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.

FINAL 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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Harrison & Radeker, P.A.
923 Calhoun Street
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(803) 779-2211
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STATEMENT OF ISSUES ON APPEAL

1. **Did the Circuit Court err as a matter of law in refusing to set aside the entry of default where there was evidence of Appellant responding to the Amended Complaint on his own and the record reflected a substantial, meritorious defense mounted by the Appellant from the commencement of litigation, as evidenced by the pleadings, discovery responses, and testimony, such that it would be against public policy and the interest of justice for the default to stand?**

2. **Did the Circuit Court err as a matter of law in refusing to allow an authorized Bank of America representative to testify as to the nature of the bank accounts at issue in the case when the Appellant specifically testified that the accounts in question were "joint accounts"?**

<u>STATEMENT OF THE CASE</u>

This case has a long and tortured history, beginning with the death of a respected retired Colonel, United States Army, and South Carolina State professor in Orangeburg County – Samuel D. Stroman – on September 21, 2006 at the age of 81. The decedent had been in ill health for many years and was primarily cared for at home by his son, the Appellant. Respondent, a daughter of the decedent, and her sisters did not live in Orangeburg but maintained family ties and involvement. On September 12, 2007, Respondent filed a Petition for Formal Testacy and Appointment as Personal Representative for her father's estate in the Probate Court of Orangeburg County. In the Petition, Respondent alleged that Appellant, her brother, was in possession of her father's will but refused to submit it for probate and, further, that Appellant told her that he was appropriating assets of the estate for his own use.

An Estate was opened with the Probate Court, Estate No. 07-ES-38-462, but no personal representative was ever appointed. On that same date, Respondent filed a Motion for Order to Show Cause Why Appellant should not deliver the Last Will and Testament to the Probate Court. On or about September 18, 2007, Appellant, Decedent's son, <u>also</u> submitted a Petition for Formal Testacy and Appointment as Personal Representative for his father's estate. In Appellant's Petition, he <u>specifically</u> denied the allegations made by Respondent and further attached a copy of a joint will in his possession made by his parents. In <u>further response</u> to the Respondent's Petition, Appellant, represented by Carl B. Grant, Esq., filed an Answer and Counterclaim on October 9, 2007, denying all allegations of misappropriation and misconduct and again submitting to the Court the copy of the only will known to him – a joint will made by his

parents years prior. In addition, Appellant asserted a counterclaim requesting that he be appointed the personal representative of the estate. On that same day, Appellant also filed a Reply to the Motion for Order to Show Cause, denying that he was in possession of any original will of his father and producing the joint will previously referenced.

On October 31, 2007, Respondent filed a Reply, generally denying the allegations in the Answer and Counterclaim and furthermore asserting that Appellant engaged in inequitable and wrongful conduct, including, but not limited to, appropriating property, both real and personal, and withholding the will of decedent. The matter was thereafter removed to the Court of Common Pleas in February 2008, and on June 4, 2008, Respondent filed a Motion to Appoint a Special Administrator. In support of the Motion, Respondent submitted a lengthy Affidavit, alleging that Appellant appropriated estate property; cheated his sisters out of their fair share of the estate; and had knowledge of the whereabouts of the will. On September 24, 2008, Respondent also filed an Amended Petition and Complaint, reiterating the allegations of misappropriation of estate assets by Appellant (which were essentially the same statements included in her Motion to Appoint a Special Administrator) and alleging again that Appellant was withholding the will and/or had in fact destroyed the will. No summons was filed with the Amended Complaint. The Amended Complaint, without a summons, was mailed to Carl B. Grant, Esquire, on September 26, 2008, as evidenced by the Certificate of Service. There was no acceptance of service of the Amended Complaint by Attorney Grant, nor was any filed with the Affidavit of Default.

On that same day of September 24, 2008, Appellant, in his Reply to the Motion to Appoint Special Administrator, expressly denied the allegations made by Respondent and

filed a detailed affidavit of his own, specifically denying the allegations made by Respondent paragraph by paragraph. This affidavit addressed all of the new allegations raised in the Amended Petition and Complaint leaving Respondent no doubt as to his position on these issues.

Finally, a hearing was held on September 24, 2008 on Respondent's Motion for Appointment of Special Administrator wherein counsel for both Respondent and Appellant appeared. On or about October 27, 2008, Respondent's counsel filed an Affidavit of Default on the Amended Petition and Complaint. At the time of the filing for default, the parties had participated in substantial discovery, attended numerous hearings, and submitted substantial testimony – by way of affidavit – relating to the allegations and counterclaims contained in the pleadings.

On or about October 14, 2010, Appellant released the Law Firm of Carl B. Grant, P.A. from representing him in the pending litigation. Sometime thereafter, Appellant changed attorneys and retained the services of Robert F. McCurry, Jr. of Horger, Barnwell and Reid, LLP. Attorney McCurry proceeded to move for relief from default judgment, arguing that he believed at the time he was retained that an answer had, in fact, been filed in response to the amended petition and complaint.

On August 9, 2011, a damages hearing was held whereupon the Master in Equity denied Appellant's Motion for Relief from Default Judgment, relying upon Sundown Operating Company, Inc. v. Intedge Industries, Inc., 383 S.C. 601, 681 S.E.2d 885 (2009).

STANDARD OF REVIEW

"The decision whether to set aside an entry of default or 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." Id. at 888 (Internal citations omitted).

ARGUMENT

1. The trial court erred as a matter of law in entering a default judgment against the Appellant

A. No evidence exists that a summons to the amended complaint was ever filed and served.

This case began in the Probate Court in 2007 and was moved to the Court of Common Pleas in 2008. From the beginning, both Respondent and Appellant were represented by counsel. From the beginning, Respondent, through her initial pleadings and affidavit testimony, asserted that Appellant misappropriated assets and hid her father's will. From the beginning, Appellant, through his pleadings, discovery responses, and affidavit testimony, vehemently denied any wrongdoing and asserted he acted in accordance with his father's wishes.

Respondent filed an Amended Petition and Complaint on September 24, 2008. 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").

In Venture, the defendants had properly answered a complaint and were served with a summons and amended complaint prior to them having been filed with the Clerk's office. 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.

Based upon the clear language of Rules 3 and 5 of the South Carolina Rules of Procedure, along with the reasoning contained in the Venture Engineering opinion, the entry of default should be set aside as no summons was ever filed with the Amended Complaint. As no summons exists, the amended action cannot be deemed to have been "filed".

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[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.

B. There is No Evidence that Service of the Amended Complaint was Perfected

No evidence of service exists. It appears that Respondent's counsel sent a letter to Carl B. Grant, Esq. on September 26, 2008, stating "[e]nclosed herewith and served upon you are the Amended Petition and Complaint and Order Granting Leave to Amend in the above-referenced action." There is no reference to a summons, nor is there reference to an acceptance of service enclosed or received by Attorney Grant. There is no acceptance of service signed or filed. Furthermore, no affidavit of service exists reflecting personal service on Appellant. Simply enclosing the amended complaint in a letter to Appellant's attorney, without more, is not proper service under Rule 4, SCRCP; to find otherwise would be to allow an amended pleading, without a summons, to be "served" simply by placing them in First Class Mail, with no restrictions whatsoever. This would allow parties to put others in default <u>without any</u> acceptance of service or service perfected otherwise having taken place.

Such a result is clearly against public policy, as it would result in parties being at the mercy of both the U.S. Mail and the certificates of mailing service provided by the opposing side. To allow a default judgment to stand without ever having an acceptance of service executed by counsel would result in a situation where a party could be found in default simply by having a pleading served by First Class Mail. If Respondent's counsel had wished to serve the amended complaint by mail, he needed to either conform with the requirements of personal service or, in the alternative, obtain an Acceptance of Service under Rule 4(j), SCRCP. See <u>Langley v. Graham</u>, 322 S.C. 428, 472 S.E.2d 259 (Ct. App. 1996) (Noting that "Rule 4(j) establishes no new procedure for service of process;

rather, it is but a recognition of the long standing practice that acknowledgement or acceptance of service is equivalent to personal service. Service by written acceptance is not converted into "service by mail" by the mere fact that the paper served was transmitted by mail."). Without proper service under Rule 4, SCRCP, or an acceptance of service executed by Attorney Grant under Rule 5, Appellant had no duty to file a formal Answer. As a result, it was a clear abuse of discretion and an error of law for the trial court to have found Appellant in default and this court should reverse and remand accordingly.

C. Even assuming that the Amended Complaint was properly filed and served, which is expressly denied, the Court should consider the Affidavit filed on September 24, 2008, and the prior pleadings, an "answer".

On the exact same day that the Amended Complaint was filed, September 24, 2008, Appellant also filed an Affidavit in Reply to Respondent's Motion to Appoint a Special Administrator. Since the Motion contains almost the same allegations as the amended complaint, this Affidavit should be deemed an "answer" and "meritorious defense" under Frank Ulmer Lumber Co., Inc. v. J.D. Patterson, 272 S.C. 208, 250 S.E.2d 121 (1978), as it was delivered to Respondent's counsel on the same day the Amended Complaint was filed. In Frank Ulmer, the Supreme Court allowed the letter of the defendant to stand as an answer, affirming the lower court's setting aside of a default judgment. The Court, while noting that the letter failed to comply with the rules of procedure governing pleadings and service, stated that "suffice it to say, the proper sanction for failure to comply with [the rules] is not judgment by default." Id. at 123.

Similarly, the Appellant appeared in this matter from the beginning, and his defenses, positions, and testimony were known to the Respondent. In the instant case, "suffice it to say", judgment by default seems an extreme penalty given that the "answer" of Appellant was essentially before the Respondent's counsel from the very beginning. See also The DM Company, Inc. v. The Nycoil Company, 273 S.C. 496, 257 S.E.2d 499 (1979) (holding that the appellant's sworn testimony at a Rule to Show Cause hearing constituted an answer sufficient to preclude judgment by default on the complaint). In The DM Company, the Court considered that the appellant's sworn testimony controverted each material allegation of the complaint. Noting that the "primary purpose and object of a pleading is to advise the opposite party of the issues it will be called upon to meet", the Court held that the sworn testimony "more than adequately complied with this substantive requirement." Id. at 500. Finally, the Court noted that the "harsh result of judgment by default is not the proper tool to reprove the failure of a party to use formal pleadings." Id.

Similarly, the Appellant herein appeared in the action immediately, engaged the services of two attorneys, participated in discovery, filed responses and replies, and submitted sworn testimony; in short, he fully participated in the litigation to an extent which makes the entry of judgment by default unwarranted.

D. Even if a Summons was filed and served with the Amended Complaint, the Entry of Default was Improper under both Rule 55 and Rule 60.

This case commenced in 2007 and the parties made their positions, and defenses, known "from the get go", both ably represented by counsel throughout. In fact, the

parties engaged in voluminous discovery throughout the pendency of the action[2] and a special administrator was appointed who worked with the parties, and outside entities such as banks, to secure documentation. In short, the parties, through their lawyers, engaged in the litigation to the fullest from the beginning. Neither neglected to assert their positions through pleadings and affidavits on file with the Court. Nevertheless, Respondent's counsel chose to hold Appellant in default on the grounds that Appellant failed to answer the amended complaint in a timely fashion.

"[T]he policy of our state [is] to resolve cases on the merits." Caldwell v. Wiquist, Appellate No. 2012-207208, NO. 5105 (S.C. Ct. App. Mar. 27, 2013) (relying upon Rochester v. Holiday Magic, Inc., 253 S.C. 147, 152, 169 S.E.2d 387, 390 (1969) (noting that the statute applicable to vacating a default judgment "should be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits" (internal citation omitted)). "Federal courts recognize the same policy." Id. (relying upon Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc., 616 F.3d 413, 417 (4th Cir. 2010) ("**We have repeatedly expressed a strong preference that, as a general matter, defaults be avoided and that claims and defenses be disposed of on their merits**." and Tazco, Inc. v. Dir., Office of Workers Comp. Program, U.S. Dep't of Labor, 895 F.2d 949, 950 (4th Cir. 1990) (noting "[t]he law disfavors default judgments as a general matter").

Even assuming that the amended complaint was properly filed and served, which Appellant expressly denies, it was an abuse of discretion for the Court to fail to set aside the entry of default. "Under Rule 55 (c), SCRCP, a default may be set aside for good

[2] Discovery was conducted beginning in November 2007 and documents were still being produced into 2011.

cause shown. Rule 55(c) should be liberally construed to promote justice and dispose of cases on the merits." Melton v. Olenik, 379 S.C. 45, 664 S.E.2d 487, 492 (Ct. App. 2008) (citing Bage v. Southeastern Roofing Co. of Spartanburg, Inc., 373 S.C. 457, 646 S.E.2d 160 (Ct. App. 2007). "In deciding whether to set aside an entry of default, the court should consider 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." Id. (citing Wham v. Shearson Lehman Bros., 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989)).

In the instant action, it appears that Respondent attempted service of the amended complaint by letter to Appellant's attorney on September 26, 2008. [need information about timing of default affidavit; motion for relief; etc.]. Certainly, there is evidence of a meritorious defense given the pleadings, documentation and testimony of Appellant which were before the lower court at the time the amended complaint was allegedly served. Additionally, there would be no prejudice to the Respondent since the Respondent conducted substantial discovery, with Appellant still responding to discovery into 2011; a Special Administrator was appointed pursuant to Respondent's request for same; and Respondent knew the claims and defenses of Appellant from the beginning. There were no new surprises; rather, the parties maintained their initial positions. In short, this is a case that requires resolution on the merits. Respondent's act of placing Appellant in default was, respectfully, a quintessential "cheap shot" given the lengthy involvement of Appellant (and his counsel) from the start.[3]

[3] Courtesy among members of the Bar would seem to dictate that a default judgment was not appropriate in the instant situation.

The transcript of the damages hearing held on August 9, 2011 – *almost 3 years after the affidavit of default was filed* - shows that the Court abused its discretion in failing to set aside the default, and that the Court, in fact, wrongly relied upon the characterization of Respondent's counsel, relying upon Sundown, rather than considering the voluminous record and the Wham factors:

> Mr. Radeker: "This motion [for relief] just says the previous attorney didn't answer the complaint. Nothing about why, or nothing that would provide an excuse for why that didn't happen. They also got explain why a relief from default would serve the interest of justice. **There's no affidavit or anything tending to indicate that the allegations in the amended complaint are not true . . . Whether the defendant has a meritorious defense, nothing tending to indicate there is a meritorious defense that's presented with this motion [for relief]. No showing of any kind presented with it . . . Here, you know, we didn't take depositions in this case or do some of the extensive discovery, things that we could have done, because Mr. Stroman was in default.**
>
> (R. p. 197, line 13-p. 198, line 14)

In this case, extensive discovery was conducted by way of interrogatories, requests for products, and requests to admit. Furthermore, the special administrator conducted lengthy investigations into the assets and property of the decedent. The meritorious defenses of the Appellant were known to Respondent's counsel. Furthermore, as soon as Attorney McCurry realized that the amended complaint had not, in fact, been answered, he filed a Motion for Relief. Respondent's counsel, having delayed almost 3 years from the affidavit of default to arrive at the damages hearing,

cannot complain of prejudice. Throughout the pendency of the litigation, Appellant specifically refuted all claims of the Respondent as to theft and fraud concerning his father's assets, while his father was both living and after his death. There were no surprise defenses; there was no lack of involvement.

II. It was Error for the Court to refuse to allow the Bank of America employee to testify as to the nature of the bank accounts at issue

Appellant contended throughout the course of the litigation that certain bank accounts from which he withdrew monies were "joint accounts" which his father opened while still alive, and his position was that any withdrawals were legal and valid. Respondent contended that the Appellant fraudulently received monies from the accounts and essentially "looted" their father during his lifetime and after death.

At the damages hearing, Appellant repeatedly sought to testify that he considered the accounts "joint accounts" and, each time, the Respondent's counsel objected. (R. pp. 410-2) The Court refused to allow testimony from Bank of America as to whether the accounts were, in fact, joint accounts such that Appellant properly withdrew funds from them, as Appellant contended. The Court held that whether the accounts were "joint accounts" was a "legal question" and therefore the Bank could not testify as to the form of account:

Mr. McCurry: And, Your Honor, as I understand it, you're not going to allow me to ask him questions or have him testify regarding those accounts?

The Court: What sort of questions were you going to ask him?

Mr. McCurry: Well, the accounts – whether the accounts were, in fact, joint accounts, it would have been joint survivor accounts as indicated, it would have been the funds of David Stroman upon death.

The Court: That's a legal question.

Mr. Radeker: That's a legal question.

The Court: That's going to be a legal question anyway, so he couldn't answer that.

Mr. McCurry: Well, he could testify as to what Bank of America – how Bank of America deemed it.

The Court: That's still a legal question. That's not a factual matter.

(R. p. 311, line 22-p. 312, line 15)

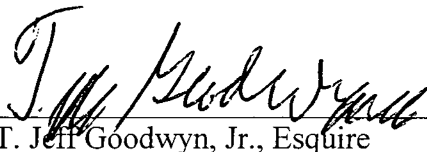
In fact, the Bank, not the Court, was the proper party to determine the nature of the accounts at issue; the Court is confusing the nature of the accounts pursuant to the bank "signature card" (i.e. joint, joint with right of survivorship; sole; etc.) with the survivorship rights of the surviving account holder. See Vaughn v. Bernhardt, 345 S.C. 196, 547 S.E.2d 869 (2001) (applying section 62-6-101 et. seq., governing joint accounts, to determine survivorship rights as a matter of law on multi-party accounts).

As a result, it was error for the court not to allow testimony from the bank representative on this issue and this court should remand the case for a damages hearing to include this testimony.

CONCLUSION

In the interest of justice and in accordance with the longstanding principle that cases are best decided on their merits, Appellant respectfully requests that the entry of default be set aside and the judgment vacated. If the default is not set aside, Appellant respectfully requests that the case be remanded for another damages hearing to allow the testimony of the bank representative on the issue of the form of the account.

Respectfully Submitted,



T. Jeff Goodwyn, Jr., Esquire
Goodwyn Law Firm, LLC
2519 Devine Street, Suite A
Columbia, SC 29205
(803) 251-4517
(803) 251-4527 (f)
Attorney for Appellant

January 6, 2014

2008-UP-002 - Venture Engineering v. Avery

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Venture Engineering, Inc., Respondent

v.

Darrell L. Avery, Sr., and Jeffrey L. Avery, Appellants.

Appeal From Horry County
J. Stanton Cross, Jr., Circuit Court Judge

Unpublished Opinion No. 2008-UP-002
Submitted November 1, 2007 – Filed January 2, 2008

REVERSED AND REMANDED

James C. Rushton, III and Reginald C. Brown, Jr., of Florence, for Appellants.

Nate Fata, of Surfside Beach, for Respondent.

PER CURIAM: In this action to set aside a default judgment, Darrell and Jeffery Avery (the Averys) argue the default judgment against them is void due to Venture Engineering's, Inc. (Venture) failure to properly file the amended complaint. We reverse and remand.[1]

FACTS

In 2002, the Averys, through their company Myrtle Beach Developers, LLC, purchased a tract of land in South Carolina. The Averys hired Venture to perform engineering and consulting services in connection with the property. After Venture provided the services, the Averys failed to pay Venture monies due under the contract.

On December 4, 2002, Venture brought suit against the Averys, alleging breach of contract, breach of contract accompanied by a fraudulent act, fraud, and quantum meruit. The Averys, who at this point were represented by counsel, timely answered.

In 2004, Venture moved to compel discovery and requested leave to file an amended complaint. Attached to the motion for leave to file an amended complaint was the amended complaint, which was file stamped on July 16, 2004. In addition, the Averys' counsel moved to be relieved.

During a hearing, the circuit court considered and granted all three motions. The circuit court's order gave the Averys thirty days to obtain new counsel, if they desired. Otherwise, the order provided Venture should mail all documents to the Averys' address in North Carolina. The circuit court ordered the Averys to notify the court, in writing, of any change of address.

On July 21, 2005, Venture mailed the summons and amended complaint to the Averys. The amended complaint was virtually identical to the first except it added a cause of action for piercing the corporate veil. However, Venture failed to file the amended complaint. The Averys, who were pro se, did not respond to the amended complaint.

Due to the Averys' failure to answer the amended complaint, Venture filed an affidavit of default. The affidavit erroneously provided the amended complaint was filed on July 15, 2005. The circuit court referred the matter to the master-in-equity for damages to be assessed, and Venture notified the Averys of the reference to the master.

At the damages hearing, which the Averys did not attend, Steve Powell testified on behalf of Venture. Powell testified that the Averys owed Venture $79,000 for services rendered. Further, Powell testified he aided the Averys in obtaining bids for selling timber and they received over $150,000 but failed to pay Venture. Powell stated he felt misled because he was unaware that Darrell Avery was in bankruptcy, and both Averys had served time in federal prison for the preparation of false and fraudulent tax returns. Following Powell's testimony, Venture argued it was entitled to prejudgment interest as well as punitive damages. Venture alleged the Averys' dealings with Venture were not out of the ordinary, and the Averys "[took] all the dirt, the sand, and the timber [off of the property] and let everyone else foreclose on them, and [the Averys] go back to North Carolina [and] file bankruptcy." Ultimately, the master awarded damages and prejudgment interest totaling $104,680.36 and punitive damages in the amount of $395,787.50.

The Averys, now represented by counsel, moved pursuant to Rules 59 and 60, SCRCP, for a new trial and to have the default judgment set aside. At the hearing, the Averys argued, inter alia, the judgment against them was void because Venture failed to properly file the amended complaint. Venture conceded the amended complaint was not filed but argued the motion for leave to amend the complaint had the amended complaint attached. The circuit court agreed with Venture that it did not need to refile

the amended complaint. Accordingly, the circuit court denied the Averys' motions. Subsequent to the order of default and judgment, Venture filed the amended complaint. This appeal followed.

STANDARD OF REVIEW

The determination of whether to set aside a default judgment lies within the sound discretion of the trial court. Wham v. Shearson Lehman Bros. Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989). The decision of the trial court "will not be disturbed on appeal absent a showing of an abuse of discretion." Thompson v. Hammond, 299 S.C. 116, 119, 382 S.E.2d 900, 902-03 (1989). An abuse of discretion occurs when the trial court "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." In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997).

LAW/ANALYSIS

The issue on appeal is whether Venture's failure to properly file the amended complaint rendered the default judgment against the Averys void. For the reasons set forth below, we find the circuit court erred by failing to set aside the default judgment. Accordingly, we reverse and remand.

Rule 55(a), SCRCP, provides, "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules" the clerk of court, after proper notification, will enter default. It is axiomatic that in order for a party to "plead or otherwise defend" an action, the action must be properly filed. In South Carolina, a civil action is commenced if the summons and complaint are filed with the clerk of court and proper service is effectuated. See Rule 3(a), SCRCP ("A civil action is commenced when the summons and complaint are filed with the clerk of court if [the summons and complaint] are [properly served]."). Further, the South Carolina Rules of Civil Procedure require the summons and complaint "be filed before service." Rule 5(d), SCRCP. See McLain v. Ingram, 314 S.C. 359, 360, 444 S.E.2d 512, 513 (1994) (finding action was not properly commenced when service preceded filing).

In the present case, Venture filed the original summons and complaint and then properly served the Averys, who timely answered. After obtaining permission from the circuit court to amend the complaint, Venture served the summons and amended complaint before filing. Due to the Averys' failure to answer the amended complaint, Venture sought and obtained a default judgment.

Venture maintains the rule requiring filing before service applies to only the original pleadings, and the amended complaint falls under the "all papers" category under Rule 5(d), which provides, "[a]ll papers required to be served upon a party . . . shall be filed with the court within five days after service." Therefore, Venture reasons under Rule

5(d) filing the amended complaint after service to the Averys was proper. However, the amended complaint was not filed within five days but belatedly filed on May 17, 2006 after the entry of a judgment.

Here, Venture would have been unable to obtain a default judgment against the Averys on the original complaint because the Averys timely answered. The only way the Averys could be held in default would be for their failure to answer the amended complaint. Therefore, the amended complaint must have been properly filed and served in order to trigger the Averys' duty to answer. See Rule 5(d). By holding otherwise we 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. Accordingly, we find the circuit court erred by failing to set aside the default judgment.

The Averys also argue the circuit court erred in affirming the master's award of prejudgment interest. Further, they allege the award of punitive damages violates their constitutional rights. Due to the resolution of this case, we decline to address the Averys' remaining arguments. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when disposition of prior issues are dispositive).

CONCLUSION

Based on the foregoing, the decision of the circuit court is

REVERSED AND REMANDED.

HUFF and PIEPER, JJ., and GOOLSBY, A.J., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

T. Jeff Goodwyn, Jr., Esquire
Goodwyn Law Firm, LLC
2519 Devine Street, Suite A
Columbia, South Carolina 29205
(803) 251-4517
(803) 251-4527 (fax)
JGoodwyn@Goodwynlaw.com
Attorney for Appellant

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