THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No. 2018-000460

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

v.

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

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

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an appeal from Circuit Court Judge J.C. Nicholson's default order against Mr. Phillip DeClemente and from Circuit Court Judge Deadra L. Jefferson's order awarding damages in the amount of Eight Hundred Seventy-Five Thousand One Hundred Forty-Four Dollars ($875,144.00) (R. pp. 6-10; R. pp. 18-30).

The underlying lawsuit arose from a dispute among former business partners and one of their accountants, Hood & Selander, CPAS, LLC. Appellant DeClemente is the former manager and minority owner of Abacare Home Medical, Inc. ("Abacare"), a durable medical equipment ("DME") company which was located in Mt. Pleasant, South Carolina. He is also the former manager and 25% owner of Assistive Technology Medical Equipment Services, Inc. ("ATMES"), a DME company in Sumter, South Carolina.

On October 31, 2011 ATMES filed its Summons and Complaint in Charleston County Court of Common Pleas, wherein Respondent set forth nine (9) causes of action against defendants Hood & Selander, CPA, 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. (R. pp. 42-52). Respondent's Complaint alleges that ATMES entered into a stock purchase and stock option assignment agreement with Defendant Dorothy A. Connelly (the Seller) and Defendant DeClemente (the Assignor) on November 7, 2008 for the purchase of Abacare's common stock. (R. pp. 39-42). ATMES purchased all of Connelly's outstanding common stock for Eight Hundred Nine Thousand Five Hundred Dollars ($809,500.00). (R. p. 40). ATMES contends that the Defendants were aware that Abacare "significantly understated" its sales tax liability to the South Carolina Department of Revenue ("SCDOR") and failed to disclose to Abacare's purchasers, Jeff Reed

and Murrell Smith, Abacare's actual sales tax liability (R. p. 40). As a result of Defendants' alleged failure to disclose known tax liability, ATMES, on behalf of its owners Smith and Reed, alleges that it overpaid for Abacare's stock in the amount of Seven Hundred Seventy-Four Thousand Five Hundred Dollars ($774,500) (R. p. 393, lines 20-22).

Appellant DeClemente was served with the Summons and Complaint on January 6, 2012 (R. pp. 58-59). DeClemente was involuntarily hospitalized for psychiatric illness from February 2, 2012 until February 16, 2012 and hospitalized again for the illness between February 19, 2012 and March 6, 2012 (R. pp. 100-110; R. pp. 114-122). After his release from the hospital, DeClemente underwent intensive court-ordered outpatient care. Respondent filed an Affidavit of Default with the Charleston County Clerk of Court on March 30, 2012 (R. pp. 60-61). The Clerk of Court never made an entry of default. Appellant does not know the reason default was not entered, as required by SCRCP 55.

On May 9, 2012 Mr. DeClemente hired attorney Cameron Marshall to represent him in this litigation against ATMES. On May 14, 2012 attorney Marshall filed a Notice of Appearance with the Clerk of Court (R. p. 708). On June 8, 2012 DeClemente's counsel sent ATMES' co-owner and legal agent, Murrell Smith, a letter requesting that Plaintiff correct its default on promissory note payments owed to DeClemente in exchange for DeClemente having sold his 25% ownership of ATMES to Smith, Reed, and Cuce (R. p. 709). The sale contract requires that such letter be sent in case of ATMES' default (R. p. 87). On June 12, 2012 Mr. Smith responded to DeClemente's counsel with a letter acknowledging ATMES indebtedness to DeClemente, but stating that ATMES would not pay any balances owed to DeClemente because, "we have filed suit....and he is now in default....we are awaiting a damages hearing to be scheduled for the

Court to set the damages and we intend to set-off any amounts awarded by the Court" (R. pp. 84-85).

On August 10, 2012 DeClemente filed an Answer, Counterclaims, Cross Claims and a Motion for Enlargement of Time in Which to Answer pursuant to Rules 6 and 60(b) of the South Carolina Rules of Civil Procedure ("SCRCP") (R. pp. 62-63). Even though default was never entered against DeClemente, in an abundance of caution, the motion for time extension was amended to include a request for relief from entry of default pursuant to SCRCP 55(c).

The hearing on DeClemente's Motion to Enlarge Time to Answer was scheduled for September 22, 2012. Respondent's counsel, James E. Smith, requested and was granted a continuance. The next hearing date was set for January 7, 2013. On the morning of the scheduled hearing, attorney Smith requested, and was granted, another continuance. The hearing was then scheduled for March 13, 2013. On March 12, 2013 Respondent's counsel requested, and was granted, another continuance. The hearing was next rescheduled for April 12, 2013. On April 11, 2013 attorney Smith again requested a continuance, which was granted. The hearing was then rescheduled for July 16, 2013. On July 12, 2013 attorney Smith requested, and was granted, another continuance. The hearing was next rescheduled for September 3, 2013. On August 30, 2013 attorney Smith requested another continuance, which was granted. The hearing was then rescheduled for November 5, 2013. On November 1, 2013 Respondent's counsel made yet another motion for continuance. On November 4, 2013 DeClemente's attorney sent Judge Nicholson a letter, with copies to all attorneys of record, requesting that Judge Nicholson deny the motion for continuance because of the previous number of continuances and the hardships the delays were causing Mr. DeClemente (R. pp. 710-711). Judge Nicholson then proceeded to grant Plaintiff's eighth continuance request. The hearing was rescheduled for December 16,

2013. On November 5, 2013 DeClemente filed a Memorandum in Support for Enlargement of Time in Which to Answer (R. pp. 79-122).

On December 16, 2013 Judge Nicholson heard arguments on DeClemente's Motion to Extend Time to Answer under SCRCP 6 and 60. The motion was amended to include a request for relief from entry of default pursuant to SCRCP 55(c), despite the fact that default was never entered against Appellant (R. p. 213, lines 1-3). At the hearing, Appellant argued, inter alia:

1) DeClemente's answer asserts nine (9) meritorious defenses pursuant to the Full and Final Release which Reed and Smith executed as a part of the sale contract in which DeClemente conveyed his 25% ownership of ATMES, including; ATMES' lack of standing to sue DeClemente (R. pp. 68-70, 227, lines 11-20).
2) Because DeClemente knew he could not be legally sued by ATMES, Reed or Smith, he was surprised by the lawsuit and mistakenly believed he was unintentionally and inadvertently named as a defendant;
3) Due to involuntary hospitalization, court-ordered psychiatric treatment, and ongoing psychiatric illness DeClemente was unable to answer the Complaint in a timely manner and;
4) ATMES would not be prejudiced by allowing DeClemente to answer the Complaint and have the case resolved by jury trial.

Judge Nicholson took the motion under advisement and allowed the record to be supplemented. On December 30, 2013 DeClemente filed an affidavit supporting his request for Enlargement of Time to Answer (R. pp. 111-112).

On April 30, 2014 Judge Nicholson filed his order denying DeClemente's Motion to Extend Time and/or Relief from Default and held him in default (R. pp. 6-10). The court also

struck DeClemente's Answer and Counterclaims and denied entry of his Crossclaims. The court also denied DeClemente's Motion for Default Judgment against ATMES on the basis that ATMES had no obligation to respond to DeClemente's Counterclaims unless and until DeClemente is relieved from default and permitted to enter his Answer and Counterclaims. A damages hearing was to be set for the next term of Court.

DeClemente filed a Motion to Amend Judge Nicholson's April 24, 2014 Order (R. pp. 127-128). Judge Nicholson denied the Motion To Amend by Order filed May 7, 2014. On June 3, 2014 DeClemente filed an appeal with the Court of Appeals challenging Judge Nicholson's Order of Default (R. pp. 130-131). By Order filed November 13, 2014 the South Carolina Court of Appeals declined to consider DeClemente's appeal because the default order was not immediately appealable since the "circuit court has not yet made an award of damages." The Remittitur was issued on November 13, 2014 (R. pp. 11-13).

On September 19, 2016 ATMES filed a Motion for Hearing on Damages. The damages hearing was scheduled for October 31, 2016. On October 28, 2016 Appellant's counsel received notice from the Clerk of Court that the damages hearing was being rescheduled for November 1, 2016 because there was a related hearing scheduled for November 1st and consolidation would prevent the attorneys from going to court on consecutive days. DeClemente's presence was not needed for the November 1st hearing and he was ordered to return to Florida immediately after the October 31st damages hearing. The Clerk of Court's office informed attorney Marshall by phone that the damages hearing would not be held on November 1st because of time constraints caused by a full schedule of hearings on the 1st. When the case was called on November 1st, Appellant's counsel requested a continuance and explained the multiple reasons for the request (R. pp. 343-381). The court rudely and angrily denied the continuance request (R. pp 383-386).

The damages hearing then proceeded for several hours while all the litigants in the overflowing courtroom were made to wait.

At the time of the damages hearing DeClemente was on probation in Florida for an offense in South Carolina. A South Carolina circuit court order permitting travel was required each time DeClemente entered South Carolina. Appellant was prevented by law from attending the rescheduled damages hearing on November 1st because the order allowing him to travel to South Carolina to attend the hearing, filed by the Chief Administrative Judge on October 27, 2016, contained only the original hearing date of October 31, 2016.

At the damages hearing Respondent called its "expert" witness, Art Bradham, and Murrell Smith to testify. Over defense counsel's objection, the Court qualified Bradham as a Certified Valuation Analyst and Economic expert for purposes of rendering an opinion on damages (R. pp. 386-435). Defense counsel further objected to Bradham's testimony due to Bradham's glaring conflict of interest, as DeClemente is Bradham's former client. Bradham testified that ATMES showed a loss of over $900,000.00 on its tax returns, allegedly as a result of ATMES paying a $100,000 sales tax liability incurred by its subsidiary, Abacare (R. pp. 426, 431-432). Bradham testified that Respondent's damages were the result of DeClemente's fraudulent, conspiratorial conduct.

When the damages hearing began on November 1, 2016 DeClemente was the only remaining defendant. Defendant Kimberly Cuce has not answered nor appeared in this lawsuit, despite being served with the Summons and Complaint on February 21, 2012. ATMES has not sought a default judgment against Cuce or otherwise pursued its claims against her. The causes of action against DeClemente at the damages hearing were fraud, negligence, negligent misrepresentation, promissory estoppel, and civil conspiracy.

On December 28, 2016 ATMES filed a motion to quash in response to DeClemente's subpoena ordering Bradham to produce documents relevant to damages. DeClemente filed a motion to compel subpoena compliance on December 29, 2016 but Judge Jefferson failed to rule on the motion despite DeClemente's counsel again raising the issue at the damages hearing.

The damages hearing was reconvened on January 5, 2017. ATMES' counsel, James Smith, was present at the hearing. DeClemente and his counsel, Cameron Marshall, were also present. At the outset of the hearing, DeClemente's counsel again objected to moving forward with the damages hearing on the basis that ATMES' counsel was preventing DeClemente from obtaining from Art Bradham subpoenaed documents crucial to an accurate damages determination (R. pp. 467-469). In response, ATMES counsel notified the Court of its pending Motion to Quash the Subpoena and for Protective Order, filed December 28, 2016. The motion asks the Court to quash DeClemente's subpoena to Art Bradham seeking documents extremely relevant to damages. Appellant filed a Motion to Compel Subpoena Compliance on December 29, 2016. At the damages hearing Judge Jefferson failed to rule upon DeClemente's Motion to Compel. During the damages hearing DeClemente testified that, in the event of a damages award, the South Carolina Uniform Contribution Among Tortfeasors Act entitles him to a credit or "set off" for any settlement amounts ATMES received from Appellant's co-defendants.

On January 24, 2017 DeClemente filed a supplemental Motion to Consider Evidence of Damages, Adopt Proposed Order, and Reconvene Damages Hearing (R. pp. 15-17). In this motion, Appellant asks the Court to reconvene the damages hearing, determine settlement amounts paid by co-defendants and adopt his proposed damages order. On July 27, 2017 the Court conducted a hearing with attorneys Marshall and Smith by telephone to address

Appellant's January 24, 2017 motions. The Court denied Appellant's motions on July 27, 2017 (R. pp. 15-17).

On August 23, 2017 DeClemente filed an expert affidavit from Ronald H. Burkett, CPA, CVA (R. pp. 156-159). The parties deposed Mr. Burkett on September 14, 2017. The Court was provided with a copy of the deposition transcript on October 11, 2017. Mr. Burkett prepared the confidential draft valuation of Abacare's common stock on or about July 14, 2008 (R. pp. 568-625). At his deposition, Mr. Burkett was asked to give his opinion on whether or not ATMES was damaged by the Abacare stock purchase and assignment agreement it entered into with Connelly and DeClemente. Mr. Burkett testified that since ATMES and its owners Smith and Reed and their CPA Bradham had, or should have had, knowledge that there was a potential sales tax issue with Abacare at the time of purchase, as there was with all South Carolina DME companies at that time, then ATMES paid fair market value for Abacare and suffered no damage (R. pp. 556-557, 560-567).

On December 20, 2017 Judge Jefferson issued her Order awarding ATMES actual damages of Eight Hundred Seventy-Five Thousand One Hundred Forty-Four dollars ($875,144.00). This is the exact amount of damages Bradham claimed ATMES suffered (R. p. 483). January 8, 2018 DeClemente filed a Motion to Amend Judgment and Be Relieved from Judgment (R. pp. 160-161). Pursuant to SCRCP 59, DeClemente's motion requests that the Court's Order be amended to reflect that the damage award has been satisfied by the "Full and Final Release." Pertaining to satisfaction of judgment, the Full and Final Release states in pertinent part,

> "...release, acquit and forever discharge Phillip L. DeClemente... 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 accounts 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..." (R. pp. 96-98).

DeClemente's motion also asserts that he is entitled to relief because the complaint was brought with fraudulent misconduct and the judgment is void. On January 26, 2018 Judge Jefferson filed an Order denying DeClemente's Motion to Amend Judgment (R. pp. 31-34). Appellant served Respondent with Notice of Appeal on March 2, 2018 (R. pp. 162-163).

STATEMENT OF FACTS

In November 2008 DeClemente, Cuce, Reed and Smith decided to become partners and purchase all of Abacare's outstanding stock shares from the Estate of Dorothy Connelly. Prior to purchasing Abacare, DeClemente, Cuce, Reed and Smith formed ATMES, a DME company located in Sumter, South Carolina. ATMES was registered with the South Carolina Secretary of State on November 5, 2008. As part of the Abacare purchase, DeClemente assigned all of his financial interest in Abacare, in the form of stock purchase options, to ATMES. Reliable Medical Equipment Services, Inc. ("Reliable") is a South Carolina DME company owned at that time by Murrell Smith, Reed and Cuce. Abacare and Reliable joined forces and merged into ATMES in November 2008. Mr. DeClemente, Mr. Reed, Mr. Smith, and Ms. Cuce then each became twenty-five percent (25%) owners of ATMES, the parent company of Abacare and Reliable.

Mr. DeClemente had disagreements with Mr. Smith and Mr. Reed over management of ATMES and its subsidiaries, Abacare and Reliable. On June 30, 2009 DeClemente sold his twenty-five percent ownership in ATMES to Smith and Reed for $330,382.59 plus a $30,000 compliance bonus, totaling $360,382.59 owed to Mr. DeClemente (R. pp. 86-90; 632-636). The

sale contract contains a mutual Full and Final Release, in which ATMES', Reed, Smith, and DeClemente agree never to sue one another for any reason whatsoever, known or unknown, related to the signatories' business relationship (R. pp. 96-98). Murrell Smith required the Full and Final Release as part of the sale contract and he wrote the document.

Between 2006 and 2009 there was an issue in South Carolina concerning whether or not many DME products were exempt from sales taxes. The Administrative Law Court issued a ruling in August of 2007 in favor of exemption (R. pp. 167, 172, 177-178). SCDOR appealed the Administrative Law Court's ruling. The South Carolina Supreme Court reversed the decision in April of 2009. *Home Medical Systems, Inc. v. South Carolina Department of Revenue*, 677 S.E. 2d 582 (2009). As a result of the Supreme Court's decision, SCDOR audited many South Carolina DME companies. Some of the audited DME companies, including Smith and Reed's Reliable Inc., had been party to a class action lawsuit against SCDOR in which the Plaintiffs alleged sales tax overpayments and sought refunds. DeClemente, Abacare's managing partner at the time *Home Medical Systems v. SCDOR* was filed, declined to have Abacare join the class action because he was unconvinced by the argument that SCDOR owed the Plaintiffs refunds. SCDOR's audit of Smith and Reed's DME Co., Reliable, resulted in Reliable owing SCDOR over $250,000 in unpaid sales tax for the time period prior to ATMES' formation and Reliable's merger with Abacare (R. pp. 637-685).

ATMES' CPA Art Bradham then conducted a self-audit on Abacare for the years 2007-2009 and believed that Abacare owed sales tax because of the Supreme Court's *Home Medical Systems* decision, *supra* (R. pp. 686-701). The audit was conducted 18 months after DeClemente sold his ownership in ATMES and approximately 23 months after the Supreme Court's *Home Medical* decision.

Abacare had no outstanding sales tax liability prior to the Supreme Court's *Home Medical* decision. That ruling made sales taxes applicable to many more products. The Abacare tax liability found in the self-audit accrued partially during a time period when Connelly and DeClemente owned Abacare and partially during a time period when ATMES owned Abacare (R. pp. 686-701). Prior to ATMES purchasing Abacare, Abacare always lawfully paid all sales tax owed and was fully compliant with South Carolina tax law as interpreted by the Administrative Law Court in the *Home Medical* decision. A portion of the sales tax liability SCDOR assessed against Abacare was for the year 2010, well after DeClemente had sold his 25% ownership in ATMES.

On October 31, 2011 ATMES filed this lawsuit, 2011-CP-10-08011, in Charleston County Court of Common Pleas (R. pp. 35-57). The Complaint alleges Mr. DeClemente and the other Defendants acted fraudulently and misled purchasers Smith and Reed about Abacare's value by failing to disclose to them Abacare's true sales tax liability owed to the South Carolina Department of Revenue. As evidence alleged to support their false allegations ATMES, through its owners Smith and Reed, relied upon the "expert" testimony of CPA Art Bradham. Mr. Bradham testified at his deposition, and stated by affidavit, that he believes Mr. DeClemente and the other Defendants fraudulently inflated Abacare's value by failing to disclose to Smith, Reed, and their CPA, Bradham himself, Abacare's potential sales tax liability (R. pp. 186, 191). The extent of Mr. Bradham's due diligence while investigating Abacare's value on behalf of his clients Smith and Reed consisted only of reviewing a confidential draft of an Abacare valuation report created by a different CPA firm for the exclusive use of Mrs. Connelly and Mr. DeClemente (R. pp. 568-625). Mr. Bradham testified that he does not know how he came into

possession of the confidential document but admits that it was clearly stamped "confidential" and that he knew he was not the intended recipient (R. pp. 193-194, 197-198, 200-203, 208).

Mr. Bradham falsely testified during his October 18, 2013 deposition, during which he purported to be an expert witness in the case, that he had no role in the audit of Abacare. In fact, however, Bradham was involved in the audit, which resulted in a finding that Abacare, Reliable, and the parent company, ATMES, had all underpaid sales taxes because of the retrospective provisions of the *Home Medical* ruling (R. pp. 187-188, 189-190, 192, 686-701). Mr. Bradham's "expert" testimony against Mr. DeClemente constitutes a conflict of interest and professional negligence, as Mr. Bradham is Mr. DeClemente's former CPA. In violation of the American Institute of Certified Public Accountants ("AICPA") Code of Professional Conduct, Bradham testified as an expert witness against his former client, DeClemente. Bradham's testimony was false, damaging to Mr. DeClemente and in violation of the AICPA's Code of Professional Conduct, Rules 1.100 and 1.200 (AICPA Code of Professional Conduct, R. 1.100.011, R. 1.110.012(a), R. 1.200.11, R. 1.210.010).

Contrary to Respondent's claims, Mr. Bradham, Mr. Smith and Mr. Reed were each quite aware of the accounting and sales tax reporting practices Abacare employed prior to Smith and Reed purchasing Abacare. Smith, Reed, and their CPA, Bradham, used similar accounting and sales tax reporting practices during Smith and Reed's nine-year ownership of Reliable. (R. pp. 171, 179-178). As a result of these practices, which were common and completely legal at the time utilized, Reliable, Abacare, and ATMES owed SCDOR past sales taxes only after the Supreme Court's reversal in *Home Medical* (R. p. 190). These past sales taxes were assessed against Reliable for the same reasons they were assessed against Abacare for the time period before ATMES purchased Abacare. (R. pp. 199, 203-207).

ATMES and its owners, Jeff Reed and Murrell Smith, violated their mutual Full and Final Release with Mr. DeClemente by filing this lawsuit. Respondent had no legal standing to sue Mr. DeClemente and the resulting default judgment is void.

When Judge Nicholson issued his default order, he erroneously ruled that DeClemente was served with the Summons and Complaint on December 1, 2012. While true that Plaintiff mailed the Summons and Complaint to 2353 Highway 17 North, Mt. Pleasant, SC, it is not true that DeClemente received the documents. (R. p. 58). Mr. DeClemente was living in North Carolina during this time and did not return to South Carolina until January 2012. Respondent was aware that Mr. DeClemente had been living in North Carolina because Murrell Smith and Jeff Reed had been sending DeClemente's promissory note payments to his North Carolina address. Mr. DeClemente was not served until a Private Investigator personally served him on January 6, 2012.

On April 24, 2014 twenty-one months after DeClemente filed his Answer, Judge Nicholson found the Answer untimely, ordered DeClemente in default, struck his Answer and Counterclaims, and denied entry of his Cross-claims (R. pp. 6-10). That ruling was initially appealed on June 3, 2014 but the Court of Appeals found the appeal premature because no damages had yet been awarded against Mr. DeClemente (R. pp. 130, 11-13).

STANDARD OF REVIEW

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial court. *Roberson v. S. Fin. of S.C., Inc.*, 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005); *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381, S.E.2d 499, 502 (Ct. App. 1989). This decision will not be reversed absent an abuse of that discretion. *Thompson v. Hammond*, 299 S.C. 116, 119, 382 S.E.2d 900, 902-903 (1989); *In Re Estate of*

Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997). An abuse of discretion occurs when the order was controlled by an error of law or when the order is without evidentiary support. *Id.*

Questions of law are reviewable de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (S. Ct. 1988). Since the issue at bar is one of an error of law, the court will review this error using the de novo standard. *See, American Prairie Construction Co. v. Hoich*, 594 F.3d 1015 (8th Cir. 2010) (Stating that "The existence of a valid contract is a question of law, subject to de novo review").

ARGUMENT

I. The trial court erred as a matter of law by failing to dismiss ATMES' complaint because ATMES and DeClemente are parties to a mutual Full and Final Release of all potential claims related to ATMES.

ATMES' lawsuit against DeClemente is frivolous and requires dismissal because the Full and Final Release prohibits Respondent's action (R. pp. 96-98). The mutual Full and Final Release forever completely shields Mr. DeClemente from "any and all claims, actions, causes of action, demands, rights, damages, cost, loss of services, expenses and compensation" in any way related to his involvement with ATMES. Respondent's lawsuit alleges DeClemente committed multiple torts when he, and his equal partners, Reed, Smith and Cuce, as owners of ATMES, purchased Abacare from Mrs. Connelly's estate and DeClemente assigned his Abacare stock options to his new company, ATMES. The transaction Respondent incorrectly claims was fraudulent involves DeClemente's actions while an ATMES owner and is barred by the Full and Final Release.

Respondent named DeClemente in its Complaint because he refused to sign a false affidavit in opposition to his eventual co-defendants (R. pp. 702-703). Because DeClemente refused to sign the affidavit, ATMES named him as a co-defendant in an effort to force him into compliance with their fraudulent demand (R. p. 704). The frivolous complaint against Mr.

DeClemente was filed in spite of the unambiguous language in the Full and Final Release and was intended merely to harass Appellant and coerce him into signing a false affidavit.

The Full and Final Release states "WHEREAS, during the period in which all members **operated under ATMES**..." (R. pp. 96-98) (*emphasis added*). In arguing that its lawsuit is not frivolous, Respondents will likely argue that the Full and Final release prevents suit only for actions Mr. DeClemente took, or failed to take, while he was an owner of ATMES. Therefore, Respondent will likely allege, the Full and Final Release does not shield DeClemente at the time he assigned his shares of Abacare to ATMES. This argument is incorrect.

On November 7, 2008 ATMES' four owners, Smith, DeClemente, Reed, and Cuce executed a Stock Purchase and Assignment Agreement in order to acquire 100% ownership of Abacare. Each of ATMES' four owners signed as purchasers (R. pp. 626-631). DeClemente's signature as a purchaser in the Stock Purchase and Assignment Agreement proves that he purchased Abacare while an owner and manager of ATMES. Respondent's lawsuit against DeClemente obviously, brazenly and egregiously violates the Full and Final Release and is plainly frivolous.

A release is "the relinquishment, concession or giving up of a right or claim by the person in whom the right exists to the person against whom it might have been enforced." *Hyman v. Ford Motor Co.*, 142 F.Supp.2d 735 (D.S.C. 2001) (applying South Carolina law, contract principles invoked to determine validity of a release); *Lowery v. Callahan*, 210 S.C. 300, 300, 42 S.E.2d 457, 458 (1947) (noting that the "same principles of adequacy of consideration which apply to other contracts, govern as to releases"); 18 S.C. Jur. §2 *Releases* (2018) ("Because a release is a contract, principles of law applicable to contracts generally are also applicable to releases.") "In construing terms in contracts, this Court must first look at the language of the

contract to determine the intentions of the parties." *C.A.N. Enterprises, Inc. v. South Carolina Health & Human Services Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). A contract is ambiguous only when it may fairly and reasonably be understood in more ways than one. *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975). Where the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect. *Blakeley v. Rabon*, 266 S.C. 68, 72, 221 S.E.2d 767, 769 (1976).

Because the Full and Final Release in the case at bar unambiguously sets forth the contracting parties' intent, the court is bound by that clearly expressed intent and the voluminous body of contract law which prohibits Respondent's suit.

II. The trial court abused its discretion by failing to set aside default when there was abundant good cause to do so.

Though the clerk of court never entered default in this case, during a hearing on December 16, 2013 the trial court properly amended Appellant's motion to set aside default to include SCRCP 55(c), as well as SCRCP 6 and 60 (R. p. 213, lines 1-3; pp. 249, 62). In determining whether entry of default should be set aside under Rule 55(c), the court, exercising a broader, more liberal discretion than it otherwise would under Rule 60(b), considers the following factors: (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.*, 298 S.C. 462, 464, 381 S.E.2d 499, 501 (Ct. App. 1989). The circuit court erred in its analysis of these factors and abused its discretion by not setting aside default under SCRCP 55(c).

SCRCP 55 and Federal Rule of Civil Procedure 55 approaches to default are the same. The Fourth Circuit Court of Appeals applies Rule 55(c) as follows: "This court has long adhered

to a strong policy disfavoring default judgments in favor of trials on the merits, frequently reminding the district courts that "Federal Rule of Civil Procedure 55(c) must be 'liberally construed in order to provide relief from the onerous consequences of defaults and default judgments.'" *Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951, 954 (4th Cir. 1987) *quoting Tolson v. Hodge*, 411 F.2d 123, 130 (4th Cir. 1969). Consequentially, "an abuse of discretion in refusing to set aside a default . . . need not be glaring to justify reversal," *Lolatchy*, 816 F.2d at 954, and "[a]ny doubts about whether relief should be granted should be resolved in favor of setting aside the default." *Tolson*, 411 F.2d at 130.

The criteria for obtaining relief from judgment under Rule 60(b) - mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other adverse party misconduct are also relevant in determining whether good cause has been shown under Rule 55(c). However, appellate courts caution trial courts that the language invites application of a heightened standard to Rule 55(c) motions. The Rule 60(b) factors are indeed relevant to a Rule 55(c) analysis, but only insomuch as proof of just one of these factors is sufficient to show good cause and require relief from default. No trial court should ever find good cause lacking based solely on the absence of a Rule 60(b) factor. *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 607-08, 681 S.E.2d 885, 888-89 (2009).

A. Default should be set aside because the delay in answering was unintentional and not unreasonable.

Excusable neglect depends on the court's interpretation of the facts and varies from case to case. 24 Am. Jur. 2d *Proof of Facts* §2 (1980). Excusable neglect can occur through defense counsel's failure to file or appear in an action. 24 Am. Jur. 2d *Proof of Facts* §4 (1980). To set aside default, it must be established that a party's act or failure to act was due to a mistake or accident rather than being intentional. 24 Am. Jur. 2d *Proof of Facts* §3 (1980). In these

situations, the courts tend to look at each case individually to determine if the attorney's acts should be imputed to the client and, if so, whether the actions were excusable under the circumstances. 24 Am. Jur. 2d *Proof of Facts* §4 (1980).

On January 6, 2012 Mr. DeClemente was served with the Summons and Complaint (R. p. 58). Appellant was involuntarily hospitalized from February 2, 2012 to February 16, 2012, making him unable to answer in a timely manner. (R. pp. 100-105). He was then re-hospitalized from February 19, 2012 until March 6, 2012, furthering his inability to respond (R. pp. 106-110, 120-122). During this time, DeClemente's father, Richard Rochford, secured general power of attorney for DeClemente because his son was unable to manage his own affairs (R. pp. 111-112). Mr. Rochford retained power of attorney for his son for well over a year.

After Mr. DeClemente was released from the psychiatric hospital March 6, 2012 he enrolled in 60-day court ordered intensive outpatient treatment. During both hospitalizations and the outpatient treatment, Appellant was continuously evaluated and diagnosed as bipolar schizophrenic with severe mental instability (R. pp. 120-122). Appellant lacked mental insight and judgment. Through administration of multiple antipsychotic medications prescribed for treatment of paranoid and psychotic behavior, including Risperdal, Lithium, and Thorazine, DeClemente's mental capacity slowly returned (R. pp. 120-122).

After Mr. DeClemente finished treatment and was discharged from care in May 2012, he hired attorney Cameron Marshall, on May 9, 2012, to represent him in this litigation. A letter of representation was filed with the court on May 14, 2012 (R. p. 708). Mr. Marshall immediately began gathering needed documents, trying to obtain medical records, conducting research and communicating with the involved attorneys. There was unavoidable delay in filing a formal motion for enlargement of time to answer, in part because medical providers unreasonably

delayed providing relevant records. The requested medical records were not received by DeClemente's counsel until September 26, 2012. On August 10, 2012, in an effort to avoid further litigation delay, DeClemente's counsel filed a Motion for Enlargement of Time in Which to Answer along with his client's Answer, Counterclaims, and Cross-Claims (R. 62). In contrast to the eight consecutive continuance motions Respondent was granted during a 14-month period of time, DeClemente's Motion for Enlargement of Time was denied by Judge Nicholson, twenty-one months after it was filed (R. pp. 6-10).

In *Allison v. Eco Tech/Ram-Q Indus., Inc.*, excusable neglect occurred, and the court found that a less drastic sanction than default should have been considered. *Allison v. Eco Tech/Ram-Q Indus., Inc.*, 993 F.2d 1535, 1993 WL 177804 at *2 (4th Cir. 1993). In reviewing the trial court for abuse of discretion, the appellate court held that although the decision whether to set aside default is one committed to the sound discretion of the district court, "an abuse of discretion in refusing to set aside a default judgment 'need not be glaring to justify reversal'" *Id.* at *1; *quoting*, *Jackson v. Beech*, 363 F.2d 831, 835 (D.C. Cir. 1980).

The trial court abused its discretion by ordering default against Mr. DeClemente. Appellant's mental health was not significantly restored until May of 2012. The trial court acknowledges that good cause for delay existed until Appellant obtained representation on May 9th (R. pp. 6-10). On May 14, 2012 counsel filed notice of his representation and informed the court and other counsel that he would be defending against any default issues which might arise, as there had been no entry of default. The case was complex, with five defendants and numerous counterclaims and crossclaims. Counsel was required to obtain and understand medical records and voluminous business records. The Clerk of Court never did enter default against Mr.

DeClemente. Had default been entered, counsel would have promptly filed a formal motion for relief under SCRCP 55(c).

These unique circumstances, in conjunction with Mr. DeClemente's serious ongoing mental illness, constitute good cause to set aside default. If these circumstances don't constitute "good cause" to set aside default, then it is unclear that any facts ever could.

B. Default should be set aside because Appellant has meritorious defenses, including a Full and Final Release barring Respondent's lawsuit.

The existence of a meritorious defense is relevant to setting aside default under both Rule 55(c) and 60(b). Mr. DeClemente asserts nine meritorious defenses in his Answer including: (1) The Full and Final Release bars ATMES' lawsuit; (2) Plaintiff knew or should have known of any tax liability complained of and therefore is barred from recovery; (3) 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; (4) portions of the Purchase Agreement bar Plaintiff from recovery; (5) as party to a purchase contract with Mr. DeClemente, any tort claims brought against DeClemente should be dismissed pursuant to the Economic Loss Doctrine; (6) the Complaint fails to state a cause of action upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6), SCRCP; (7) Plaintiff is barred from recovery by the law of comparative negligence; (8) if Plaintiff suffered any damages, which is denied, the damages were proximately caused by the actions of some other party or by circumstances beyond Mr. DeClemente's control; and (9) Plaintiff is barred from recovering for a wrongful act while simultaneously recovering for conspiracy to commit the wrongful act. (R. pp. 68-70).

On July 10, 2009 Respondent executed a Full and Final Release of Appellant which provides, in relevant part:

> . . . 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 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 accounts 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 document 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 (R. p. 96).

ATMES' owners, Smith, Reed, DeClemente, and Cuce executed this mutual Full and Final Release on July 10, 2009. At that time, Smith, Reed, Cuce, and DeClemente each owned 25% of ATMES. DeClemente entered into a contract to sell his 25% interest in ATMES to Smith and Reed. Along with the Contract of Sale Agreement, the parties executed the Full and Final Release, in which each party agreed not to sue the others. This Full and Final Release was legally executed and is fully enforceable. It protects DeClemente from any and all potential business-related liability to ATMES, Smith and Reed, whether past, present, or future. A release also discharges the party to whom it is given from all liability for contribution to any other potential tortfeasor (S.C. Code Ann. §15-38-50).

Releases are enforceable unless in contravention of public policy or the law. *Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC,*, 374 S.C. 483, 493, 649 S.E.2d 494, 499 (Ct. App. 2007). Releases are governed by the same adequacy of consideration principles which govern other contracts. *Hyman v. Ford Motor Co.*, 142 F.Supp.2d 735, 743 (D.S.C. 2001). If consideration is bargained for and given in exchange for the promise, the promise is not gratuitous." Restatement (Second) of Contracts §71(4) (Am. Law Inst. 1981). Mr. DeClemente gave valuable consideration, 25% ownership in ATMES and a Full and Final Release, in exchange for promises to be paid money and not be sued by ATMES or its owners (R. pp. 91-95). The Full and Final Release is enforceable and guarantees that ATMES, Smith, and Reed will never sue Mr. DeClemente for any reason in any way related to his involvement with ATMES.

The Full and Final Release alone, without analysis of the other eight defenses, constitutes not just a meritorious defense, but an absolute defense to Respondent's frivolous lawsuit. Opposing counsel concedes on the record that the Release is a meritorious defense, and the trial court's refusal to set aside default is an abuse of discretion (R. p. 240). The following exchange proves a meritorious defense, and exhibits the court's abuse of discretion in failing to set aside default under SCRCP 55(c):

> THE COURT: But don't you think that would be meritorious, at least from his perspective? That's a pretty good argument saying, Hey, I've got a contract that you can't sue me. I understand that you may have an argument against that, but doesn't that make it meritorious?
> MR. SMITH: It's an argument.
> THE COURT: I'm not saying it's correct.
> MR SMITH: It's an argument. It may be one prong of -- of --
> THE COURT: Well, I guess a better question is, does –
> isn't that a meritorious argument on his behalf?
> **MR. SMITH: I will concede that.**
> **THE COURT: Okay.**
> **MR. SMITH: I will concede that that --** but I think that, in terms of that low threshold, under Rule 55, which was not brought until

today, yes, that is -- that would be considered – (R. p. 240, Lines 6-23).

Because Appellant has a meritorious, absolute defense, the trial court erred in failing to set aside default and in failing to dismiss Respondent's frivolous lawsuit.

C. Default should be set aside because allowing the case to be decided on the merits would not prejudice Plaintiff.

A petitioner seeking relief from default must show that his failure to timely answer did not injure the opposing party. *Melton v. Olenik*, 379 S.C. 45, 56, 664 S.E.2d 487, 493 (Ct. App. 2008). ATMES has attempted to falsely claim that the timing of Mr. DeClemente's answer has caused prejudice. It is well-established law that delay, itself is not prejudice. *See, e.g., Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.3d 808, 812 (4th Cir. 1988); *Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951, 952-53 (4th Cir. 1987). When the issue of prejudice was raised at the motion hearing on December 16, 2013 Respondent's counsel could not articulate any prejudice caused by the timing of Mr. DeClemente's Answer. Nonetheless, Mr. Smith attempted to assert prejudice as follows:

> THE COURT: How would you be prejudiced? I mean, other than you're going to have to address his defenses. I mean, how is it going to affect the - - how is the litigation going to be prejudiced, because I think that's what you've got to look at?
> MR. SMITH: Well, it is. But, I mean, we would have done things differently had he been - - had he shown up and appeared timely, which is the whole point of the prejudice, your Honor. If he had done what his obligations are under the Rule, this past two years of litigating this case would have been done very differently; with the decisions we made, the course of conduct that we made, and how we proposed to pursue the matter, would have been very different had he been a participating party.
>
> ...
>
> MR. MARSHALL: ... Judge, the fact that my client was sued in violation of a contract is certainly relevant. It goes to the meritorious defense. And when you - - interestingly, when you question Mr. Smith about specifically what prejudice is your client

> suffering here, he couldn't answer that question directly. He just said: Well, we would have done some things differently. But there was no specific answer to that question. So there's been no showing of prejudice. The prejudice has been to my client because his clients owe my client in excess of $150,000. There's no question about it. We've - - they've admitted it. We've filed for summary judgment on that issue. It didn't get scheduled for today, but I guess it will be scheduled soon. So all of the prejudice is to my client, Judge, not to his side (R. p. 243, lines 2-16, p. 248, line 10-249, line 1).

The *Lolatchy* Court addressed prejudice, and held that a nearly three-month delay was no more prejudicial than any similar delay, and does not establish prejudice. 816 F.2d at 953; *See also, Allison v. Eco Tech/ RAM-Q Indus., Inc.*, 993 F.2d 1535, 1993 WL 177804, at *2 (4th Cir. May 26, 1993) (finding refusal to set aside default entered as sanction to be an abuse of discretion where delay continued for "only a few months"). Allowing trial of the case at bar would not prejudice Respondent. The trial court's default order against DeClemente is a clear abuse of discretion.

STANDARD OF REVIEW

In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. *American Federal Bank, FSB v. Number One Joint Venture*, 321 S.C. 169, 467, S.E.2d 439, 441 (1996).

III. The trial court erred by ordering Appellant to pay damages, by failing to allow his presence during important stages of the damages hearing, by allowing Respondent's CPA to testify as an expert against his former client, and by failing to order the judgment satisfied.

A. Appellant was denied the right to be present and confer with his attorney during important stages of the damages hearing.

On October 21, 2016 Appellant's counsel submitted a proposed order allowing Mr. DeClemente, who was on probation in Florida at the time, to travel to South Carolina for the damages hearing scheduled for October 31, 2016. The order was filed on October 27, 2016 (R. p. 15). The day after the order was filed, the clerk of court notified DeClemente's attorney that the damages hearing had been rescheduled for November 1, 2016. Without a travel order, DeClemente was legally prohibited from attending the November 1st damages hearing. At the hearing on November 1, 2016 DeClemente's counsel informed the court that his client's presence was necessary, and moved for a continuance. The court denied the motion (R. pp. 352-357). Counsel also informed the court of other reasons a continuance was needed and proper. The court's denial of the motion severely restricted defense counsel's ability to conduct informed, thorough and effective cross-examinations of Respondent's witnesses. The court abused its discretion and committed error in refusing to continue the damages hearing.

A defending party's presence at a damages hearing gives the judge and/or jury a broader understanding of the amount which should be awarded, and tends to insure a more fair damages award. *Renney v. Dobbs House Inc.,* 75 S.C. 562, 567, 274 S.E.2d 290, 292 (1981). When the defaulting party is not given an opportunity to participate in the damages hearing, the trial and appellate courts should closely scrutinize the award to prevent hard, unwarranted results. *Id.* at 568.

Proper procedure was not followed in the damages hearing. Mr. DeClemente's presence was not allowed during Art Bradham and Murrell Smith's testimony. Mr. DeClemente was not able to confer with his attorney to assist counsel in the cross-examination of Plaintiff's witnesses, including its "expert," Art Bradham. Mr. DeClemente's absence from the damages hearing was

extremely prejudicial because the business, financial and tax issues involved are specialized, complicated and detailed. In addition to counsel being unprepared because the Clerk of Court's office informed him that the damages hearing was being continued, Appellant was further harmed by the court's denial of counsel's ability to consult with his extremely knowledgeable and prepared client. Mr. DeClemente asked to be present for the hearing and counsel properly secured the necessary travel order. The court committed harmful error by refusing to continue the hearing date.

B. The plain and unambiguous terms of the Full and Final Release require Respondent to satisfy the judgment against Appellant.

A release is a specific type of contract governed by the same principles of interpretation as other contracts. *See, Bowers v. S.C. Dep't of Transp.*, 360 S.C. 149, 153-54, 600 S.E.2d 543, 545 (Ct. App. 2004). "In construing [a] release, the court must seek to ascertain and give effect to the intention of the parties." *Wilson Group, Inc. v. Quorum Health Res., Inc.*, 880 F. Supp. 416, 425 (D.S.C. 1995). The scope of a release is therefore controlled by the intention of the parties, as revealed in the language and terms of the release See, *S. Glass & Plastics v. Duke*, 367 S.C. 421, 428, 626 S.E.2d 19, 22 (Ct. App. 2005) ("A release is a contract, and the scope of a release is gathered by its terms.") South Carolina courts have a strong policy of enforcing settlements and releases to avoid costly litigation and to fulfill the settling parties' intentions. *See, Poston by Poston v. Barnes*, 294 S.C. 261, 264, 363, S.E.2d 888,890 (1987) ("We are cognizant that litigants are free to devise a settlement agreement in any manner that does not contravene public policy or the law. In fact, this Court encourages such compromise agreements because they avoid costly litigation and delay to an injured party.")

Addressing the principles of contract construction and enforcement, the South Carolina Court of Appeals states, "[t]o discover the intention of a contract, the court must first look to its

language - if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect." *M & M Group, Inc. v. Holmes,* 379 S.C. 468, 666 S.E.2d 262, 266 (Ct. App. 2008). "[W]hen a contract is clear and unambiguous, the construction of the contract is a question of law for the court." *Id.*, S.C. at 477, 666 S.E.2d at 266 (citations omitted). Whether a release is unambiguous is a matter of law for the court to decide. *Wilson Group, Inc.,* 880 F. Supp. at 416, 425 (D.S.C. 1995) citing, *Campbell v. Bi-Lo, Inc.,* 301 S.C. 448, 392 S.E.2d 477 (Ct. App. 1990).

The mutual Full and Final Release the parties entered unambiguously prohibits Respondent's lawsuit against Mr. DeClemente. The scope of the release is broad, and all parties with ownership interest in ATMES freely agreed to and signed it. The Full and Final Release states:

> "...the 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... 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..." (R. p. 96).

This language is clear and concise regarding the parties' intent. In *Bowers v. S.C. Dept. of Trans.*, the court wrote: "Since the release unambiguously sets forth the contracting parties' intent, we are bound by that clearly expressed intent without resort to extrinsic evidence." *Id.*, 360 S.C. 149, 600 S.E.2d 543 (Ct. App. 2004). When analyzing a release's effect, courts are guided and constrained by the instrument's plain, unambiguous language. Respondent's claims against Mr. DeClemente are squarely within the scope of the Full and Final Release, bargained for and executed by the parties. Respondent's fraudulent lawsuit against Appellant is barred as a

matter of law. The trial court's failure to adhere to even the most basic legal principles requires this Court's correction.

C. The trial court erred in allowing Respondent's, Smith's and Reed's personal CPA to testify as an expert witness against his former client, Appellant.

The American Institute of Certified Public Accountants (AICPA) holds its members to high standards by enforcing the Code of Professional Conduct. Much of the Code concerns maintaining an acceptable standard of independence in performance of professional services. Rule 1.210.010 provides that performance at an acceptable level is free from relationships or circumstances which could impair independence. Safeguards are in place to eliminate such threats and avoid violation of the Independence Rule. (Rule 1.200.011, AICPA Code of Professional Conduct). Equally important is the maintenance of Integrity and Objectivity in the performance of professional services. This requires members to be free of conflicts of interest or the subordination of his or her judgment to others. (Rule 1.100.011, AICPA Code of Professional Conduct). A threat of conflict of interest may arise when a member "provides service related to a particular matter involving two or more clients whose interest with respect to the matter are in conflict." Rule 1.110.012.(a), AICPA Code of Professional Conduct.

A conflict of interest may arise when there is a breach of a fiduciary duty. The court in *O'Shea v. Lesser* stated that "[a] fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Id.*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992). Additionally, fiduciary duties owed to clients extend past the date of employment or representation. *See*, *Spence v. Wingate*, 395 S.C. 148, 160-62, 716 S.E.2d 920, 927-28 (2011) (stating that "the fiduciary duties created by an attorney-client relationship may be breached even though the formal representation has ended, and these duties include an obligation

not to act in a manner adverse to a former client's interest in *matters substantially related to the prior representation")* (emphasis added). Allowing expert testimony which violates the fiduciary duties owed to a litigant constitutes abuse of discretion. Such improper testimony is grounds for reversal. *See, Mizell v. Glover*, 351 S.C. 392, 406, 570 S.E.2d 176, 183 (2002) (stating that trial court's ruling to exclude or admit expert testimony will not be disturbed on appeal absent a clear abuse of discretion).

In his October 18, 2013 deposition, Art Bradham details the history of his business relationship with Respondent and the extent of his duties therein. Bradham first came in contact with Respondent when he began doing work for ATMES' subsidiary, Reliable, in 2005. (R. p. 196). In 2008 Reliable and Abacare were acquired by ATMES. Mr. Bradham then began doing the accounting work for all three companies (R. p. 196). From 2008 forward, Mr. Bradham has been Respondent's CPA. Bradham also admits to being both Reed and Smith's individual personal accountant.

> BRADHAM: No, I do Murrell Smith's individual return, but I don't think any other entities that he owns, I do the accounting. He has K-1's from a number of partnerships and various investments and that sort of thing. I don't think I do the accounting for any of them.
> MYRICK: Okay. And how long have you been doing Murrell Smith's individual tax returns?
> BRADHAM: Several years. I'm not sure exactly how many.
> MYRICK: Would it go back to the era when you first took on Reliable, which was 2005, 2006 or would it predate that?
> BRADHAM: It did not predate that. I think it would be about 2008, but I'm not certain.
> MYRICK: You first started doing Reliable and a little bit later Murrell Smith brought his personal stuff?
> BRADHAM: That's correct.
> MYRICK: And what about the accounting work for – is it Reed, is that the other ---
> BRADHAM: Jeff Reed.
> MYRICK: Jeff Reed. Do you do his work?
> BRADHAM: Yes.

> MYRICK: Tell me how long you've done Jeff Reed's work.
> BRADHAM: Well, I think it started about 2005.
> MYRICK: Do you handle accounting for Jeff Reed's other businesses?
> BRADHAM: Yes. (R. p. 196).

Mr. Bradham works as Mr. Smith's and Mr. Reed's personal CPA and as CPA for their businesses, including ATMES, Reliable and Abacare and hence has a conflict of interest preventing him testifying as an expert against Mr. DeClemente. (Rule 1.200.010, AICPA Code of Professional Conduct). The circumstances of Bradham's employment prevent him from performing services independently. (Rule 1.200.011, AICPA Code of Professional Conduct). Bradham's testimony also constitutes a violation of Rule 1.100.011, in reference to the subordination of his judgment to others.

The circumstances of Bradham's testimony are identical to the example set forth in Rule 1.110.012(a), AICPA Code of Professional Conduct. Mr. Bradham administered professional services as an expert witness and CPA on a matter in which two of his clients, Respondent and Appellant, have conflicting interests. He breached his fiduciary duty to DeClemente. The transcript from the November 1, 2016 hearing shows that Mr. DeClemente was in fact one of Bradham's clients and the recipient of Bradham's fiduciary duties.

> MARSHALL: And it's true that my client, Phillip DeClemente, was also at one time your client; was he not?
> BRADHAM: He was a partner in one of the businesses that I provided my CPA services. He was not my client.
> MARSHALL: So you had no fiduciary duty to him?
> BRADHAM: I had – my client was the partnership. I have a duty to do all things that I should do as a competent caring CPA for the partnership, and I presume some of that goes to the partners, but I don't know the law in that area; you would (R. p. 405, lines 5-16).

While Bradham is correct that he owes ATMES a fiduciary duty, he is incorrect in stating that Mr. DeClemente was not one of his clients. Since the Appellant was a partner in ATMES, he

is entitled to the same fiduciary duty as Respondents Smith and Reed. Since Mr. Bradham did not acquire DeClemente's permission to provide "expert" testimony on his affairs, the conflict of interest breached Bradham's fiduciary duty to DeClemente. The fact that Bradham is no longer Mr. DeClemente's CPA, through their mutual employment under ATMES, does not end his fiduciary duty.

By allowing Respondent's CPA, who is also DeClemente's former CPA, to testify as Respondent's expert witness, the court committed severe prejudicial error. Bradham's testimony violated the ethical codes of his profession. The trial court blindly followed Bradham's damages calculation. Bradham testified that DeClemente caused ATMES $875,144.00 dollars in damages, which is the exact amount the court awarded. Appellant's counsel moved the court for permission to re-examine Bradham in his client's presence, but the motion was improperly and prejudicially denied. Bradham's conflict of interest and breach of fiduciary duty results in there being no basis for the court's damage award.

IV. The trial court erred by ruling that Appellant was served with the Summons and Complaint on December 1, 2011.

Mr. DeClemente was served with Respondent's summons and complaint on January 6th, 2012 (R. p. 58). Under the South Carolina Rules of Civil Procedure:

> an individual may be served in a judicial district of the United States by doing any of the following: (A) delivering a copy of the summons and complaint to the individual personally; (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process. Rule 4.

Service made through any other way is improper. Rule 4, SCRCP. Respondent claims, and the court incorrectly ruled, that Mr. DeClemente was served on December 1, 2011. However, on that date the Summons and Complaint were left at the invalid address 2353 N.

Highway 17, Mt. Pleasant, SC, 29466. That address was Mr. DeClemente's former business address when he was Abacare's managing owner. He had not even visited that property for many months prior to the date Respondent claims to have served him there. The trial court committed factual error in ruling that Mr. DeClemente was served December 1, 2011.

V. Respondent's continued pursuit of its frivolous lawsuit requires imposition of costs and fees.

Respondent's six-and-a-half-year pursuit of its meritless lawsuit entitles Appellant to the award of costs and fees. A reasonable attorney would not have filed the subject complaint against Mr. DeClemente. This complaint was brought in an effort to harass Mr. DeClemente and coerce him into signing a fraudulent affidavit and avoid paying Appellant the hundreds of thousands of dollars ATMES owes him. S.C. Code Ann. §15-36-10, provide that an action is proper if:

> ... a reasonable attorney in the same circumstances would believe that under the facts his claim or defense may be warranted under the existing law or, if his claim or defense is not warranted under the existing law, a good faith argument exists for the extension, modification, or reversal of existing law and a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of a civil cause is not intended merely to harass or injure the other party. S.C. Code Ann. §15-36-10(A)(3)(b-c).

S.C. Code Ann. §15-36-10 further states:

> (4) An attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned for:
>
> (a) filing a frivolous pleading, motion, or document if:
>
> (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
>
> (iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause

> was intended merely to harass or injure the other party; or
> (iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based. S.C. Code Ann. §15-36-10 (4)(a)(ii-iv).

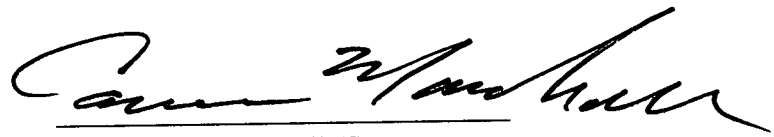
Pursuant to S.C. Code Ann §15-36-10(G)(1-3), Mr. DeClemente asks this court to order ATMES to pay costs and reasonable attorney's fees including, but not limited to, the following: the time required in defending the frivolous lawsuit, travel expenses, mileage, parking, costs of reports, and any additional reasonable consequential expenses resulting from the frivolous proceeding. S.C. Code Ann. §15-36-10 (G)(1-3).

CONCLUSION

The trial court committed legal and factual errors, and grossly abused its discretion by failing to dismiss Plaintiff's frivolous lawsuit, by holding Mr. DeClemente in default and by ordering him to pay Plaintiff $875,144.00 in damages.

Appellant has proven mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, misconduct by the opposing party, satisfaction, and release. The trial court erred in denying Appellant's Rule 6, Rule 55, and Rule 60 motions and committed numerous other errors, as detailed *supra*. Mr. DeClemente requests that the default judgment against him be set aside, the damages award be vacated or satisfied by Respondent, the frivolous complaint be dismissed, and Appellant be awarded costs and fees.

Respectfully submitted,



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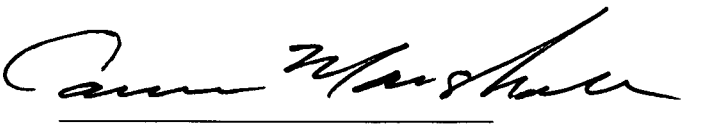
CERTIFICATE OF COMPLIANCE

I, Cameron Marshall, counsel for the Appellant, hereby certify the Appellant's Initial Brief complies with the provisions of Rule 208 and Rule 267 of the South Carolina Appellate Court Rules.



December 18, 2018
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