

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Apr 19 2021

SC 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. 2021-000038

Unpublished Opinion No. 2020-UP-255 (S.C. Ct. App. filed December 23, 2020)

Assistive Technology Medical Equipment Services, LLC,Respondent,

v.

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

Of whom Phillip DeClemente is the Petitioner,

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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Attorney for Respondents

Pursuant to Rule 242 SCACR, the Respondents respectfully submit the following Return to Petition for Certiorari.

COUNTER-QUESTIONS PRESENTED FOR REVIEW

Respondents believe the issues can be consolidated and re-stated as follows:

- I. Whether the Court of Appeals erred in affirming the Circuit Court's finding that the Petitioner failed to show good cause for relief from default.
- II. Whether the Court of Appeals erred in finding the record supports the Damages awarded the Circuit Court.
- III. Whether the Court of Appeals erred in affirming the decision of the Circuit Court to denying Petitioner's motion or a continuance and allowing Respondent's Expert Witness Art Bradham to testify.

COUNTER-STATEMENT OF THE CASE

In November of 2011, Assistive Technology Medical Equipment Services ("ATMES") sued Phillip DeClemente and several others. ATMES alleged all those defendants—including DeClemente—fraudulently mis-represented the profitability of a Charleston business named Abacare prior to the purchase of that business by ATMES in 2008.

DeClemente failed to validly answer or defend that suit. The Circuit Court denied his motion for relief from default and entered a default judgment against him in the amount of \$875,144. The Court of Appeals affirmed the decision of the Circuit Court. DeClemente filed this Petition for Certiorari seeking to overturn the decision of the Court of Appeals.

All this litigation is the result of a business venture that went south.

Reliable Medical Equipment of South Carolina is a Sumter business started in 1998

by Murrell Smith and Jeff Reed. In 2008, they acquired an ownership interest in a Charleston business; Abacare Home Medical.

Assistive Technology Medical Equipment Solutions—ATMES—was created to accomplish this acquisition because Reliable and Abacare were already ongoing businesses with existing Medicare provider numbers. Eighty percent (80%) of Abacare's stock was owned by the Estate of Dorothy Connelly. DeClemente owned the other 20%. DeClemente assigned his rights in Abacare to ATMES and ATMES bought the Connelly Estate's shares in Abacare for \$809,500. This agreement was executed November 7, 2008.

There was deposition testimony in the 2011 case that problems began immediately afterwards. ATMES originally had four owners: Smith, Reed, DeClemente, and Kim Cuce. DeClemente was to run the Charleston operation and Cuce was to run the business in Sumter. Smith and Reed learned DeClemente and Cuce were having an affair shortly after ATMES bought Abacare. DeClemente also tested positive for marijuana and got into a fistfight with his brother. In June of 2009, less than a year after ATMES bought Abacare, DeClemente sold his 25% interest in ATMES back to the company.

The parties accomplished DeClemente's buyout in June of 2009 via a series of documents. These include a promissory note, a bill of sale, a confidentiality and non-compete agreement, and a release. The note called for DeClemente to receive monthly payments until March of 2013. (Promissory Note p.1, ¶3(A)).

The 2011 lawsuit by ATMES came about because more problems followed DeClemente's departure from the company.

Around the same time DeClemente left ATMES the Supreme Court decided a case about whether certain medical equipment was exempt from sales tax. See *Home Med. Sys., Inc. v. S.C. Dep't of Revenue*, 382 S.C. 556, 677 S.E.2d 582 (2009). Shortly thereafter, the Department of Revenue offered taxpayers an amnesty period to pay any back taxes owed as a result of the court decision.

The owners of ATMES claimed they discovered significant accounting irregularities while examining Abacare's books to determine back taxes. There was deposition testimony in the 2011 case that Abacare's past owners had known of these irregularities since 2007 and that this prior knowledge was not disclosed to ATMES until 2010, after DeClemente left. The filing of this litigation followed.

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 judge. The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 606-07, 681 S.E.2d 885, 888 (2009) (internal citations omitted).

ARGUMENT

“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted **only** where there are special circumstances **and** important reasons.” Rule 242 SCACR (Emphasis Added). The rule provides a list, albeit not exclusive, of the

reasons the Supreme Court may grant a petition for certiorari. Among the cited reasons are 1) a novel issue of law, 2) where there is a dissent in the decision of the Court of Appeals, and 3) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court. There is nothing about this Petition that give rise to special circumstances **and** important reasons either with those cited in the Rule or by the Petitioner in his Petition. The Petition cannot add to the record on appeal. The Petition cannot raise new issues that were not properly preserved for this appeal.

- I. Whether the Court of Appeals erred in affirming the Circuit Court’s finding that the Petitioner failed to show good cause for relief from default.
- II. Whether the Court of Appeals erred in finding the record supports the Damages awarded the Circuit Court.
- III. Whether the Court of Appeals erred in affirming the decision of the Circuit Court to denying Petitioner’s motion or a continuance and allowing Respondent’s Expert Witness Art Bradham to testify.

Addressing these counter-questions presented collectively. The Court of Appeals affirmed the decision of the Circuit Court, stating, “the lower court did not abuse its discretion in finding Appellant had not demonstrated good cause for avoiding default after May 2012. The court found Appellant had the benefit of prior counsel, and the motion for relief from default was not timely. Appellant did not put forth a satisfactory explanation for the default. This finding is well supported by the record and is not controlled by an error of law.” Court of Appeals 2020-UP-255. The Petition submitted does not raise any additional facts or issues preserved that would disturb the ruling of the Court of Appeals. Petitioner does not provide in his petition any grounds properly preserved that would show

an abuse of discretion on behalf the Circuit Court. Similarly, Petitioner fails to raise grounds properly preserved to overturn the Court of Appeals decision affirming the Damages findings and the denial of a continuance and allowing Art Bradham to testify. As such, the Petitioner has failed to identify sufficient special circumstances and important reasons adequate to support his request for a Writ of Certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

April 19, 2021

s/ James E. Smith, Jr.

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Phillip DeClemente Defendants,

Of whom Phillip DeClemente is the Petitioner,

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for Petitioner, Cameron Marshall, with a copy of *Respondents' Motion for Extension of Time to File Respondents' Return to Petitioner's Writ of Certiorari and Respondents' Return to Petition for Writ of Certiorari* by emailing the same to the following AIS email address:

Cameron Marshall, Esq.
Cameron@attorneymarshall.com
Counsel for Petitioner

The undersigned also certified that on the dated indicated below a copy of *Respondents' Motion for Extension of Time to File Respondents' Return to Petitioner's Writ of Certiorari and Respondents' Return to Petition for Writ of Certiorari* has been sent to the South Carolina Court of Appeals via email using that court's email address, ctappfilings@sccourts.org and filing with the South Carolina Supreme Court using that court's email address supctfilings@sccourts.org .

Respectfully submitted,

April 19, 2021

s/ James E. Smith, Jr.

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April 19, 2021

Via Email Only

Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
By Email: supctfilings@sccourts.org

Re: Appellate Case No. 2021-000038
ATMES et al v. Phillip DeClemente

Dear Mr. Sherouse:

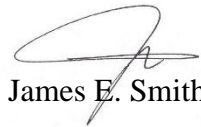
Please find the attached Motion for Extension of Time to File Return to Petition for Certiorari, Respondents' Return to Petition for Certiorari and Proof of Service of same.

A copy of this letter with the same documents and proof of service has been provided to the Court of Appeal and counsel of record.

Please do not hesitate to let us know if you need anything further.

With kind regards, I remain,

Very truly yours,



James E. Smith, Jr.

cc via email: Hon. Jenny Abbott Kitchings, Clerk of Court S.C. Court of Appeals
Cameron Marshall, Esq.

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