. That
2 was before him originally back in 2014, April 30th,
3 when he ruled. One of the things he indicated was
4 that Plaintiff's motion for a damages hearing for
5 scheduling was before him.

6 MR. MARSHALL: It doesn't designate
7 jury or nonjury, so --

8 THE COURT: A damages hearing is
9 nonjury. That language is very clear.

10 MR. MARSHALL: Well, it wasn't clear to
11 me, respectfully, Judge, but since the prevailing
12 request concerning jury versus nonjury was made by
13 the Plaintiff and was jury, I think it's
14 understandable that --

15 THE COURT: I think it's their right to
16 assert, and if they want to, they can come here at
17 any time and say they don't want it anymore. The
18 issue that you need to be concerned with is whether
19 your client asserted a right to a jury trial and he
20 didn't. And the time is passed and it's waived.

21 MR. MARSHALL: I disagree with that
22 because when he made his motion for damages
23 hearing, which he doesn't specify jury or nonjury
24 pursuant to Rule, I guess it's 3038, we filed
25 notice of a demand for a jury trial issue. That

1 was filed on October --

2 THE COURT: You need to give me some
3 case law that says your client is entitled to a
4 jury trial when he's in default.

5 MR. MARSHALL: Well, he is under these
6 circumstances because the request to have the case
7 heard jury, which Mr. Smith made, has never been
8 withdrawn.

9 THE COURT: We're going in circles.
10 I've already determined he doesn't have to assert
11 it. He can come to court after we've picked the
12 jury and decide he doesn't want a jury trial
13 anymore.

14 MR. MARSHALL: I believe we're entitled
15 to notice of that.

16 THE COURT: The Rules don't provide how
17 much notice. You had notice since last month when
18 we heard this originally. And if you appeared
19 before Judge Nicholson, you had notice in 2014.
20 That was two years ago.

21 So any -- any assertion that you're
22 surprised -- I'm not surprised. We heard it last
23 month. We originally had this heard
24 September 19th. Since then you've been on notice.

25 MR. MARSHALL: Okay. Well, I attempted

1 -- my communications with Mr. Smith last week to
2 get some clarification. I didn't get anything
3 until 5:45 last night that he was bringing his
4 witness. And I said, please don't do that because
5 I think --

6 THE COURT: And, actually, the hearing
7 was set before Judge Nicholson for a damages
8 hearing on April 30th of 2014, and it was continued
9 so he could hear the other motion. So I really
10 don't -- I mean, you were present at that time. So
11 you certainly are not surprised now that's the
12 relief that they're seeking.

13 MR. MARSHALL: So we have some
14 outstanding motions which are --

15 THE COURT: What outstanding motions do
16 you have?

17 MR. MARSHALL: The motion to
18 reconsider.

19 THE COURT: That doesn't affect your
20 client, does it?

21 MR. MARSHALL: Well, I think it does
22 because if it's granted --

23 THE COURT: I can tell you that I think
24 very clearly about how I rule, and unless you've
25 raised something new, there's not going to be any

1 relief granted. Unless you raised some new
2 argument I didn't hear at the time, I've considered
3 it before.

4 The purpose for a motion for
5 reconsideration is to bring to the Court's
6 attention something it failed to rule upon or some
7 new matter that was not ruled upon. Not to rehash
8 the old argument.

9 MR. MARSHALL: Well, we raised the
10 issue of the fact that -- the fact that one of the
11 co-owners of the Plaintiff which is ATMES --

12 THE COURT: Your motion doesn't even
13 have the correct judge in it. I'm trying to figure
14 out what this is even relating to.

15 MR. MARSHALL: Well, I filed one on
16 your ruling and I filed one on Judge Cooper's
17 ruling.

18 THE COURT: What ruling did Judge
19 Cooper make in this case?

20 MR. MARSHALL: He made a -- well, he
21 made a couple of but --

22 MR. SMITH: It's not in this case, Your
23 Honor. It's actually a related case in which my
24 client is the Plaintiff.

25 THE COURT: Okay. Well, the wrong

1 order was submitted to my office, so I'm not even
2 clear what you filed a motion for reconsideration
3 on.

4 What ruling did you ask to be
5 reconsidered?

6 MR. MARSHALL: The ruling that you gave
7 when we were here on --

8 THE COURT: On September 19th, I heard
9 several motions. One was the Defendant Hood and
10 Selander's motion for summary judgment on the
11 cross-claim, which was granted. I signed an order
12 on that October 14th of 2016.

13 The other was Defendant Mr. Myrick's
14 client's motion to amend, which was granted, and I
15 signed an order on that 9/26/16.

16 The next was Defendant Howser's motion
17 to compel, which was resolved.

18 The next was Mr. Myrick's motion for
19 joinder and motion to compel by the Defendant, and
20 that was resolved.

21 Yours was a motion to compel, which was
22 resolved.

23 MR. MARSHALL: It was the grant of the
24 summary judgment motion that Mr. Howser filed.

25 THE COURT: On the cross-claim, yes.

1 MR. MARSHALL: Correct.

2 THE COURT: So what new would you have
3 raised in that motion that I didn't hear at that
4 time?

5 MR. MARSHALL: Well --

6 THE COURT: The purpose of a motion for
7 reconsideration is not to simply reargue what
8 you've already told me.

9 MR. MARSHALL: And part of what I was
10 -- in your -- in your language that you used in
11 your ruling, Judge, there were a couple of things
12 that -- obviously, I paid close attention to all of
13 it, but I think that there is some newly discovered
14 evidence --

15 THE COURT: You don't get to raise
16 newly discovered evidence. You get to -- the only
17 purpose for motion for reconsideration is to call
18 to the Court's attention something it didn't rule
19 on; in other words, something that you argued at
20 the time that I overlooked and did not give a
21 ruling, so that in the event that you need an
22 appeal, the appellate court could be clear to what
23 ruling the Court made.

24 MR. MARSHALL: When I say newly
25 discovered, I mean, from the time that Judge

1 Nicholson made in his ruling. Not newly discovered
2 since you made --

3 THE COURT: But did you argue it at the
4 time?

5 MR. MARSHALL: I did.

6 THE COURT: That means I heard it,
7 right?

8 MR. MARSHALL: You heard, but --

9 THE COURT: And I ruled on it.

10 MR. MARSHALL: It wasn't specifically
11 ruled upon.

12 THE COURT: I articulated exactly what
13 my thoughts were and I ruled on it. Judge
14 Nicholson's order is dispositive. He said your
15 client could not file a cross-claim, that he was in
16 default and he could not file a cross-claim or a
17 counterclaim.

18 MR. MARSHALL: I still --

19 THE COURT: So there is nothing for me
20 to rule on because you have an order that says he
21 can't do it. That's the order of the case. It is
22 final. It is dispositive. So at the end of the
23 case, if you disagree with that, you get to appeal
24 it.

25 MR. MARSHALL: Sure. But I think if

1 there was a clear error of law, I think you do have
2 authority to --

3 THE COURT: I have authority to do what
4 I feel I need to do. I didn't need to do anything
5 because Judge Nicholson had already ruled on it and
6 it was dispositive and it was correct; your client
7 was in default. He's judicially estopped from
8 taking any position against anyone.

9 He didn't allow you to expand the time
10 to answer or enlarge the time to answer; therefore,
11 your client is in a posture where he has
12 substantively admitted the allegations of the
13 complaint against him.

14 Now, at the end of the case, if there
15 is a fact of judgment against him, you then get to
16 go to Columbia and appeal all of it. You get to
17 appeal the amount of damages; you get to appeal the
18 fact that he was found in default; you get to
19 appeal the fact that the judge said he's estopped
20 from filing any answer or counterclaims or
21 cross-claims.

22 So Judge Nicholson's order was very
23 clear. He said your client was in default, he was
24 not enlarging the time to answer, and he's
25 basically stuck in his position.

1 MR. MARSHALL: Regarding the
2 cross-claims, if you recall, Your Honor, Judge
3 Nicholson did not strike nor did he dismiss --

4 THE COURT: Doesn't have to. When he
5 said he can't file it, it makes it a moot filing.
6 It's void on its face.

7 MR. MARSHALL: Well, he drew some
8 distinction between the answer --

9 THE COURT: His order is very clear.
10 The order states that I find that because Defendant
11 Declemente is not relieved from default, he cannot
12 enter his answer, counterclaims and cross-claims,
13 and cannot pursue default judgment against the
14 Plaintiff for counterclaims that have never been
15 permitted to be asserted.

16 Defendant Declemente's motion for
17 default judgment against Plaintiff is denied. And
18 Defendant's answer and counterclaims are stricken.

19 I don't know how much more clear he can
20 be.

21 MR. SMITH: Well, Your Honor, if I may,
22 to help. I spoke briefly to Mr. Howser. If you
23 want to hear his motion to reconsider right now,
24 we're confident --

25 THE COURT: I don't have hearings on

1 motions for reconsideration unless they raised
2 something new. If Mr. Howser wants to file
3 something in response to the motion, I will be glad
4 to hear it. If he wants to stand on the record, I
5 will place that in the record.

6 I generally give great thought to
7 things, and it's very rare that I have to relook at
8 it again. So once I get it and once I give
9 somebody the opportunity to respond, I'll do a form
10 order denying it.

11 MR. HOWSER: I'll stand on the record.

12 THE COURT: I don't have anything that
13 I've heard so far that would require the Court to
14 reconsider.

15 MR. MARSHALL: Okay. Additionally,
16 Judge, this case --

17 THE COURT: And we also need your
18 correct motion. I have a motion that is addressed
19 to Judge Cooper. That's probably why we haven't
20 contacted you yet, Mr. Howser, because generally
21 when we get it, either my secretary or clerk will
22 contact you if you want to file a responsive memo.

23 So I apologize that we haven't
24 contacted you, but I haven't gotten the correct
25 motion yet.

1 MR. HOWSER: Mr. Smith and I have
2 conferred, and I'm perfectly willing to stand on
3 the record without you having to have a hearing as
4 far as we're concerned.

5 THE COURT: Thank you, sir. But as
6 soon as we locate the correct motion, I'll look at
7 it and do an order.

8 MR. MARSHALL: I apologize for that,
9 Judge, she was sending them both out at the same
10 time and it sounds like it crossed.

11 THE COURT: That happens.

12 MR. MARSHALL: At any rate,
13 additionally, this case has now been scheduled for
14 a date certain with Judge Young for, I guess, a
15 couple of months at least, for November 28th.

16 THE COURT: There's no need for it
17 because it's been settled.

18 MR. MARSHALL: Well, that was news to
19 me that I discovered this morning.

20 THE COURT: That happens when cases
21 settle.

22 MR. MARSHALL: So that's the date that
23 we've been targeting. And I've got some subpoenas
24 outstanding which I haven't gotten responses that
25 are relevant to the issue of damages specifically.

1 THE COURT: Who have you subpoenaed
2 that's not been responsive?

3 MR. MARSHALL: Well, it hasn't been ten
4 days yet. So I was basing things on the date of
5 November --

6 MR. SMITH: Your Honor, I have not been
7 served with any copies of any subpoenas. I'm not
8 aware of any that's been issued. Under Rule 45, I
9 would expect to have gotten notice.

10 THE COURT: I'm sorry?

11 MR. SMITH: Your Honor, pursuant to
12 Rule 45, we have not received notice of any
13 subpoenas. I'm not aware that any were actually
14 issued, and we would object if they dealt with
15 anything other than damages.

16 MR. MARSHALL: If they weren't mailed
17 by my assistant on Friday --

18 THE COURT: They should have been
19 mailed long before that. They should have been
20 mailed when you got the docket.

21 MR. MARSHALL: Okay. But, Judge,
22 they're from a man named Dewey Long.

23 THE COURT: Who is he?

24 MR. MARSHALL: He's a fellow that
25 apparently bought many of the assets of ATMES.

1 THE COURT: How is that related to
2 damages?

3 MR. MARSHALL: Well, because,
4 apparently, ATMES was paid according to the
5 testimony of Jeff Reid, he wasn't sure, but he
6 thinks maybe 5- or \$600,000.

7 THE COURT: What does that have to do
8 with damages? Does that mitigate in any way?

9 MR. MARSHALL: Yes, ma'am.

10 THE COURT: How?

11 MR. MARSHALL: If they profited to that
12 extent of the sale of one little portion of the
13 company, but they're claiming that the alleged
14 misdeeds of the co-defendants caused them \$100,000
15 loss, then --

16 THE COURT: Let me interrupt you one
17 second.

18 (Off-the-record conference.)

19 THE COURT: All eight. Sorry, I
20 stopped you mid sentence. You may continue.

21 MR. MARSHALL: Mr. Smith, you were
22 talking?

23 MR. SMITH: No, Your Honor. We're
24 ready to proceed.

25 THE COURT: Okay. Who else did you

1 subpoena that you claim you have not heard from,
2 Mr. Marshall, that you feel is relevant to damages?

3 MR. MARSHALL: Dewey Long is the only
4 one, and we were this week going to send a subpoena
5 to Mr. Bradham --

6 THE COURT: Why did you wait until this
7 week?

8 MR. MARSHALL: Judge, we've been
9 premising everything on November 28th --

10 THE COURT: You couldn't have. You
11 could not have. The original docket went out
12 October 12th. And you knew since we were here in
13 September that this matter was going to be set for
14 a damages hearing on today. I distinctly remember
15 Ms. Caroline saying she was going to set it for
16 today, this week.

17 So it's not tenable that you had any
18 misapprehension about that. I clearly remember her
19 saying that -- it stuck in my mind because I knew
20 it was my term. She said very clearly she was
21 going to reschedule it.

22 They wanted to go forward with it in
23 September. And she said, I will schedule -- I
24 said, schedule it for the next nonjury term. And
25 she gave you the terms, and she said she was going

1 to schedule it for this week, which happened to be
2 one of my terms.

3 MR. MARSHALL: Well, Judge, if the
4 settlement, which I learned about --

5 THE COURT: It really doesn't matter;
6 none of that is relevant to damages.

7 MR. MARSHALL: If the settlement hadn't
8 occurred, then we would be having --

9 THE COURT: No. They could have had --
10 no. They would have had their damages hearing
11 today. They didn't have to wait to have their
12 damages hearing until when the jury trial matter
13 was set. That was never their intention, at least
14 that was not my impression.

15 She said it was going to be set for
16 this term, and that's why it sticks in my head.
17 And I very clearly said that they didn't have to
18 wait for a jury trial to have their damages hearing
19 set. As a matter of fact, I said, you probably
20 need to go ahead and get it out of the way.

21 So I -- it just should not come as any
22 surprise to you. I knew it was going to be on the
23 docket. Ms. Caroline very clearly said she was
24 going to set it.

25 MR. MARSHALL: Well, my reading of the

1 law is that since they had requested a jury trial
2 and have not withdrawn it --

3 THE COURT: They clearly made you aware
4 that they were going to proceed on the damages
5 hearing nonjury.

6 MR. MARSHALL: That would have been
7 nice --

8 THE COURT: No. You've been aware of
9 that since 2014, when you appeared before Judge
10 Nicholson.

11 All right. The next issue I need to
12 determine -- what I'm going to do is I'm going to
13 go forward with the damages hearing. I will allow
14 you to supplement the record with any witnesses
15 that you feel are necessary. I'm going to give you
16 a very short window to do that because you should
17 have already sent out your subpoenas since October
18 12th when the docket went out.

19 Really, you should have sent them out
20 in September and got with Ms. Caroline and found
21 out exactly what date this was going to be set so
22 you could have sent out your subpoenas. In
23 addition to the fact that you haven't made
24 Mr. Smith aware of the subpoenas that you sent out.

25 MR. MARSHALL: He was copied on those,

1 Judge. I just don't think they have reached his
2 office.

3 THE COURT: Okay. Well, I'm going to
4 allow you to supplement the record with any
5 witnesses that you feel are necessary to challenge
6 damages in addition to your client, and we will
7 reset that for another day and -- before I make any
8 final decision.

9 But I'm not going to make them come
10 back up here again to have a damages hearing that
11 clearly you should have been aware of.

12 MR. MARSHALL: Well, Judge, I was
13 informed very, very early this morning about 5
14 something that --

15 THE COURT: They didn't have to handle
16 their case because you told them that. They didn't
17 have to not be -- they were ready to go forward on
18 their damages hearing.

19 MR. MARSHALL: Well, he communicated
20 with me last night, and I saw the e-mail early this
21 morning trying to resolve the issue.

22 THE COURT: Legally, he's in the right
23 posture. He didn't have to wait for you to have a
24 damages hearing. There is nothing in your e-mail
25 that would have precluded him from going forward

1 with his damages hearing today.

2 All right. Mr. Smith, ready to
3 proceed.

4 MR. SMITH: I am, Your Honor. Just one
5 last point.

6 THE COURT: Yes, sir.

7 MR. SMITH: It will be that all of the
8 e-mails indicated he knew that we wanted to proceed
9 without a jury, which is why he was asking why we
10 objected to his request for a jury trial. So we're
11 ready to move --

12 THE COURT: Did he, in fact, ever
13 request a jury trial?

14 MR. SMITH: I think there was a filing
15 made, but it was after we filed our second motion
16 to schedule this hearing --

17 THE COURT: So it was beyond the time
18 required for a jury trial?

19 MR. SMITH: Years beyond, yes.

20 THE COURT: Well, the other issue that
21 you have with the rules, and I just thought about
22 it, if he didn't have a right to file an answer, he
23 could not have filed a request for a jury trial
24 because that would come in connection with his
25 answer.

1 And since the judge did not allow you
2 to enlarge your time to answer, by virtue of that
3 it's waived either way.

4 MR. MARSHALL: Well, I agree with that.

5 THE COURT: It's a moot issue.

6 MR. MARSHALL: We were just proceeding
7 under his request for a jury trial.

8 THE COURT: You don't have any standing
9 to do that. It's his right to assert.

10 All right. I've dealt with that. I've
11 given it all the time I can give it. I have a
12 gallery full of lawyers that are ready to proceed
13 with their motions.

14 You-all have been abundantly patient,
15 and I appreciate it, while we dispose of this
16 matter. And I do not take your time for granted.

17 Mr. Smith, call your first witness.

18 MR. MARSHALL: Judge, before he does
19 that, may I supplement the record with the cite
20 from one case called Bowman v. American Telephone
21 --

22 THE COURT: I've already ruled. You
23 should have brought that to my attention before I
24 ruled.

25 MR. MARSHALL: I thought I was going to

1 have an opportunity to --

2 THE COURT: You've had over an hour to
3 argue your points, and I think I've been very
4 patient, and even Mr. Smith has spoken very little.
5 You have done all the speaking for over an hour. I
6 don't think -- I need this record to be clear that
7 I've given you more than an abundant opportunity to
8 make -- and really this isn't a record for you to
9 make, arguing to convince me to make a decision.
10 Anything that you need -- that you want a record,
11 needs to be in writing in the form of a memo.

12 MR. MARSHALL: Okay. Well --

13 THE COURT: The appellate court doesn't
14 make a decision based on what you tell me. They
15 make a decision based on what you reduce to
16 writing.

17 MR. MARSHALL: But that case, Judge,
18 for the record, does say that under Rule 38, the
19 Defendant may rely on Plaintiff's demand for a jury
20 trial.

21 THE COURT: What case are you referring
22 to?

23 MR. MARSHALL: Bowman v American
24 Telephone and Telegraph, which is 378 S.E.2d 599.

25 THE COURT: Mr. Smith, would you like

1 to respond to his -- since he has made a late
2 observation, would you like to respond to it?

3 MR. SMITH: Yes, Your Honor. And I
4 would just rely on the cite that we provided
5 earlier. It simply does not apply when they're
6 held in default. And what is the clear,
7 unambiguous ruling of our appellate rulings that
8 say, that when a party is in default, the right to
9 a jury trial is waived pursuant to 38(d) where it
10 provides that a demand for jury trial must be made
11 within ten days of service of the last pleading,
12 and a failure to do that constitutes a waiver.

13 The Court is correct that his ability
14 -- the only chance he might have had an opportunity
15 is if he filed some sort of separate request early
16 on at the last pleading was filed. It doesn't
17 matter that we filed a motion and then he decided
18 years later to make a request. That's not a
19 pleading.

20 So we'll stand on the material that we
21 provided, the cite we provided. We're quite
22 confident in the position that the Court is taking
23 on the matter of whether or not he can request our
24 jury trial request or request his own; he's
25 precluded, Your Honor.

1 THE COURT: Yeah. I think he's
2 precluded under the rule where he's not offered the
3 ability to file a late answer which would have
4 afforded him the ability to request a jury trial;
5 therefore, it's waived pursuant to that theory.

6 In addition to that, I need to look at
7 the facts of Bowman. Each of these cases are
8 factually driven, and I don't know if the facts are
9 similar or dissimilar, but this case certainly in
10 its posture would be different, I would assume;
11 because since 2014, Mr. Marshall has been on notice
12 that the Plaintiffs in this case were seeking an
13 order for a damages hearing, and that they were not
14 in any way seeking a jury trial on the issue of
15 damages.

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

22 She then sent out a supplemental notice
23 on the 25th, because my secretary brought to her
24 attention that there was one motion set on Monday
25 and the rest of the motions were set on Tuesday.

1 So the only change that was made was the motion to
2 compel that was set for Monday was set for today.

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

6 MR. MARSHALL: That may have been my
7 mistake thinking that it was the -- otherwise, I
8 wouldn't have submitted --

9 THE COURT: There was one motion set
10 for Monday, but there were a whole group of others
11 set for Tuesday. So, as a matter of courtesy, when
12 my secretary saw both of those things set on
13 separate days, instead of you-all having to come
14 two days, she simply brought that to Ms. Caroline's
15 attention, and then she sent another notice on the
16 25th indicating to you-all that instead of coming
17 on two days you needed to come on one.

18 MR. MARSHALL: That may have been my
19 mistake that the damages hearing was on the 31st.
20 That was the date --

21 THE COURT: Clearly, you knew it was
22 going to be scheduled this week because I -- and I
23 don't know who my court reporter was on that day
24 and I don't know if she took down what Ms. Caroline
25 said, she may or may not have taken it all day. If

1 it was Denise, she would have taken it all down,
2 but -- actually, it was Denise.

3 So I may well go back and listen to the
4 transcript and see what's on there. I recall
5 Ms. Caroline saying she was going to set the
6 damages hearing for this week.

7 MR. MARSHALL: There is one other issue
8 as to whether or not Mr. Declemente should have
9 been able to rely --

10 THE COURT: I have already ruled. And
11 the rules are very clear; once the Court has ruled,
12 there is to be no further argument. I have given
13 you ample opportunity to make your record. We can
14 go back and forth doing this all day, and I'm not.

15 MR. MARSHALL: Well, Judge, if you
16 would like us to step aside and let these other
17 lawyers handle their --

18 THE COURT: No. I have given you all
19 the time I'm going to allocate to you. We're going
20 to have the damages hearing.

21 MR. MARSHALL: Judge --

22 THE COURT: I've given you -- an hour
23 is more than ample time to have argued what you
24 need to argue, and I think it's been more than an
25 hour. Probably one of my lawyers in the gallery

1 could tell me how long. I tend to loose track.

2 All right. Proceed, Mr. Smith.

3 MR. SMITH: Thank you, Your Honor. May
4 it please the Court.

5 THE COURT: Yes.

6 MR. SMITH: The Plaintiff will call
7 Mr. Art Bradham, CPA.

8 THE COURT: Sir, come to the stand for
9 me, please, to be sworn.

10 Sir, take a seat right there for me.

11 ART BRADHAM, CPA,

12 being first duly sworn, testified as follows:

13 THE CLERK: Please state your name --

14 MR. MARSHALL: Let me just state for
15 the record my objection going forward --

16 THE COURT: I'm clear that you object,
17 Mr. Marshall. Have a seat.

18 MR. MARSHALL: -- my client not being --

19 THE COURT: Have a seat. I have
20 allowed you to supplement the record if necessary.
21 Your client suffers no prejudice. He will be heard
22 on all issues.

23 Sir, state your full name for the
24 record.

25 THE WITNESS: My name is Arthur Fope

1 Bradham.

2 THE COURT: If you could spell your
3 middle name for us, please.

4 THE WITNESS: F-O-P-E.

5 THE COURT: And your last name?

6 THE WITNESS: B-R-A-D-H-A-M.

7 THE COURT: You may proceed, Mr. Smith.

8 MR. SMITH: Thank you, Your Honor. May
9 it please the Court?

10 THE COURT: Yes, sir.

11 DIRECT EXAMINATION

12 BY MR. SMITH:

13 Q. Mr. Bradham, what do you do for a
14 living?

15 A. I'm a CPA.

16 Q. And how long have you been a CPA?

17 A. For at least 15 years.

18 Q. And during those 15 years, have you had
19 an occasion to opine on the economic losses for
20 businesses?

21 A. Yes.

22 Q. And have you had occasion to do that as
23 an expert witness in the courts in South Carolina?

24 A. Yes.

25 Q. And tell me a little bit about your

1 educational background with respect to the CPA
2 work.

3 A. I have a BS in accounting from the
4 University of South Carolina; I have a master of
5 taxation from Florida Atlantic.

6 Q. Are you also a -- what is a CVA?

7 A. That's a certified evaluation analyst.
8 It's a certification as to business analysis and
9 valuation.

10 Q. Advise the Court also of any
11 professional associations and other statuses that
12 you hold with respect to your work as a CPA?

13 A. I'm admitted to practice in US tax
14 court; I am an enrolled agent.

15 Q. Do you have your own firm?

16 A. Yes, sir, I do.

17 Q. And how long have you operated your own
18 firm?

19 A. Ten years in Sumter, South Carolina.

20 Q. Have you had occasion or have you
21 participated in the case that is before the Court
22 today?

23 A. Yes, sir.

24 Q. And in what capacity have you
25 participated?

1 A. Primarily, I've been a CPA for the
2 Sumter organizations, that means Reliable and
3 Abacare to a certain extent.

4 Q. And did you evaluate whether or not
5 ATMES -- and let's -- I'll take it a few steps back
6 just to add some facts here. ATMES purchased a
7 company called Abacare; is that correct?

8 A. Yes, sir.

9 Q. And the question became after the
10 purchase that there was some losses that was
11 suffered by ATMES as a result of that purchase; is
12 that correct?

13 A. Yes, sir.

14 Q. And did you evaluate what the economic
15 losses were to ATMES?

16 A. Yes.

17 Q. And what did you do in performing that
18 evaluation?

19 A. I reviewed a number of documents; the
20 first and foremost was the valuation report
21 prepared by Mr. Burkett of Columbia. The second
22 was the sales tax examination results from the
23 South Carolina Department of Revenue.

24 Q. And during the litigation of this case,
25 did you render an opinion as to the amount of the

1 economic loss suffered by ATMES?

2 A. I did.

3 Q. Did you prepare a report regarding that
4 opinion?

5 A. I did.

6 MR. SMITH: May I approach, Your Honor?

7 THE COURT: Yes, sir.

8 MR. SMITH: Your Honor, I'm providing
9 Mr. Bradham with a copy of the report.

10 BY MR. SMITH:

11 Q. Mr. Bradham, can you identify the
12 document for the Court, please?

13 A. Yes, sir. This is the full report.
14 There was also a one-page summary report.

15 Q. Okay. And is that report based on your
16 own personal investigation in the case?

17 A. Yes, sir.

18 Q. And so your report and your testimony
19 here today is based upon your own personal
20 knowledge?

21 A. Yes.

22 Q. And do you intend to provide this Court
23 with an expert opinion as to the economic losses
24 suffered by ATMES in this case?

25 A. Yes, sir.

1 Q. At this point I would like to offer
2 Mr. Bradham as an expert witness on the issue of
3 economic losses suffered by ATMES in this
4 litigation.

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

7 MR. MARSHALL: Well, I object to his
8 testimony, Judge.

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

14 MR. MARSHALL: No. In that regard, no.

15 THE COURT: So admitted. You may
16 proceed.

17 MR. SMITH: Your Honor, just to
18 clarify, the request was a certified evaluation
19 analysis for the purpose of giving --

20 THE COURT: Expert testimony on
21 economic damages to the business.

22 MR. SMITH: That's correct.

23 THE COURT: You may proceed.

24 MR. SMITH: Thank you.

25 THE COURT: You're welcome.

1 BY MR. SMITH:

2 Q. So, Mr. Bradham, the report that you
3 have in front of you, how did you go about
4 preparing that report?

5 A. Well, the first thing we looked at was
6 what the valuation of the business was that
7 Mr. Burkett had prepared.

8 Q. Right.

9 A. He prepared a valuation report. That
10 was an integral part of the purchase price paid.
11 After the business was purchased, there was a sales
12 tax examination by South Carolina Department of
13 Revenue and a substantial amount of sales tax
14 liability was discovered. It was determined that
15 sales had not been reported for sales tax purposes.

16 Q. How much was that sales tax liability
17 that was not reported prior to the purchase?

18 A. \$87,000 worth of tax, 13,000 in
19 interest; roughly, \$100,000.

20 Q. And did that have an impact -- did that
21 impact that kind of losses suffered by ATMES after
22 the purchase?

23 A. It absolutely did.

24 Q. Did anything else impact and cause
25 ATMES to suffer economic losses after the purchase

1 that was not disclosed at the time of the sale?

2 A. Not to my knowledge, no, sir.

3 Q. Were there concerns about
4 over-reporting of gross income?

5 A. Yes.

6 Q. Share with the Court exactly what the
7 concerns were.

8 A. The impact of the omission of the sales
9 tax is very important. Because what's happened is
10 gross revenues are overstated. The income -- the
11 expenses are exactly the same, so net income is
12 overstated dollar for dollar by the amount of sales
13 tax that was collected, but not remitted and not
14 reported or disclosed. So net income was
15 substantially overstated.

16 Q. What did you conclude are the damages
17 suffered by ATMES sought in this litigation in your
18 report?

19 A. There were two parts to that. One was
20 the \$100,000 of sales tax. The other was the value
21 of the business that was overstated which was
22 774,000. So roughly \$875,000 in damages.

23 Q. You came up with an exact number based
24 on your calculation, correct?

25 A. Let me -- if you don't mind, let me

1 explain how I went through that calculation.

2 Q. Please.

3 A. Rather than make all this up from
4 scratch, I took Mr. Burkett's report. Mr. Burkett
5 is well regarded. He knows what he's doing. He
6 did an excellent job in the evaluation. I
7 concluded that Mr. Burkett would have come to
8 different results had he known the correct net
9 income.

10 He used the industry standard valuation
11 method. So what I did was I took Mr. Burkett's
12 exact methods, assumptions, et cetera and applied
13 them to the corrected net income and calculated
14 what I think Mr. Burkett would have concluded had
15 he been provided the correct net income.

16 Q. Now, are there alternative methods of
17 evaluating the loss that confirmed your report?

18 A. That's an excellent question. Yes,
19 sir. I calculated the loss at 875. And you stop
20 and you say, okay, you made this calculation. What
21 makes you think that's right? And we looked at
22 other ways to confirm that value.

23 First, they filed an income tax return
24 in 2011 that showed a loss from discontinued
25 operations from \$921,000. I assure you, I would

1 not have signed that tax return or prepared that
2 tax return if there was not adequate documentation
3 to support that entry. So --

4 Q. I'm sorry, go ahead.

5 A. Second, ATMES Reliable they paid
6 \$150,000 worth of sales tax. They borrowed
7 \$658,000 from NBSC to finance the purchase. The
8 Charleston operations were closed in 2011. So they
9 paid \$800,000 for a business that they got no
10 economic benefit from.

11 So that's two alternative ways of
12 testing this damages calculation.

13 Q. And by those two ways, one, it being
14 recorded that loss in the tax return and the
15 description you made of actually paying the
16 \$150,000 in sales tax and having to pay the note
17 for a business that turns out to be worthless,
18 that's a real economic loss?

19 A. Absolutely.

20 Q. And it was a real economic loss
21 suffered by ATMES?

22 A. Yes, sir.

23 Q. And it was a real economic loss
24 suffered by the proximate cause of Mr. Declemente
25 for failure to disclose that prior to the sale?

1 A. I don't know who was responsible for
2 the failure to report. I know that the sales tax,
3 gross income, net income were overreported.

4 Q. So what is your -- in your opinion,
5 Mr. Bradham, what is the economic loss suffered --
6 the damages suffered by ATMES in this case?

7 A. It is my opinion that ATMES suffered
8 real economic damages of \$875,144.

9 MR. SMITH: Your Honor, at this time, I
10 would like to admit as Plaintiff's 1,
11 Mr. Bradham's report.

12 THE COURT: Any objection?

13 MR. MARSHALL: Well, I would like to
14 renew my objection. If I could be heard at the
15 appropriate time.

16 THE COURT: I need to know if you have
17 an objection to the admission of the report.

18 MR. MARSHALL: Well, I do. I don't
19 think the proper foundation has been laid as to how
20 you go from \$100,644 alleged --

21 THE COURT: You can handle that on
22 cross-examination. I need to know foundationally
23 from the rules of evidence is there any objection
24 to the admissibility of the report.

25 MR. MARSHALL: No. Go ahead.

1 THE COURT: I'm sorry, I couldn't hear
2 you.

3 MR. MARSHALL: No, no objection.

4 THE COURT: Marked and admitted without
5 objection.

6 (PLAINTIFF'S EXH. 1 in evidence.)

7 MR. SMITH: Thank you, Your Honor.

8 BY MR. SMITH:

9 Q. Mr. Bradham, the work that you relied
10 on from Burkett, Burkett, Burkett, as you described
11 it earlier; do you recall?

12 A. Yes.

13 Q. And their work, was it an evaluation of
14 the value of the company that was to be purchased?

15 A. Yes, sir. It was a formal industry
16 standard valuation report.

17 Q. And they were evaluating the value of
18 Abacare which was being purchased by ATMES?

19 A. That's correct.

20 Q. And so you used that information as
21 part of the basis for your evaluation, correct?

22 A. Yes, sir.

23 MR. SMITH: May I approach, Your Honor?

24 THE COURT: Yes, sir.

25 BY MR. SMITH:

1 Q. I'm providing you with another
2 document. I think I gave you the wrong thing.
3 Sorry, they all look similar. No, this is it.

4 A. Again, Mr. Bradham, the document that I
5 provided you, do you recognize that and can you
6 identify that?

7 A. Yes, sir.

8 Q. What is it?

9 A. This is the summary of the calculation
10 of damages report.

11 MR. MARSHALL: Mr. Smith, can I have a
12 copy?

13 MR. SMITH: I don't have another copy.
14 I thought I brought more copies.

15 THE COURT: You can give it to me and I
16 will have my clerk make a copy for Mr. Marshall.

17 MR. SMITH: Thank you. I know it was
18 provided in discovery, but -- this is the first
19 exhibit. Do you have a connected exhibit?

20 THE COURT: Mr. Marshall, do you have a
21 copy of the summary?

22 MR. MARSHALL: I've been looking at
23 something that was handed to me incorrectly, so I
24 haven't seen what was just handed to me which
25 apparently is Exhibit 1. I guess I would like to

1 have a minute to look at this.

2 THE COURT: Was that provided to
3 Mr. Marshall in discovery?

4 MR. SMITH: It was, Your Honor. What
5 this is is the report that was prepared.

6 THE COURT: The valuation of the
7 business.

8 MR. SMITH: Correct. A long time ago
9 it was provided to Mr. Marshall.

10 THE COURT: And then here's the -- this
11 is your original and then there is the copy for
12 Mr. Marshall.

13 MR. SMITH: Thank you. And I will
14 provide you with a copy as well.

15 THE COURT: We have a copy.

16 MR. MARSHALL: Judge, I had requested
17 discovery in this case, but I never got it because
18 they always objected that my client was in default,
19 so I have not seen this. I would like to have a
20 recess so I could look at it. It's about six
21 pages.

22 MR. SMITH: Your Honor, may I address
23 that? I just will tell you respectfully that is an
24 absurd notion. Mr. Marshall participated in the
25 very quite lengthy deposition of Mr. Bradham.

1 THE COURT: Which, for the record,
2 looks like a six-inch volume of a deposition.

3 MR. SMITH: At which he was entitled to
4 ask all the questions that he would like with
5 respect to the damages suffered that we were
6 pursuing.

7 And Mr. Bradham was thoroughly deposed
8 by a multitude of lawyers who were involved in the
9 case. And he's had more than adequate notice of
10 the damages we were seeking and the basis of those
11 and the valuation that Mr. Bradham has done.

12 THE COURT: Mr. Marshall, were you
13 present for the deposition?

14 MR. MARSHALL: I was, but I don't
15 believe I was given a copy.

16 THE COURT: That report should come as
17 no mystery. As a matter of fact, more would have
18 been covered in the deposition than that report.

19 MR. MARSHALL: I don't believe I have
20 ever seen it.

21 THE COURT: That's not the issue. The
22 issue is whether you are aware of the damages that
23 they're seeking and whether you had the ability to
24 cross-examine him. If you were present for a
25 deposition that lengthy, you know what they're

1 asking and you should be able to adequately
2 cross-examine the witness.

3 MR. MARSHALL: Well, I think I can do
4 that if I have an opportunity to read the report.

5 MR. SMITH: I would be glad to give
6 him --

7 THE COURT: Go ahead and proceed.

8 BY MR. SMITH:

9 Q. Mr. Bradham, the document that you were
10 provided, can you identify that, please?

11 A. Yes, sir; this is the summary report of
12 the little bit longer version.

13 Q. So this is a one-page summary of the
14 report that was just admitted into evidence?

15 A. Yes, sir.

16 Q. And, again, does this look like the
17 same conclusion that your larger report does?

18 A. Yes, it does.

19 Q. And that the damages totalled \$875,144?

20 A. That's correct.

21 Q. The statement in there, and I'll read
22 it into the record, it is your opinion that -- you
23 put in the document, it is my opinion that ATMES,
24 LLC, suffered real economic damages of \$875,144 as
25 a result of the erroneous filings of sales tax

1 returns, the omission of disclosures of the
2 positions taken on those sales tax return, and the
3 failure to report the overstated income to the
4 evaluator, Mr. Burkett.

5 Is that your opinion?

6 A. Yes, sir.

7 MR. SMITH: Your Honor, at this time I
8 would like to admit the summary as Plaintiff's
9 Exhibit 2.

10 THE COURT: Any objection to
11 Plaintiff's 2?

12 MR. MARSHALL: Well, I don't object to
13 that, Judge, but it was previously identified to me
14 as Exhibit 1.

15 THE COURT: We marked 1 which is the
16 longer document.

17 MR. MARSHALL: And I object to
18 Exhibit 1 --

19 THE COURT: On what basis?

20 MR. MARSHALL: I have not had an
21 opportunity to review it, Judge.

22 THE COURT: That's not a basis for an
23 objection to a document, so it's overruled. It's
24 admitted subject to the objection, which I'm not
25 aware is any basis to object to the document.

1 MR. MARSHALL: Well, it was requested
2 in discovery and not provided.

3 THE COURT: They have a continuing
4 duty; you have it now. Now, do you have any
5 objection to Number 2, which is the summary of the
6 longer document?

7 MR. MARSHALL: Oh, no. I've already
8 agreed to that one.

9 THE COURT: Number 2 is marked and
10 admitted without objection.

11 (PLAINTIFF'S EXH. 2 in evidence.)

12 MR. SMITH: Mr. Bradham, thank you for
13 your time today. Please answer any questions that
14 Mr. Marshall might have.

15 THE COURT: Mr. Marshall, you may
16 proceed.

17 MR. MARSHALL: Thank you, Judge.

18 THE COURT: You're welcome.

19 CROSS-EXAMINATION

20 BY MR. MARSHALL:

21 Q. Good morning, Mr. Bradham. How are
22 you, sir?

23 A. Morning.

24 Q. Is it -- first of all, let's try to get
25 a time frame on here. You testified that you based

1 your valuation of Abacare upon a report produced by
2 a company called Burkett & Burkett accounting firm?

3 A. The damages report I used the Burkett
4 valuation as a basis for the calculation, yes, sir.

5 Q. And when you looked at that report, is
6 it true that in the beginning of the report it says
7 that it was created solely for the use of my
8 client, Phillip Declemente, and also the Estate of
9 Connelly, and that each page was stamped in large
10 letters across each page as confidential and for
11 use only of those two named people? Is that
12 correct?

13 A. May I expand my answer just slightly?

14 Q. Sure.

15 A. Number one, a document is only
16 confidential if it's kept confidential. I got it.
17 I represented the buyers. It had to come from
18 somewhere, and I assume it came from the sellers,
19 which most likely was your client.

20 Second, you can stamp anything you want
21 to draft; and if I've got it, well, it got
22 disclosed. So that was the foundation for the
23 purchase price and negotiation it's my
24 understanding.

25 Q. Well, where did you get the document?

1 A. I don't know, sir.

2 Q. No idea?

3 A. I presume it was from your client who
4 was one of the sellers.

5 Q. And it's true that my client, Phillip
6 Declemente, was also at one time your client; was
7 he not?

8 A. He was a partner in one of the
9 businesses that I provided CPA services. He was
10 not my client.

11 Q. So you had no fiduciary duty to him?

12 A. I had -- my client was the partnership.
13 I have a duty to do all the things that I should do
14 as a competent caring CPA for the partnership, and
15 I presume some of that goes to the partners, but I
16 don't know the law in that area; you would.

17 Q. Well, is that not covered in the
18 national accounting ethical standards?

19 THE COURT: You need to limit your
20 questions as it regards damages. I'm not going to
21 admit anything that you would have alleged in a
22 counterclaim or cross-claim regarding your client's
23 duty in this matter. He's judicially estopped from
24 taking any position opposite of the pleading.

25 So you need to limit your questions to

1 damages.

2 Whether he has a fiduciary
3 responsibility have no bearing on damages. Now, if
4 you can prove to me it has something to do with his
5 credibility, that's different.

6 MR. MARSHALL: That's what I'm trying
7 --

8 THE COURT: Then you need to connect
9 the dots. At this moment I don't see any relevance
10 to his credibility as a witness. Whether he has a
11 fiduciary responsibility to your client, that goes
12 to duty.

13 BY MR. MARSHALL:

14 Q. Is it not a breach of the national
15 standards that govern accounting ethics for an
16 accountant to serve as an expert witness against --
17 under a current or former client of his?

18 A. I have no idea, sir.

19 Q. You don't know the answer to that?

20 A. No.

21 Q. If I told you that it is, you don't
22 doubt that, do you?

23 A. Could you phrase the question a little
24 bit different?

25 Q. You don't have a reason to doubt that

1 that proposition is an ethical violation by an
2 accountant in the national accounting standards?

3 A. I'm sorry, I don't know how to answer
4 your question.

5 Q. What was the sales price of Abacare
6 when ATMES purchased it?

7 A. 80 percent was valued at, and I believe
8 the purchase price was \$809,500. That was the
9 Connelly portion.

10 Q. Okay. And is it true that Mr. -- that
11 Mr. Declemente, when he and the Connelys merged
12 Abacare with ATMES, is it true that the purchasers,
13 Murrell Smith and Jeff Reed, gained some benefit by
14 way of Mr. Declemente giving up certain rights that
15 he had -- monetary rights that he could have
16 asserted, but inured to the benefits of his new
17 parties Jeff Reed and Murrell Smith? Are you aware
18 of that?

19 A. I have no clue of that, sir.

20 Q. What was the sales date of this
21 transaction?

22 A. I think it was November 2008.

23 Q. Okay. And the Burkett & Burkett
24 confidential report that you somehow came into
25 possession of and based your valuation upon, that

1 covered what period of time of analysis of
2 Abacare's earnings?

3 A. Well, let me answer that a little more
4 fully. The report was issued in July of 2008.
5 There are multiple ways that one goes about valuing
6 a company, and one of them is income look-back,
7 which went back the last -- the previous four
8 years, if I'm being responsive to your question.

9 Q. Okay. Covered a four-year period of
10 Abacare. And how long did your former client,
11 Mr. Declemente, stay as a partial owner of ATMES?

12 A. Mr. Declemente was not my client. He
13 was a partner in one of the partnerships that I did
14 work for.

15 Q. He was a partner --

16 A. And the answer to your question is, I
17 don't know.

18 Q. All right. So in November of 2008, the
19 transaction was concluded. What were the earnings
20 of Abacare -- what were the average earnings over
21 that four-year period that you just testified to?

22 A. They are in that complete report. If
23 you give me that back, I would be glad to answer a
24 little more adequately.

25 Mr. Burkett used multiple methods.

1 There's net cash flow to equity holders; there is
2 normalized net income; there is normalized EBIDA.
3 Which of those would you like me to comment on?

4 Q. Which page are you on, sir?

5 A. It would be the fourth and fifth pages.
6 Starts out capitalization of cash flow to equity
7 holders.

8 Q. Okay. So -- all right. So tell me
9 what I'm looking at here because I don't understand
10 it.

11 A. Here's what I did, and this gets to the
12 core of the valuation issue. Mr. Burkett used
13 industry standard method. He started with
14 projected cash flow of \$99,000. My position has
15 been that if Mr. Burkett had known that income was
16 overstated by approximately \$48,000, he would have
17 used a different cap -- he would have used a
18 different cash flow and arrived at a different
19 value of the company.

20 Burkett started with roughly 100,000,
21 came up with 471,000. My using the exact same
22 Burkett methods with corrected net income will give
23 a \$245,000 value using that one single method of
24 valuing a company.

25 Q. Okay. So that's over this four-year

1 period, right? That you're claiming a difference
2 between 471,000 and the number that you came up
3 with, 245,000?

4 A. Well, the 99- or the \$100,000 is
5 basically one year's worth of average cash flow.
6 So the answer to your question, this is industry
7 method that you look at four years and you don't
8 pick just one year. You look at over the period of
9 time.

10 And so I'm using the exact same way he
11 did it. To answer your question, yes. One method
12 of looking at value of the company would suggest
13 had Mr. Burkett known the correct net income, he
14 would have come to 245- instead of 471,000.

15 Q. Okay. That's still -- what is that?
16 Roughly, \$130,000 or something?

17 A. I think you may have missed math class.
18 There's a good bit more than that.

19 Q. 471 --

20 A. Minus 245.

21 Q. Oh, you're right. Yeah. 230-something
22 thousand dollar. So how are you coming up with the
23 figure of 875,000?

24 A. Can I get you to flip to the next page
25 of the report?

1 Q. Sure.

2 A. Down at the bottom there is a industry
3 standard method which Mr. Burkett used, is you look
4 at four or five different ways of valuing a
5 company. You don't just look at one way, and I've
6 done that exact same thing.

7 Mr. Burkett, just run down his column,
8 one method 471; another method 930; another method
9 a million dollars; another method a million two;
10 another method 400. He used his professional
11 judgment to select a value for the whole company of
12 975 right there on the bottom. Okay?

13 Q. Uh-huh.

14 A. When I apply the same methods with the
15 corrected net income, I come up with a much
16 different value. Here's why. It appears
17 Mr. Burkett placed a great deal of value on
18 earnings multiples. His conclusion value was 975,
19 the method of earnings multiple was a little over a
20 million dollars. That's very, very high when other
21 methods come up with \$400 and the 471,000 value.

22 I got the same qualifications that
23 Mr. Burkett did, came to an opinion that suggested
24 the value of this company is markedly low than what
25 he had come up with based on the revised net

1 income.

2 Q. Okay. What due diligence, if any, did
3 you perform on behalf of your client, ATMES, which
4 would be Mr. Reed and Mr. Murrell Smith, other than
5 looking at the confidential report Burkett
6 prepared? Did you do any other due diligence --

7 MR. SMITH: Objection.

8 THE COURT: Basis.

9 MR. SMITH: Assuming facts not in
10 evidence. He made it clear about who his client
11 was.

12 THE COURT: Sustained. Rephrase.

13 BY MR. MARSHALL:

14 Q. Did you do any due diligence in your
15 assistance of the ATMES owners in their
16 consideration of purchasing Abacare?

17 MR. SMITH: Your Honor, objection.

18 THE COURT: I'm sort of confused. I
19 don't understand what you're asking, Mr. Marshall.
20 I need you to rephrase it.

21 MR. MARSHALL: Well, I'm asking --

22 THE COURT: No. Just rephrase the
23 question. It's not clear; it's very convoluted.
24 If I don't understand it, I don't -- I can't follow
25 what you're asking him. Restate the question.

1 BY MR. MARSHALL:

2 Q. In the work that you did for ATMES in
3 helping them consider whether or not to purchase
4 Abacare and, if so, for how much money, did you do
5 anything other than review the report -- the
6 confidential report prepared for my client and the
7 Connellys that Burkett & Burkett prepared?

8 MR. SMITH: Your Honor, objection; not
9 relevant. This is about the prepurchase work, not
10 his valuation of the damages.

11 THE COURT: Sustained. If you want --
12 if you want to rephrase the question as it relates
13 to his valuation for damages purposes, you can do
14 that. What he did before is irrelevant. Your
15 client is deemed to have admitted the allegations
16 of the complaint.

17 He has no duty to your client under any
18 theory in this case. So any questions you ask need
19 to be related to damages only. As to how he
20 prepared the report to damages today, not what he
21 did previously.

22 BY MR. MARSHALL:

23 Q. Okay. The methods that was used to
24 calculate sales taxes owed by Abacare is called --
25 I'm sorry, what is that called? The methodology

1 that by which Abacare was calculating the sales
2 taxes owed to the State of South Carolina
3 Department of Revenue?

4 A. I would assume that would be South
5 Carolina Code of Laws.

6 Q. But isn't there a cash accrual
7 methodology? Aren't there a couple of different
8 ways that you can calculate --

9 A. I'm delighted that you asked that
10 question. There's no authority under South
11 Carolina law to use the cash method of accounting
12 for sales tax, reporting or obligations, et cetera.
13 There are two parts to that. One, sales taxes is
14 owed when sold regardless of when paid. If Abacare
15 was using the cash method, they were using
16 unauthorized and unapproved method.

17 Number two, go to the board minutes of
18 June, I believe it is, 2007, Abacare, which is
19 before ATMES or anybody else bought them, and
20 Mr. David Selander, the CPA, reported to the board
21 as recorded in the minutes that the sales tax
22 reports appeared to be materially understated.

23 Number three, even if they used the
24 cash method of accounting for sales tax when they
25 weren't authorized to do so, the financial reports

1 that Mr. Burkett were provided were based on the
2 accrual basis of accounting, and that liability for
3 sales tax whenever it was owed should be recorded
4 in those financial statements, and they were not.

5 Q. So Burkett's analysis was under the
6 accrual method?

7 A. Which is what Abacare's financial
8 statements were using for their tax returns and
9 their financial statements. That's what they gave
10 him.

11 Q. But you're saying that they weren't
12 actually using the accrual method. They were
13 actually using the cash method?

14 A. No, sir; I didn't say that.

15 Q. Okay. I'm -- you have to excuse me. I
16 don't understand what you said. The Burkett report
17 used the accrual method meaning that as soon as you
18 show a sale, you then need to go ahead and pay the
19 sales taxes based upon the amount of that sale
20 whether your company actually collects the profits
21 from the sale or not, correct?

22 A. You've got two or three things mixed
23 up. See if we can get it straightened out. They
24 were reporting -- it's my understanding, or that's
25 what I have heard, they were reporting sales tax on

1 a cash basis.

2 They weren't entitled to do that, but
3 even if they did do that, they should have recorded
4 the sales tax obligations that they had -- they
5 owed, but had not yet paid in their financial
6 statements and they had not done. That's why're
7 here today.

8 Q. And was there anything that you could
9 have done to discover that?

10 A. Well, I think Mr. Selander did a
11 wonderful job of reporting to the board they were
12 not in compliance with South Carolina sales tax law
13 and, apparently, they didn't take any action.

14 Q. All right. The cash method -- is it
15 not true that the cash method of paying South
16 Carolina Department of Revenue sales taxes on these
17 durable medical goods is the same method that you
18 were using as the CPA for ATMES?

19 A. I did not prepare any sales tax returns
20 for ATMES.

21 Q. Did you ever review any sales tax
22 returns for ATMES?

23 A. No, sir.

24 Q. What did you do as employee for ATMES?
25 What did you do for them?

1 A. I was not an employee for ATMES.

2 Q. You were never hired by ATMES?

3 A. I was a CPA independent. I was not an
4 employee.

5 Q. Okay. Well, I mean, in your
6 employment. I didn't mean to indicate you were a
7 full-time employee.

8 A. The first time that I became involved
9 with sales tax was involved in the Department of
10 Revenue examination. This was -- I'm not sure of
11 the dates right now.

12 Q. Well, what -- other than keeping track
13 of sales tax, what is it as an independent CPA that
14 you did for ATMES and Murrell Smith and Jeffrey
15 Reed?

16 A. We did quarterly financial statements;
17 we did tax returns; we would have made normal CPA
18 level adjustments and advisory-type services.

19 Q. And as part of the tax return that you
20 did for them, was it not significant to you to
21 determine how they were calculating sales taxes
22 owed to the State of South Carolina?

23 A. No, sir. I assumed they knew what they
24 were doing and they were doing it.

25 Q. Okay. And how is it they were handling

1 that?

2 A. I don't know, sir.

3 Q. You don't know that they were using the
4 cash method, which is the same method that -- that
5 Abacare was using?

6 A. I don't know that, sir.

7 MR. SMITH: Objection.

8 THE COURT: Basis of the objection?

9 MR. SMITH: He's talking facts that are
10 not in evidence.

11 THE COURT: Sustained; rephrase.

12 BY MR. MARSHALL:

13 Q. Were you involved on behalf of ATMES
14 going to South Carolina Department of Revenue and
15 figuring out how much back taxes ATMES owed to SC
16 DOR at some point?

17 MR. SMITH: Objection, Your Honor.

18 THE COURT: Basis?

19 MR. SMITH: That's not relevant and
20 it's not in evidence.

21 THE COURT: How is it relevant? How
22 does it go to make an issue of consequence more or
23 less likely, meaning damages?

24 MR. MARSHALL: Well, because the
25 company that he worked for initially -- he was the

1 CPA for, ATMES, was using the same accounting
2 method, the cash method, that they have now sued
3 the Defendants over using.

4 THE COURT: That's a duty issue. Not a
5 damages issue. Stick to damages. If it relates to
6 how he made his valuation, it's a permissible
7 question. If it has anything to do with duty --
8 you keep trying to challenge your client's
9 liability in this matter. His liability has
10 already been determined. He was judicially
11 estopped from taking an opposite position.

12 Judge Nicholson has already said he's
13 in default. He's admitted his liability. Only
14 thing you get to challenge today or question are
15 the validity of his damages and the way the Court
16 affords any testimony about the weight of damages.

17 So if any of that what you've asked
18 relates to how he -- the methodology he used in
19 coming to damages, the weight to be afforded the
20 damages, then you can ask it. If it relates to
21 anything to do with your client's duty, it's off
22 limits.

23 BY MR. MARSHALL:

24 Q. Was the cash accounting method the one
25 that was used by most -- to your knowledge, if you

1 have the knowledge, used by most DME, durable
2 medical equipment companies, in South Carolina
3 during the time frame that we're talking about?

4 A. I will answer that in two parts: One,
5 I don't know; and, two, that's expressly against
6 South Carolina Department -- you know, their laws,
7 sales tax it's accrual. You don't get to choose
8 the cash method.

9 Q. Well, it was not always that way, was
10 it, sir? Wasn't there a big lawsuit filed by a
11 number of DME companies, including ATMES, I believe
12 was a named Plaintiff in the case, in which they
13 asserted that the cash method was correct and that
14 assertion was upheld by lower court; was it not?

15 A. I don't know the answer to that.

16 Q. Never heard of a lawsuit in which ATMES
17 and a number of other DME companies participated
18 asserting that the cash method was the proper
19 method?

20 A. I was aware that there was a lawsuit.
21 No, sir, I don't know the foundation and the
22 issues.

23 Q. And was it not until after the sale by
24 Abacare of its assets to ATMES that the South
25 Carolina Supreme Court issued an order overturning

1 that lower court ruling? Are you aware of that?

2 A. I'm familiar with the Supreme Court
3 ruling somewhat, yes, sir.

4 Q. So at the time that Abacare sold its
5 assets and merged into ATMES with Reliable, they
6 were following the law that existed in this state
7 at that time; were they not?

8 A. No, sir.

9 Q. Why not?

10 A. They were underreporting their taxable
11 sales.

12 Q. Well, not according to the applicable
13 law at that point in time.

14 A. According to the people that matter,
15 and that's the Department of Revenue's examining
16 officers who went in and examined Abacare and found
17 that there was a significant understatement
18 consistent in sales tax reported revenues.

19 Q. And that was after the Supreme Court
20 for South Carolina ruled on the issue; was it not?

21 A. The timing of when they committed the
22 underreporting is not relevant to the Supreme
23 Court. They were underreporting for who knows how
24 long.

25 Q. No. They were reporting in compliance

1 with South Carolina law just as ATMES was. The
2 exact same cash method; were they not, sir?

3 MR. SMITH: I have to object. This has
4 nothing to do with damages and it's not relevant.
5 These are disputes that were in the suit which has
6 been resolved.

7 THE COURT: Uh-huh. I'm a little
8 strained to know how it is relevant to his
9 evaluation of damages, Mr. Marshall. The objection
10 is sustained.

11 BY MR. MARSHALL:

12 Q. So you say that at one point over this
13 four-year period that Abacare was underreporting
14 South Carolina Department of Revenue sales taxes
15 due over a four-year period in a total of \$100,644?

16 A. I did not say that, sir. That's
17 incorrect.

18 Q. How am I misinterpreting?

19 A. I said the sales tax for the
20 examination period was \$100,000. That's a much
21 shorter period of time than four years. I believe
22 it's only like 12 months or something. It's much
23 shorter.

24 Q. And when were those 12 months?

25 A. From the examination period -- I don't

1 know the answer to that. There is a full 60- or
2 70-page South Carolina examination report that
3 would detail all of that.

4 Q. Is it not true that part of that
5 \$100,644 is liability accrued by your client,
6 ATMES, because they were using the cash reporting
7 method for sales taxes? True or not?

8 A. No, sir. You've got several concepts
9 and several companies mixed up in that question.

10 Q. Well, tell me how I'm wrong.

11 A. If you isolate Abacare the company in
12 Charleston, what my schedule on page 2 of this
13 report outlines is the total of the examination
14 report and removes the portion that -- of sales tax
15 that was due after the Sumter folks acquired it.

16 So we only isolated the sales tax that
17 was underreported for the period that your Abacare,
18 the Charleston operation, held it.

19 What we were trying to get at is what
20 is the net income impact of that understatement for
21 just the Charleston, just the Abacare operations.
22 Nothing to do with Sumter's ownership.

23 Q. And how much money was ATMES ordered to
24 repay to the South Carolina Department of Revenue
25 as a result of reporting its sales taxes under the

1 cash method rather than the accrual method?

2 A. I'm going to object to multiple to --

3 Q. You don't have a right to object --

4 A. Well, then, I don't mean to -- I won't
5 answer your question because you've got two
6 different things connected there. ATMES is a
7 company in Sumter, South Carolina. First, you
8 asserted they were on the cash basis, which I don't
9 think they were, and I think it's been objected to
10 and it is outside of the scope of what this report
11 -- of what my report is all about.

12 If you will phrase your question
13 cleanly and accurately, I will answer it.

14 Q. On behalf of ATMES, you negotiated, did
15 you not, with South Carolina Department of Revenue
16 to try to reduce the amount of back sales taxes
17 that ATMES owed SC DOR as a result of using the
18 cash method of accounting for sales taxes?

19 A. I'm going to agree and disagree. I did
20 represent the client with South Carolina. I did
21 negotiate with them and do everything I could to
22 reduce the amount of sales tax. Cash or accrual
23 doesn't have anything to do with this. There was
24 no question it should have been reported on the
25 accrual method of accounting.

1 Q. And it wasn't by ATMES, correct?

2 A. That's your assertion, sir. Not mine.

3 Q. Well, why do you assert that ATMES had
4 to pay back the sum of taxes for sales -- sales
5 taxes to SC DOR? Why do you believe they had to
6 pay it back?

7 A. There were a lot of issues. This is
8 not a singular you can put your finger on this
9 issue or that.

10 Q. Well, what were the issues? What's the
11 explanation for why, if it's not because they were
12 using the exact same accounting methodology that
13 Abacare was using?

14 A. I can't answer that in the scope of
15 this.

16 Q. You don't know?

17 A. I don't know.

18 Q. Now, Mr. Smith, when he was asking
19 questions asserted that Abacare was a, quote,
20 worthless business, do you agree with that?

21 A. If he said that, I don't recall it, and
22 I don't agree that it was worthless. No, sir.

23 Q. Just instead of \$900,000 roughly that
24 was paid for Abacare, you believe that the true
25 value was 285?

1 A. Of the -- yes, sir. That -- I think
2 that's correct.

3 Q. Tell me this, as a result of their
4 purchase of Abacare, what profits did ATMES enjoy
5 subsequent to the purchase of Abacare?

6 A. They enjoyed a \$921,000 loss.

7 Q. So you're saying then that Abacare was
8 worthless because they lost every penny?

9 A. I didn't say that.

10 Q. Well, how do you say it was not
11 worthless, but they lost every penny?

12 A. I don't know how to answer your
13 question in the way that it's phrased.

14 Q. Has Mr. Declemente -- he sold his
15 interest in ATMES to Jeff Reed and Murrell Smith
16 fairly shortly after merging Abacare with ATMES;
17 did he not?

18 MR. SMITH: Objection.

19 THE COURT: Basis?

20 MR. SMITH: Relevance.

21 THE COURT: Sustained. Ask the next
22 question.

23 BY MR. MARSHALL:

24 Q. What profits or what sales revenue --
25 let me ask it that way then. What revenue did the

1 purchase of Abacare in Mount Pleasant, what revenue
2 did it produce for the new company ATMES?

3 A. I don't know.

4 Q. Why don't you know?

5 A. Because that wasn't what I was asked to
6 testify to here today.

7 Q. So it's your testimony that the
8 co-defendants that were initially sued in this case
9 caused a loss to ATMES, but you don't know the
10 amount of the loss?

11 A. That's not what I said at all, sir.

12 Q. How are you able to tell what loss
13 Abacare caused to ATMES unless you know what
14 revenue Abacare generated for ATMES?

15 A. Well, a company could have revenue of
16 \$100 million and lose 50 million. It can have
17 revenue of \$1 million and make \$500,000. Revenue
18 is not the only indicator of value or net income.
19 You're going to have to ask a more precise
20 question.

21 Q. You have to have revenue, do you not,
22 to do a calculation that's reliable?

23 A. No, sir; I would not agree with that.

24 Q. Why not?

25 A. You asked me what the revenue of this

1 operation after the purchase date was up until the
2 time that it was closed; is that the correct
3 question?

4 Q. What was the date it was closed?
5 You're talking about Abacare's closing, right?

6 A. I think December 2011. The Charleston
7 operations, let's call it that.

8 Q. Okay. Right. That's my question.

9 A. I don't know that number.

10 Q. You don't know?

11 A. That number is readily available from
12 financial statements and tax returns. It's not a
13 part of this.

14 Q. And you didn't examine those in making
15 your report?

16 A. I reviewed those, but, no, they weren't
17 relevant to this report. Because what happened
18 after the Sumter people purchased the property does
19 not have any -- any inclination in value
20 indications when they overpaid for the company on
21 purchase because the revenue were overstated.
22 That's the contention of the damages here.

23 Q. Regardless of how much money Abacare
24 generated for ATMES, you're saying that's
25 irrelevant?

1 A. Well, let's go for a good example, and
2 I will answer the question. They sold the
3 Charleston operations to Long's Drugs in 2011. As
4 a part of that sale they sold the goodwill for
5 \$112,000. That was the same goodwill that they had
6 purchased from the Connelys, et cetera, Abacare
7 for 606,000. So on that one asset they lost
8 \$500,000.

9 They sold, for example, the fixtures
10 and equipment for about \$70,000. Those were the
11 same assets they had bought three years earlier for
12 180,000. That's \$110,000 worth of loss. Do I need
13 to go on?

14 Q. Yes. Go ahead and tell me how much the
15 total amount of money that Long's paid to ATMES was
16 and for what that money was?

17 A. Well, the total amount they paid has to
18 be considered in relation to the assets that they
19 acquired and the obligations that they assumed.
20 You can't just say, tell me one side of the ledger,
21 without looking at the other.

22 Q. My point exactly.

23 A. And I think if you -- if you were able
24 to get that information accurately, you won't want
25 that answer. I just gave you two examples that

1 showed they lost \$600,000 on two asset sales. I
2 believe receivables were \$170,000 less.

3 Q. So the accounts receivables from MUSC,
4 those were transferred from ATMES to Long's?

5 A. I don't know what the composition of
6 the receivables were. I just saw the total.

7 Q. Do you know the total amount of money
8 that Long's paid for the assets that it purchased
9 from ATMES?

10 A. I do not.

11 Q. So, to your knowledge, it could be a
12 million dollars that ATMES received for just that
13 portion of the Abacare assets?

14 A. I do know that at the conclusion of
15 that transaction was when we recorded the \$921,000
16 net loss from discontinued operations, which would
17 take into account total money taken in, sales price
18 to Longs, less assets given up. And that's where
19 that 921 net loss came from on the 2011 tax return.

20 Q. And that loss was due to you're saying
21 devaluation of goodwill?

22 A. That was one, \$500,000.

23 Q. And that was -- when the transaction
24 was made between Long's and ATMES, you're saying
25 there was a delineation in there, a line item for

1 goodwill?

2 A. That's correct.

3 Q. But there was no line item for goodwill
4 when ATMES purchased and merged with Abacare, was
5 there?

6 A. There was a computation made, and it
7 was 606,000.

8 Q. Where did that appear? In what
9 document?

10 A. When I recorded the transaction for the
11 -- I'm going to call them Sumter because of the
12 confusion -- for the Sumter people merging with the
13 Charleston people, we identified all of the assets
14 that were purchased, less the liabilities, and the
15 difference between the tangible assets and
16 identifiable liabilities as goodwill by definition.

17 Q. Okay. And where does that, for
18 instance, appear in your evaluation here that you
19 have given in writing today?

20 A. It doesn't.

21 Q. It doesn't, huh? So you're claiming
22 \$100,000 of underreporting -- \$100,644 of alleged
23 underreporting or improper reporting of sales tax
24 liability?

25 A. There's nothing alleged about the

1 underreporting. That was the determination by the
2 Department of Revenue.

3 Q. And you agree that that figure is the
4 actual out-of-pocket loss that ATMES sustained as a
5 result of the conduct for which the Defendants were
6 sued?

7 A. No, sir. Did you not understand
8 anything that I testified to or whatever? That's
9 completely wrong.

10 Q. What I'm talking about is the amount of
11 money that they had to come out of their pocket to
12 satisfy a debt.

13 A. Sales tax.

14 Q. Sales tax?

15 A. Yeah. That's my understanding, yes,
16 sir.

17 Q. And you're not claiming that the
18 Defendants in this case, that their actions caused
19 any other out-of-pocket monetary loss to ATMES, are
20 you?

21 THE COURT: Is there an objection?

22 MR. SMITH: Relevance, Your Honor.

23 THE COURT: Sustained; relevance.

24 Next question.

25 BY MR. MARSHALL:

1 Q. How is it that you explain \$100,000
2 out-of-pocket payment to SC DOR was actually the
3 equivalent of a seven -- excuse me, \$875,144 loss?

4 A. That's an excellent question. May I
5 explain?

6 Q. Sure.

7 A. The \$100,000 was -- represents
8 underreported gross income because that sales tax
9 that was collected that was not remitted to the
10 South Carolina Department of Revenue, the expenses
11 are identical so that revenue that was taken and
12 not given falls straight to the bottom line.

13 If we convert that \$100,000 into an
14 annual basis. Okay. The \$100,000 represented over
15 a greater than one-year period. That's about
16 \$48,000 a year. So when Mr. Burkett did his
17 valuation report, his net income numbers were
18 approximately \$48,000 overstated. He used a
19 multiplier of that net income as one of his methods
20 of calculating value. That caused his report to be
21 overstated.

22 Q. But Abacare was sold, if I understood
23 you correctly, not terribly long after it was
24 acquired by ATMES; is that correct?

25 A. Three years.

1 Q. So the difference between the roughly
2 \$100,000 and the valuation of 875, and the
3 valuation -- excuse me. The valuation that Burkett
4 gave, was that dependent upon the Abacare assets
5 being held for any particular time? That was today
6 on the date of this sale? That's how it had been
7 valued.

8 A. There are multiple methods that you use
9 in valuation, but I think the premise of your
10 question is that it considers the assets on hand at
11 the day of valuation.

12 Now, the majority of the value of
13 Abacare was not physical assets. It was goodwill.
14 It was intangible value. It was the ability to
15 earn future earnings.

16 Q. And why did Abacare not continue to run
17 the business for a longer period than it actually
18 did?

19 A. I don't know the answer to that.

20 Q. So if they had continued to operate the
21 business -- and you say you have no idea whether
22 Abacare generated any income or not, or any cash?
23 Any cash?

24 A. Sir, you're going to have to use a
25 little more exact language. If you're talking

1 about gross revenue, that's one thing. If you are
2 talking about net income, that's a completely
3 different concept.

4 Q. Right, gross. And you said --

5 A. I know they were losing their shirt on
6 the Charleston operation.

7 Q. And the reason for that, your testimony
8 is, because once the law changed there was a tax
9 liability of \$100,000 to the South Carolina DOR?

10 A. That is not my testimony. My testimony
11 is that part of the reason that they were losing
12 money -- the majority of the reason they were
13 losing money is because they overpaid for the
14 business.

15 The business wasn't worth what they --
16 what it was presented as what they acquired it for.

17 Q. Are you aware of the testimony -- the
18 deposition testimony in this case of ATMES co-owner
19 Jeff Reed in which he testified that he believes
20 Phillip Declemente bears no responsibility --

21 MR. SMITH: Objection, Your Honor.

22 THE COURT: Sustained; pitting. You
23 can't ask him to comment on the veracity of another
24 witness. And your client's liability is already
25 admitted. He cannot contest that. The only thing

1 I'm interested in today is damages. Confine your
2 questions to that scope.

3 And the question is stricken from the
4 record in its totality. You may proceed.

5 MR. MARSHALL: Okay. That's all of the
6 questions, sir, I have.

7 THE COURT: Any redirect?

8 MR. SMITH: None, Your Honor.

9 THE COURT: Sir, you may sit down
10 subject to being recalled later if necessary.

11 Any other witnesses?

12 MR. SMITH: One. We would call
13 Mr. Murrell Smith.

14 THE COURT: Mr. Smith, come to the
15 stand to be sworn.

16 GEORGE MURRELL SMITH, JUNIOR,
17 being first duly sworn, testified as follows:

18 THE COURT: State your full name.

19 THE WITNESS: George Murrell Smith,
20 Junior, M-U-R-R-E-L-L.

21 THE COURT: Thank you. You may
22 proceed.

23 MR. SMITH: Thank you. May it please
24 the Court.

25 DIRECT EXAMINATION

1 BY MR. SMITH:

2 Q. Mr. Smith, what relationship do you
3 have with ATMES?

4 A. I'm a member in the LLC.

5 Q. Okay. And that's the Plaintiff in this
6 action?

7 A. That's correct.

8 Q. And now in that role as a member of the
9 LLC, are you familiar with the transaction that is
10 at issue in this lawsuit?

11 A. Yes, sir.

12 Q. And the financial dealings of ATMES,
13 are you familiar with those profits/losses of the
14 business?

15 A. In generalities, yes. Do I know the
16 specifics of it? No, sir.

17 Q. You have engaged in the past whom we
18 just heard from Mr. Bradham?

19 A. That's correct.

20 Q. Do you know -- do you believe he's done
21 a considerable amount of work for you?

22 A. He's been the CPA that was involved in
23 the -- guiding us through the sale, doing our tax
24 returns and still our CPA.

25 Q. And you were dependent upon his

1 evaluation and advice?

2 A. Absolutely.

3 Q. Do you agree with his -- is it -- the
4 loss that was reported as testified to earlier of
5 \$921,000 on the income tax return; is that correct?

6 A. That's correct. From when we closed
7 out the Abacare, that's my understanding what the
8 tax return was. Obviously, he prepared that. He
9 understands the loss, but that was the loss
10 reported.

11 Q. And his report, you're familiar with
12 the report that's in evidence today?

13 A. Yes, sir.

14 Q. And the summary?

15 A. Yes, sir.

16 Q. And it reflects an \$875,144 economic
17 loss to ATMES?

18 A. That's correct.

19 Q. Do you believe that to be accurate?

20 A. Yes, sir.

21 Q. Are you requesting this Court to enter
22 a judgment in that amount, \$875,144, against the
23 Defendant, Mr. Declemente?

24 A. I am.

25 MR. SMITH: Thank you very much,

1 Mr. Smith.

2 THE COURT: Any questions for the
3 witness?

4 CROSS-EXAMINATION

5 BY MR. MARSHALL:

6 Q. Good morning, Mr. Smith.

7 A. Morning, Mr. Marshall.

8 Q. Mr. Bradham was not really able to talk
9 about income produced by Abacare, said he didn't
10 have any knowledge of that. And I want to ask you
11 the same question.

12 For instance, let's start with the
13 purchase of Abacare assets by Longs Medical. Do
14 you know how much Longs Medical paid ATMES for
15 certain assets?

16 A. Approximately -- when you add
17 everything up, approximately, \$525,000 is what I
18 understand.

19 Q. And when was that?

20 A. I believe he said December of 2011.

21 Q. And the original purchase date was
22 November 2008, right?

23 A. That's what the paperwork said.

24 Q. The period of just about three
25 months -- three years and a month it looks like.

1 So Longs paid ATMES 525 roughly.

2 A. If you -- if you assume what they
3 did -- they assumed accounts, because as
4 Mr. Bradham said, it was losing money. And so it
5 would lose money every year; there were accounts
6 that were behind.

7 So it assumed some of the outstanding
8 payables that we had, and then they paid some money
9 to a vendor. So there was no cash change hands.
10 That was the price of the sale, yes, sir.

11 Q. Okay. For accounts receivable from
12 MUSC; is that right?

13 A. Accounts payable for two vendors whom
14 we purchased equipment from.

15 Q. Okay. Did Long's purchase anything
16 else?

17 A. They purchased the company. They
18 purchased -- it was an asset sale.

19 Q. So all of Abacare's assets?

20 A. Abacare assets were.

21 Q. Sold to Longs?

22 A. Yes, sir.

23 Q. For about 525. And the purchase price
24 had been -- when -- when ATMES purchased Abacare it
25 was 875?

1 A. Yes, sir. And, Mr. Marshall, if you're
2 trying to imply this \$300,000 is an actual loss,
3 that's not correct. There were losses to the
4 company. There was capitalizations that had to be
5 made by the partners so the losses were much more
6 than \$300,000. It's not an addition and
7 subtraction in the business.

8 Q. Well, I understand, but the Defendants
9 should be held only accountable for losses that
10 they caused?

11 A. Yes, sir. And your client caused those
12 losses, the \$875,000. I mean, actually, it was
13 \$921,000 that was -- that was reported as a loss
14 when we closed and sold the business, but I guess
15 from the valuation, I'd certainly rely on what
16 Mr. Bradham says.

17 Q. So you think Phillip Declemente caused
18 you nearly a million dollars in loss? Phillip
19 Declemente?

20 A. That's what he did when he admitted the
21 allegations of the complaint, yes, sir. He caused
22 losses and then his -- his conduct is what caused
23 the losses to the corporation, yes, sir.

24 Q. Well, regarding the cash accounting
25 method that I tried to speak with Mr. Bradham

1 about, is it your knowledge that the accounting
2 methodology being used by Abacare prior to its
3 merger with ATMES was the same as was being used by
4 Reliable, the company that you owned --

5 A. No, sir.

6 Q. -- prior to the merger?

7 A. No, sir. The problem is -- and I don't
8 think you understood what Mr. Bradham was telling
9 you. Mr. Declemente filled out the tax returns is
10 what came out in discovery. He prepared the tax
11 returns. And let's say he did \$150,000 as way of
12 example of sales that time. He would report to the
13 Department of Revenue he only did \$100,000 in
14 sales. So he underreported. So we had to go back
15 and adjust all the sales tax returns to reflect the
16 accurate amount of income that came into Abacare
17 which generated the tax assessment that was against
18 us.

19 Q. Well, you agree that Mr. Declemente
20 didn't prepare the tax returns, don't you? He may
21 have signed them, but he didn't prepare them?
22 Wasn't it Burkett & Burkett that --

23 A. No, sir. Burkett was never the -- they
24 prepared an analysis of the company for the sale.

25 Q. Well, who was preparing those tax

1 returns? You said that Phillip Declemente was; is
2 that right?

3 MR. SMITH: Objection; relevance.

4 THE COURT: Sustained; that goes to
5 duty. Ask the next question.

6 BY MR. MARSHALL:

7 Q. Why was it that the goodwill of Abacare
8 was reduced by about a half million dollars in
9 Mr. Bradham's analysis?

10 A. Yes, sir. Mr. Marshall, I'm a lawyer
11 like you. I don't obviously understand goodwill
12 and so I rely upon my accountant to tell you that.
13 I can't answer that question. I think he answered
14 that for you.

15 Q. Mr. Declemente, when asked about the
16 tax reporting methodologies being used by Abacare,
17 he was never dishonest with you about that, was he?

18 MR. SMITH: Objection, Your Honor.

19 THE COURT: Goes to duty; sustained;
20 relevance.

21 BY MR. MARSHALL:

22 Q. Do you think that the nearly half mill
23 dollar reduction in goodwill value of Abacare,
24 which Mr. Bradham is claiming, do you think that
25 the management of Abacare under your direction and

1 Mr. Reed's direction, or lack there of, could have
2 had anything to do with the reduction in that --

3 THE COURT: Basis?

4 MR. SMITH: Calls for speculation.

5 There is no foundation.

6 THE COURT: Well, it's relevant really.

7 THE WITNESS: I don't think the
8 management had anything to do with it. Part of the
9 deal, Mr. Marshall, was Mr. Declemente -- I never
10 had the management of the office. That's not what
11 my role was either.

12 So the day-to-day operations was -- Mr.
13 Declemente was the one that was going to manage the
14 Sumter office and -- I mean, the Mount Pleasant.
15 And Mr. Shay was going to do that.

16 Well, lo and behold, we found out they
17 were engaged in a relationship and one was married
18 and the other wasn't, which wasn't disclosed to us.
19 And then your client tested positive for marijuana
20 against the drug test policy in the office, and he
21 was suspended by our company because of that
22 conduct.

23 Then he got into a fist fight with his
24 brother and so we had to suspend him from there
25 from that point too, so --

1 Q. My client --

2 A. Sir, let me finish. So still answering
3 the question, he was no longer allowed to be a part
4 of the company and so it was a decision that
5 happened. It was his conduct that caused all of
6 this company to start crashing in by engaging in
7 this behavior.

8 We had -- at his insistence, we hired a
9 human resource management company or something like
10 that called Synergetics. They came in and removed
11 him from the office. That's how he was no longer
12 in the office.

13 Q. Well, and then you consummated a sale
14 whereby he sold ATMES --

15 A. Right. He was about to --

16 Q. -- his ownership in ATMES which was
17 20 percent. And that was done, as I recall, in
18 2009; was it not?

19 A. Whatever the note says. I can't recall
20 the date.

21 Q. So but, generally, Phillip Declemente
22 was a member of ATMES and one of your partners for
23 a relatively short period of time?

24 A. Yes, sir, about two or three months
25 before he started all of that conduct. Yes, sir.

1 Q. Two or three months, and then he was
2 out. And the claim is that he caused in a period
3 of two or three months --

4 MR. SMITH: Objection; relevance.

5 THE COURT: Sustained; relevance. He's
6 already admitted he's negligent, and he admitted
7 all of the causes of action against him. He is in
8 default. You cannot challenge his liability.

9 Ask the next question that deals with
10 damages.

11 MR. MARSHALL: I think I may just about
12 be done, Judge. Thank you.

13 BY MR. MARSHALL:

14 Q. So just to be clear on this, I think I
15 understood you, the asset sale of Abacare in total,
16 all of those assets went to Long's?

17 A. That's correct.

18 Q. And none were retained by Abacare?

19 A. No, sir.

20 Q. How about accounts receivable with
21 MUSC?

22 A. Everything was sold. There is no
23 accounts receivable to MUSC, Mr. Marshall. So with
24 that being said, there is -- everything was sold to
25 Longs. All of the assets were sold to Long's. If

1 there was account receivables, that would be
2 included in the sale.

3 Q. All right. You're confident of that
4 figure of 525?

5 A. That's a round about figure,
6 Mr. Marshall. I did not bring anything with me,
7 but I think it's somewhere in that neighborhood,
8 yes.

9 Q. And are you aware of the sworn opinion
10 of your partner, Jeff Reed, that Mr. Declemente
11 caused no damages?

12 MR. SMITH: Objection; relevance.

13 THE COURT: Sustained. The question is
14 stricken. You cannot ask someone about someone
15 else's testimony and ask them to comment on the
16 veracity of that. In addition to that, that is not
17 relevant. Your client's liability is admitted.

18 Next question. I don't intend to
19 revisit that again.

20 BY MR. MARSHALL:

21 Q. Did you and Mr. Reed conduct anything
22 in the way of what you would consider due diligence
23 in checking out the appropriateness of purchasing
24 Abacare?

25 MR. SMITH: Objection; relevance.

1 THE COURT: Sustained; relevant. And
2 my directions were very clear, Mr. Marshall.

3 MR. MARSHALL: All right. Nothing
4 further. Thank you, sir.

5 THE COURT: Any redirect of the
6 witness?

7 MR. SMITH: Just briefly.

8 THE COURT: You may proceed.

9 REDIRECT EXAMINATION

10 BY MR. SMITH:

11 Q. Obviously, Mr. Smith, your company
12 obviously suffered a great loss as a result of
13 this. In the testimony it's established as
14 870-some-odd-thousand-dollar-loss. Is there
15 anything else that you would like to share with the
16 Court about the experience for you and the company
17 at this time?

18 A. Mr. Smith, you know, I don't want to
19 get into -- I'm not going to get into how it came
20 about, but this was a medical equipment company
21 that we had. I was a passive investor, so to
22 speak, in the company, and it was not a lucrative
23 business, but it was a profitable business.

24 And so then we merged with
25 Mr. Declemente, which facts we turned out to be --

1 that were represented turned out to be incorrect.
2 So we've had to basically bail that whole business
3 out, the whole foundation was horribly done, it was
4 horribly represented to us.

5 And so we got it; it was a huge loss;
6 it cost us a lot of money. We had to personally
7 capitalize our company about \$250,000 between the
8 two of us, which we borrowed.

9 So as we sit here today, we're still
10 paying off the loan from which we purchased the
11 company and paying off all these other ancillary
12 costs related to the company with, you know -- with
13 -- we assumed all the contracts, and there was
14 leases that Mr. Declemente had entered into with
15 them, probably about \$200,000, I would imagine,
16 250. So we had to pay all of those off for money
17 that was really paid -- that was supposed to come
18 in and they represented more accounts receivable,
19 you know.

20 As to the damages, it's personally --
21 you know, it's caused this company -- you know,
22 there has been no profits, so to speak of, for
23 years. It's been paying back loans on which we get
24 taxed on the payment of the interest every year.
25 So I have phantom income as a result of this. I

1 pay taxes on income I never received.

2 I mean, it's been pretty devastating to
3 the both of the two of us who still own the
4 company. You know, fortunately, we've worked hard,
5 saved, and had to deal with everything to pay off
6 this bad purchase and it and -- you know.

7 Listen, it's one thing it's a business
8 deal and it's a bad purchase. It's another thing
9 when you know and the records have shown there was
10 underreporting of the sales taxes and they just
11 didn't disclose it.

12 And -- and -- and when you-all look at
13 this and it points back to Mr. Declemente is the
14 one that had had the knowledge. He was the one
15 that -- that was told by the accountant he needed
16 to do that and he just disregarded it and plugged
17 on ahead.

18 MR. SMITH: Thank you very much.

19 Thank you, Your Honor.

20 THE COURT: Thank you.

21 Now, do you have any further witnesses,
22 Mr. Smith?

23 MR. SMITH: We have nothing --

24 THE COURT: Sir, you can step down.

25 Now, I'm trying to understand,

1 Mr. Marshall, what witness you would want to call.
2 You said Mr. Long, but it would seem to me that
3 you-all would be able to stipulate as to what he
4 paid and what assets he purchased.

5 Other than that, I don't know how his
6 testimony would be relevant so there really is no
7 need to bring him up.

8 MR. MARSHALL: I think I agree with
9 that, Judge, as long as he produces the needed
10 documents. We've been very specific --

11 THE COURT: I think you-all can
12 stipulate as to what Mr. Long paid, correct?

13 MR. SMITH: Yes.

14 THE COURT: And I believe the
15 accountant already took that into account when he
16 did the valuation.

17 MR. SMITH: Yes, Your Honor, he did.

18 THE COURT: So you-all should be able
19 to stipulate to that. And that eliminates the need
20 for him to testify.

21 Who else do you need to testify
22 regarding damages?

23 MR. MARSHALL: Well, there were some
24 documents mentioned earlier that my client
25 requested that I subpoena --

1 THE COURT: Like what, and how is it
2 relevant?

3 MR. MARSHALL: -- from Mr. Bradham.
4 They are tax documents. Without looking at his
5 specific detailed --

6 THE COURT: You talked to Mr. Bradham
7 in a deposition. I'm trying to figure out how any
8 of that is relevant to his testimony.

9 MR. MARSHALL: Well, because the
10 documents are the ones that actually have been sent
11 to the state. And the testimony is great, but you
12 need to verify it --

13 THE COURT: How is your client going to
14 be able to testify to any of this? Are you saying
15 you're going to try to get them from Mr. Bradham?

16 MR. MARSHALL: Right. Those are
17 documents that --

18 THE COURT: Why didn't you get those
19 documents long before today?

20 MR. MARSHALL: Judge, as I mentioned --

21 THE COURT: You've been in discovery.

22 MR. MARSHALL: And every time --

23 THE COURT: But you have subpoena
24 power.

25 MR. MARSHALL: They refused to

1 produce --

2 THE COURT: You could have subpoenaed
3 them a long time ago. Why would you wait until the
4 eve of trial to --

5 MR. MARSHALL: The trial was supposed
6 to be a month away.

7 THE COURT: No, it's not. It was
8 supposed to be today, and you know that. I'm not
9 rephrasing that again either.

10 So any reliance on a date certain --
11 you never rely on a date certain. It can always
12 settle. That does not provide the barometer for
13 your preparation. You have a client to represent.
14 You should have been prepared.

15 You don't rely on them to get prepared.
16 It's not their job or their responsibility.

17 MR. MARSHALL: So those are the
18 other --

19 THE COURT: I'm going to give you five
20 days to get those documents and then to let me know
21 whether you need to supplement the report. And at
22 that time I will determine if supplementing the
23 record is necessary. After that I would ask
24 Mr. Smith to go ahead and provide me with a
25 proposed order on damages.

1 Now, does your client need to testify
2 to anything regarding damages?

3 MR. MARSHALL: Yes, ma'am; he would
4 like to testify.

5 THE COURT: Confined to damages.

6 MR. MARSHALL: Right.

7 THE COURT: I'm going to have my
8 secretary then within five days of today reschedule
9 the hearing for your client to be present. And I'm
10 not going to be interested in any tap-dancing about
11 why he's not here.

12 All right. Have a good day.

13 And just for the record, in the event
14 that I -- Mr. Smith, you need to include in your
15 order all of the facts, the deal with the jury
16 trial. The case that -- Mr. Marshall, that you've
17 cited is factually inapposite to this case. It has
18 nothing to do with this case; it has no bearing on
19 it.

20 In that case they were not in default,
21 they had filed a valid answer. So they did have
22 the right to benefit and not demand a jury trial,
23 but it's not even remotely applicable. So make
24 sure you include that and any other case law that
25 supports the law of this court as well as any facts

1 and circumstances that are necessary.

2 Provide that to me in Word format to
3 djeffersonsc@sccourts.org. My secretary will be in
4 touch to reschedule the matter for Mr. Declemente
5 to testify.

6 And if you-all can reach a stipulation
7 regarding Mr. Long's purchase of assets, go ahead
8 and reduce that to a stipulation so it can be
9 filed.

10 MR. SMITH: We will do that.

11 MR. MARSHALL: I'm not sure how we can
12 get all of these documents in five days. I think
13 under the Rules --

14 THE COURT: I think I'm being generous.
15 You should already have them.

16 MR. MARSHALL: I thought the Rule
17 provided at least ten days for documents.

18 THE COURT: Unless the Court shortens
19 the time, which I have done.

20 MR. MARSHALL: Okay.

21 THE COURT: You've had since
22 October 4th -- actually, you've had since September
23 to have gotten the documents. And I'm really at a
24 loss as to how any of them have any bearing on the
25 valuation because you really didn't contest what's

1 been presented.

2 I have no -- I find Bradham very
3 credible and I do not believe he would have
4 misrepresented to this Court what is in those tax
5 documents. So you've already sent a subpoena, as I
6 understand it.

7 MR. MARSHALL: To Mr. Long.

8 THE COURT: Why haven't you sent it to
9 anybody else you wanted documents from before
10 today?

11 MR. MARSHALL: Judge, again, we thought
12 the trial was November --

13 THE COURT: That -- that is ridiculous.
14 It really is. It just has no bearing on you being
15 prepared for your client's default hearing that you
16 knew was going to be scheduled this week. That
17 you've known since 2014 was pending. It just
18 doesn't compute for me.

19 MR. MARSHALL: That's why I checked
20 with the clerk of court.

21 THE COURT: Well, the clerk of court is
22 not the Court. You knew, you were here, you were
23 present. We all had -- and I will go back and
24 listen to the transcript because I am certain that
25 Ms. Caroline said it would be scheduled for this

1 week.

2 And you've at least known since 2014
3 with Judge Nicholson this was scheduled. I will
4 give you additional time to get any documents you
5 think have bearing on this. I would suggest you
6 get with Mr. Smith to find out whether there are
7 some documents he can --

8 Do you have any tax documents that you
9 can provide to Mr. Marshall? He says now -- if I
10 read his -- his argument correctly or his statement
11 to the Court correctly, they have some bearing on
12 Mr. Bradham's valuation of the loss.

13 I have no reason to believe Mr. Bradham
14 has told this Court something that is not in those
15 tax documents.

16 MR. SMITH: That's correct.

17 THE COURT: And he was at a lengthy
18 deposition where I assume those documents were
19 provided and Mr. Bradham testified to them.

20 MR. SMITH: Mr. Marshall may be
21 confused, I will share with the Court --

22 THE COURT: If you could assist him, I
23 would appreciate that. And then if there are any
24 other documents, you have five days to supplement
25 the record with that. And my secretary will be in

1 touch to reschedule your client's testimony. Re --
2 yeah, schedule your client's testimony so he can be
3 heard on the issue of damages.

4 We'll coordinate everyone's schedule to
5 make sure that that's a convenient time for
6 everyone.

7 MR. MARSHALL: Judge, do I have the
8 Court's permission to put in any subpoenas that
9 this was by order of the Court? Is that what I
10 should do?

11 THE COURT: Subpoena rules are clear.
12 We don't issue subpoenas anymore, and I'm not
13 issuing any subpoenas. I'm not getting involved in
14 your preparation for trial, for a hearing on the
15 merits of your case.

16 MR. MARSHALL: I thought you said that
17 the period of time to comply with the subpoena is
18 ten days unless --

19 THE COURT: No. That deals with you
20 having complied with what you were supposed to do.
21 You said you didn't have enough time. I gave you a
22 timeline to get ready.

23 You should have already contacted these
24 people, but what I suggest you do is get with
25 Mr. Smith to see if he has the documents you need.

1 You could eliminate that part of the process
2 altogether. I would imagine everything you need he
3 has. You really should have already had it because
4 the gentleman has testified to it.

5 MR. SMITH: Right. We've asked for
6 documents.

7 THE COURT: He's already testified to
8 it in the deposition. They should be attachments
9 to the deposition, right?

10 MR. SMITH: All of those documents have
11 been provided. I'm happy to work with Mr. --

12 THE COURT: I would assume -- seems to
13 me a better course is for you to get to with
14 Mr. Smith and short-circuit having to deal with the
15 Department of Revenue about it and get the
16 documents you need.

17 Mr. Bradham -- based on that transcript
18 that I saw, that's an eight-inch transcript. I
19 would imagine that you-all thoroughly questioned
20 him about that and those documents are attachments
21 to that deposition. So you're aware of them; you
22 had them; you questioned him.

23 So I would suggest you get with to
24 Mr. Smith so he can provide you with copies that
25 you need.

1 MR. SMITH: Thank you, Your Honor.

2 THE COURT: Thank you all. Have a good
3 day.

4 (These proceedings were concluded at
5 12:23 p.m.)

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1 CERTIFICATE OF REPORTER

2
3 I, Carol Denise Lauder, Registered
4 Professional Reporter and Notary Public for the
5 State of South Carolina at Large, do hereby certify
6 that the foregoing transcript is a true, accurate,
7 and complete record.

8 I further certify that I am neither related
9 to nor counsel for any party to the cause pending
10 or interested in the events thereof.

11 Witness my hand, I have hereunto affixed my
12 official seal this 12th day of May, 2018 at
13 Charleston, Charleston County, South Carolina.

14
15
16
17
18 Carol Denise Lauder
19 Registered Professional
20 Reporter, CP
21 My Commission expires
22 February 27, 2028
23
24
25