THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

O. Davie Burgdoff, Master-in-Equity

Civil Action No.: 2008-CP-38-310

In Re: Estate of Samuel D. Stroman, Decedent,

Jamileh S.D. Stroman and Synthia D. Stroman,.....Respondents,

v.

Samuel D. Stroman, II and Sherolyn D. Stroman
of whom Samuel D. Stroman, II is the.....Appellant.

INITIAL REPLY BRIEF OF APPELLANT

T. Jeff Goodwyn, Jr., Esquire
Goodwyn Law Firm, LLC
2519 Devine Street
Suite A
Columbia, SC 29205
(803) 251-4517
Attorney for Appellant

Andrew S. Radeker, Esquire
Harrison & Radeker, P.A.
923 Calhoun Street
Columbia, SC 29201
(803) 779-2211
Attorney for Respondents

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I. MERELY MAILING AN AMENDED PLEADING TO A PARTY'S ATTORNEY, WITHOUT MORE, IS INSUFFICIENT TO PERFECT SERVICE ON THE PARTY OR, IN THE ALTERNATIVE, IS NOT APPROPRIATE GROUNDS FOR DEFAULT.

Respondents contend that Appellant was properly served with the Amended Complaint when they mailed the amended complaint to Appellant's counsel. However, while Rule 5 allows for service of an amended pleading upon a party by serving the party's attorney, Rule 5 does not abrogate a party's responsibility to serve the amended complaint with a summons or to perfect service by securing an acceptance of service. In short, a default is not appropriate where a pleading has merely been mailed, without more. As previously stated, from the beginning of this case in 2007, both Respondent and Appellant were represented by counsel and intensely involved in the litigation. From the beginning, Respondent asserted that Appellant misappropriated assets and hid her father's will. From the beginning, Appellant, through pleadings, discovery, and testimony, denied wrongdoing.

There is no evidence that a summons was filed and served with the amended pleading. In South Carolina, "[a] civil action is commenced when the summons and complaint are filed with the clerk of court" if properly served. Rule 3(a), SCRCP. A summons and complaint must be filed before service. Rule 5(d), SCRCP. As there is no evidence that a Summons was attached to the Amended Petition and Complaint, the duty to answer was not triggered. See Venture Engineering, Inc. v. Darrell L. Avery, Sr., et

al., 2008-UP-002 (Ct. App. 2008).[1]; See also McLain v. Ingram, 314 S.C. 359, 444 S.E.2d 512 (1994) ("the language of Rule 5 is clear: the summons and complaint must be filed prior to their service").

While acknowledging that Venture is unpublished and therefore of no precedential value, the facts of Venture are so analogous to the instant case that Appellant would respectfully request that the Court give Venture careful consideration. In Venture, the defendants had properly answered a complaint and were then served with both a summons and amended complaint prior to filing. The defendants failed to answer the amended pleading and were held in default. On appeal, the Court of Appeals held that an amended complaint (and summons) must be properly filed (and served) in order to trigger a duty to answer. Id. "By holding otherwise [the court] would, in essence, allow a litigant to obtain a default judgment against a party who failed to answer despite the fact no amended action was pending at the court house." Id.

The instant case mirrors the scenario present in Venture – a party seeks a default, alleging failure to answer an amended pleading, and no summons was ever served with, or filed with, the amended complaint. The Respondent here, referencing Rule 5, argues that "[t]here was no need to serve [Appellant] with a summons *again.*" Resp. Init. Brief at p. 18. However, the Court of Appeals in Venture clearly felt there was.

Respondents rely upon the cases of BB&T v. Taylor, 369 S.C. 548, 633 S.E.2d 501 (2006) and Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 693 S.E.2d 27 (Ct. App. 2010) in support of their argument that a summons was not required when serving an amended complaint, asserting that Appellant "seems to miss the point of a summons".

[1] Counsel takes note that this opinion is unpublished and therefore of no precedential value; however, the facts presented are such that counsel respectfully believes it may assist the Court in determination of the issues at bar and attaches a copy hereto.

Resp. Init. Brief at p. 17. However, both the BB&T and the Mull opinions deal with the service of an original summons and complaint, not an amended pleading. Service of an amended complaint is a separate issue and must be considered differently as a result.

Quite simply, Respondents put a party in default who was significantly involved in the litigation from the start and who had refuted Respondents' allegations piece by piece from the get-go, both in his pleadings and his testimony. This default was accomplished without a summons; without an acceptance of service; without an affidavit of service. Such a result is clearly against the public policy and law of South Carolina which "favors resolution of disputes based upon all parties having their day in court." See Williams v. Watkins, 384 S.C. 319, 681 S.E.2d 914, 918 (Ct. App. 2009). In Williams, a defendant failed to appear at trial due to a mistaken belief that the case had been continued to the next term of court. The case concerned a dispute over floor refinishing between the defendant homeowner and the installer. A jury verdict in the amount of $7,500 was entered, and defendant appealed the magistrate court judgment to the circuit court under Rule 60(b). The case was sent back to the magistrate court which re-affirmed the judgment; on appeal, the circuit court also affirmed the judgment. The Court of Appeals, on appeal, noted that the defendant had filed an answer both denying the allegations and asserting that the manufacturer of the wood stain had breached its implied warranty of merchantability, thereby finding that there was a *prima facie* showing of a meritorious defense and that the matter was "worthy of a hearing" Id. Furthermore, the Court of Appeals noted that the degree of prejudice the respondent would suffer was not so high, given that he was on notice of his customer's denials and therefore on notice to gather evidence.

Similarly, in the case at bar, Respondents were aware of Appellant's defenses and assertions from the beginning – Appellant answered the original complaint; responded to Respondents' Motion to Appoint a Special Administrator; and filed sworn testimony with the Court. In short, there were "no secrets" between the parties in this litigation. From the beginning, the parties knew each of their respective positions, defenses, and arguments. Voluminous pleadings were filed in both the probate and circuit courts. To allow this case to be resolved with a default, instead of on the merits, is simply against South Carolina jurisprudence and the Court should reverse on these grounds.

II. Respondents' Allegation That Appellant "Made No Showing of a Meritorious Defense" is Not Support by the Record.

Incredibly, Respondents allege that Appellant "made no showing of a meritorious defense" and thereby failed to meet the standards to set aside default articulated in Sundown Operating Co. v. Intedge, 383 S.C. 601, 681 S.E.2d 885 (2009). Brief of Resp. at p. 20. Appellant has done nothing but assert meritorious defenses, all of which are grounded in his belief that, day in and day out, he cared for his father and sought to protect and preserve his father's estate. While Appellant addressed this issue in his Initial Brief and does not wish to repeat himself, a brief listing of the pleadings filed by Appellant are instructive:

1. Appellant filed a Petition for Formal Testacy and Appointment as Personal Representative for his father's estate, specifically denying the allegations made by Respondents and asserting he was a loving and trusted son and companion to his elderly father on a daily basis;

2. Appellant filed an Answer and Counterclaim to the original complaint, denying all allegations of misappropriation and misconduct;

3. Appellant filed a sworn affidavit in response to the allegations contained in the Motion to Appoint a Special Administrator.

Each of these documents show that Appellant believed his actions at all relevant times to be appropriate and in his father's best interests. This constitutes a "meritorious defense" at its most basic. The Court is hardly confronted with a situation where a defendant simply failed to answer a complaint or to respond; here, Appellant engaged the services of attorneys and created a voluminous record which consistently denied the allegations and set forth a meritorious defense. As a result, the Court should reverse on these grounds.

III. The Testimony of Bank of America Was Improperly Excluded.

Respondents' rely upon Limehouse v. Hulsey, (Adv. Sh. No. 28) (S.C. Sup. Ct. filed June 26, 2013) to advance their argument that calling a Bank of America employee to testify as to the nature of the bank accounts at issue would be improper. However, the judge was not the proper person to determine the nature of the bank accounts at issue – only the bank could testify to how it classified the decedent's accounts. In short, the nature of the accounts was a question of fact for which the Bank's testimony would be critical. If the withdrawals made by Appellant were deemed by the bank to be proper pursuant to the card agreement, then the court would have to consider such testimony in determining the amount of damages related to the accounts.

"In a default case, the plaintiff must prove by competent evidence the amount of his damages, and such proof must be by the preponderance of the evidence. Although the

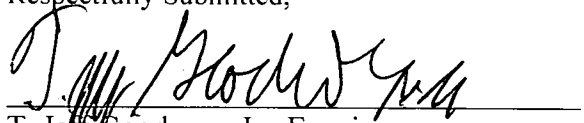
defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted. It is incumbent upon the judge to make a judicial determination of the amount recoverable based on the proof." Jackson v. Midland Human Resource Center, 296 S.C. 526, 374 S.E.2d 505 (Ct. App. 1988).

Here, the judge refused to allow Bank of America to testify as to how it classified the accounts, asserting it was a "legal question." This was clear error – the classification of the accounts would have been determined by Bank of America pursuant to the bank's servicing/card agreement, a clear question of fact. The Respondents failed to submit proof that the accounts were not the property of the Appellant or that Appellant did not have the right to make withdrawals from the accounts. As a result, this court should reverse and remand the case on this issue.

CONCLUSION

For the reasons set forth in its Initial Brief, and incorporated herein, the Appellant respectfully requests that the Court reverse the rulings of the lower court, remand the case for a new trial, vacate the judgment against Appellant, plus such other and further relief as this Court may deem just and proper.

Respectfully Submitted,



T. Jeff Goodwyn, Jr., Esquire
2519 Devine Street, Suite A
Columbia, SC 29205
(803) 251-4517
(803) 251-4527 (fax)
JGoodwyn@Goodwynlaw.com
S.C. Bar No.: 0073789
Attorney for the Appellant

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