

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

O. Davie Burgdorf, Master-in-Equity

Court of Appeals Case Tracking No. 2013-000549
Trial Court Case No. 2008-CP-38-310

In re: Estate of Samuel D. Stroman,

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

v.

Samuel D. Stroman, II, and Sherolyn D. Stroman, Defendants,

Of whom Samuel D. Stroman is.....Appellant.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES

- I. Does the plain language of Rule 5, SCRPC, dispose of the bulk of this appeal?
- II. Did the master-in-equity err in denying the Appellant's motion to set aside default where the Appellant failed to satisfy the test set forth in Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 681 S.E.2d 885 (2009)?
- III. Should this Court reverse the master-in-equity for following controlling precedent in preventing the Appellant, who was in default, from calling a witness at the damages hearing?
- IV. Does the Appellant now make new, unpreserved arguments he never made below?
- V. Is a default judgment immediately appealable?

STATEMENT OF THE CASE

This action was filed on September 12, 2007, in the Orangeburg County Probate Court by Respondent Jamileh S.D. Stroman (hereinafter “Jamileh”), seeking probate of a will and Jamileh’s appointment through formal testacy proceedings as personal representative of the estate of her father, Samuel D. Stroman, who attained the rank of colonel in the United States Army and, for the sake of clarity, is hereinafter sometimes referred to as “Colonel Stroman.” (R. pp. 34-39.) The parties to this case are the children of Colonel Stroman. (R. pp. 13, 35.) The Appellant is Samuel D. Stroman, II, who goes by his middle name, David, and is hereinafter sometimes referred to as “David.” (R. p. 13.) David was served with the summons and petition on September 13, 2007. (R. p. 50.) The petition stated that David “has advised us [i.e., Jamileh and Synthia D. Stroman (hereinafter ‘Synthia’)] that he is in possession of the will but will not submit the same for probate, and he advised my sister and I that he is appropriating the assets of this estate for his own use.” (R. p. 37.) David retained counsel, Carl B. Grant, and served an answer and counterclaim, seeking for the court to appoint him as personal representative. (R. pp. 53-55.) Jamileh’s reply to David’s counterclaim asserted, among other things, an unclean hands defense to his counterclaim based on David having executed purported deeds to himself of realty owned by Colonel Stroman, deeds that stated he acted via power of attorney, and on David having withheld his father’s will and misappropriated estate property. (R. pp. 63-64.)

David did many things that slowed down the progress of this case. He opposed removal of this case from the probate court to the court of common pleas,

even though removal was mandatory. (R. pp. 1, 58-60, p. 121 ln. 6 through p. 123 ln. 7); see S.C. Code Ann. § 62-1-302(d)(1). Even though he never served a jury demand within the time to do so provided in Rule 38, SCRCF, when Jamileh made a motion to refer the case to the master-in-equity David filed (but did not serve) a jury demand 114 days after the last possible date on which it could have been timely served. (R. p. 76.) When the motion came up for a hearing, he consented at the courthouse to the reference. (R. p. 2.)

This case largely concerns property that Colonel Stroman owned but over which David came to exert sole control and possession after Colonel Stroman died in 2006. (R. pp. 13-14.) Jamileh and Synthia moved for the appointment of a special administrator and for David to surrender the estate property to that special administrator. (R. pp. 67-75, 78-80.) David opposed the appointment of a special administrator and filed a reply to that motion with a rambling, largely irrelevant unsworn statement – not an affidavit – attached to it. (R. pp. 83-96, p. 141 ln. 20-25.) He did, however, consent at that motion hearing to the amendment of Jamileh’s and Synthia’s pleadings. (R. p. 177 ln. 11-23.)

The master granted the motion to amend by order signed and filed September 24, 2008. (R. pp. 3-4.) By order filed October 8, 2008, the Court appointed Kathleen Palinski as special administrator of the estate and ordered the following:

Defendant/Respondent Samuel D. Stroman, II, is hereby enjoined, restrained, and Ordered not to dispose of, alienate, or otherwise transfer any property of any kind in which the Decedent held any interest during his life that is now in the possession or control of Samuel D. Stroman, II (including, but not limited to, all monies and other property owned by the Decedent during his life that Samuel D. Stroman, II, has purported to

transfer to himself pursuant to a power of attorney, all monies removed from any and all bank accounts of which Samuel D. Stroman, II, purported to change ownership so as to make himself a record owner thereof, all monies removed from any account of which the Decedent and Samuel D. Stroman, II, were joint owners of record during the Decedent's life, and any and all other property owned by the Decedent during his life), except as is set forth in the next subparagraph hereinbelow;

During the pendency of this action and until further Order of this Court, if any, Defendant/Respondent Samuel D. Stroman, II, may use, for the purpose of paying for his reasonable living expenses, an amount of money not to exceed 25 percent of the total amount of money now in his possession that is or was in bank accounts in which the Decedent held an ownership interest during his life; [and]

Defendant/Respondent Samuel D. Stroman, II, shall document any monies expended pursuant to the preceding subparagraph hereinabove, and any such expenditures he makes from assets determined to be Estate assets shall be charged against his share of the Decedent's Estate[.]

(R. p. 9.)

David was made aware at the September 24, 2008, hearing that the master was ordering that David was permitted only to spend, for the purpose of paying his reasonable living expenses, an amount of money not to exceed 25 percent of the total amount of money that was then in his possession that is or was in bank accounts in which Colonel Stroman held an ownership interest during his life, and David was also made aware at that hearing of his obligation to the Court to document any such expenditures he made. (R. 15, p. 170 ln. 13 through p. 174 ln. 11.) David later testified that he knew that the master had ordered that he was not to use more than 25

percent of the money that was in that account during the pendency of this case. (R. p. 255 ln. 21 through p. 256 ln. 1.)

Jamileh (with Synthia now realigned as a plaintiff/petitioner along with her) filed their amended petition and complaint on September 24, 2008, just after the order permitting the amendment was filed. (R. pp. 3-4, 97-110.) The amended petition and complaint pled the following causes of action:

- 1) That David held property that Colonel Stroman owned during his life in a constructive trust for the estate and for Jamileh and Synthia, and that the court should enforce the constructive trust;
- 2) That David was liable to the estate, Jamileh, and Synthia for breach of fiduciary duty and as an executor de son tort, and that the court should require a discovery of assets, order David to account for all property he has misappropriated from the estate and/or his sisters, and require David to return the property or its value;
- 3) That the court should declare Colonel Stroman's last will and testament to be as described in the original petition in this case (which was attached to and incorporated into the amended petition and complaint) and appoint Jamileh as personal representative of the estate;
- 4) That the court should declare all purported transfers of personal property to David by David as attorney-in-fact for Colonel Stroman to be void, rescind them, and order all things necessary to the restoration of the personal property to the estate;

- 5) That the court should declare void deeds to David from David as attorney-in-fact for Colonel Stroman that purport to have transferred to David real property that Colonel Stroman owned during his life; and
- 6) That the court should partition the real property Colonel Stroman owned in South Carolina as the court deemed equitable.

(R. pp. 97-110.)

Per Rule 5, SCRCPP, on September 26, 2008, Jamileh and Synthia's counsel served David's counsel, Carl B. Grant, Esquire, by mail with a copy of the filed order granting leave to amend and a copy of the filed amended petition and complaint. (R. p. 484.) Pursuant to Rule 15(a), SCRCPP, David was required to serve a responsive pleading to the amended petition and complaint within 20 days of September 26, 2008 (15 days under Rule 15(a), SCRCPP, and an additional five days under Rule 6(e), SCRCPP, since the service was by mail). (R. pp. 16, 111-12.) David did not serve a responsive pleading within that time frame. (R. pp. 16-17, 111-12.) On October 27, 2008, counsel for Jamileh and Synthia served David's counsel with an affidavit of David's default. (R. pp. 17, 111-12.)

Once Ms. Palinski was appointed as special administrator and David was in default, the focus of the case shifted largely to her investigating and marshaling the property of Colonel Stroman's estate. (R. p. 287 ln. 9 through p. 303 ln. 6.) In addition, a tort action concerning injuries Colonel Stroman had suffered while at a nursing home was pending at that time, and the special administrator spent time focusing on resolving that case through settlement. (R. p. 291 ln. 16-18.)

Once a final hearing was scheduled, though, David occasioned still more delay. A hearing had been set for November 30, 2010, but David obtained new counsel, so that hearing was cancelled and a status conference was set for December 6, 2010. (R. pp. 487-88.) At the status conference, as well as in the conversations and correspondence with Jamileh and Synthia's attorney that led up to it, David's new counsel was informed that David was in default of the amended complaint. (R. p. 196 ln. 5-20, p. 197 ln. 1-4, pp. 488-89.) February 7, 2011, was set aside as the date for a hearing on a motion to set aside default should David decide to make one. (R. p. 18, p. 197 ln. 1-4, p. 489.) He did not make such a motion, and the date passed with no motion hearing. (R. p. 18, p. 197 ln. 1-5, p. 489.) Jamileh and Synthia's counsel immediately began asking the court to schedule a final hearing. (R. p. 489.) A hearing was eventually scheduled for August 9, 2011. (R. p. 190.)

On August 1, 2011, David's counsel served a motion to set aside default, with a proposed answer to the amended petition and complaint but with no supporting affidavit. (R. pp. 113-17.)

The hearing was begun on August 9, 2011, but the hearing had to be stopped and then resumed in two follow-up sessions, on October 5, 2011, and June 28, 2012.¹ (R. pp. 17, 190, p. 313 ln. 9 through p. 314 ln. 4, p. 316, p. 413 ln. 1-19, p. 415, p. 417 ln. 25 through p. 418 ln. 5.) David's motion to set aside default was heard and orally denied at the beginning of the August 9 hearing. (R. p. 17, p. 193 ln. 15 through p. 199 ln. 25.) Counsel for Jamileh and Synthia called David to the stand as his first witness in the default damages hearing. (R. p. 200 ln. 12-13.) As a result of

¹ The master was not in good health during this time, which affected his schedule and the time he had to hold hearings in this case and still deal with other cases before him, as well as affecting the duration of time he could devote to a hearing.

David's admission during his testimony that he exceeded the court-ordered spending limit by around \$126,000.00 from his personal bank account where he had deposited the funds he transferred from his father's accounts after his death (and that he kept no account of how he spent that money), the Court issued an Order on August 9, 2011, providing for the immediate transfer of the funds remaining in the account to the possession of the special administrator. (R. p. 10, p. 217 ln. 20 through p. 222 ln. 21, p. 255 ln. 16 through p. 264 ln. 3, p. 303 ln. 15 through p. 307 ln. 5, p. 310 ln. 9 through p. 311 ln. 16.) David attempted to call a witness, but the master sustained Jamileh and Synthia's objection to that. (R. p. 309 ln. 3-8, p. 311 ln. 22 through p. 312 ln. 16.)

Jamileh and Synthia presented their witnesses and exhibits and proved their damages. (R. pp. 190-413.) The master issued a rule to show cause why David should not be held in contempt for willfully violating the order restraining David from spending more than 25 percent of the money in the bank account, and that matter was heard on June 28, 2012. (R. pp. 10a, 415-80.) The order subject of this appeal followed. (R. pp. 11-33.) It appointed Jamileh as personal representative of the estate and ordered the following relief:

1. All of David's purported transfers of property of Colonel Stroman and the Estate to himself are void;
2. The Orangeburg County Register of Deeds shall record a copy of this Order in the land records and shall index it under all of the names listed in the caption in this action;
3. David has already received the entirety of his inheritance from Colonel Stroman and is not entitled to receive any further distribution from the Estate;
4. A money judgment is hereby rendered against David in the amount of \$31,969.87;

5. On or before March 15, 2013, David shall leave the Pruitt Drive house and turn over to the Special Administrator of the Estate all keys to and possession of the house and all personal property of the Estate that David has been keeping in his possession, including the contents of the house (which may be left in the house if this is secure and practical);
6. Sherry has already received \$24,166.16 of her one-fourth share of the Estate;
7. The Personal Representative of this Estate is empowered and authorized to sell both of the aforementioned pieces of real estate in Orangeburg County and to contract with a realtor to market the property for sale;
8. If after reasonable efforts the Personal Representative has not been able to sell either or both of the pieces of the Orangeburg County real estate, she may apply to this Court for an Order directing that either or both of said parcels be sold at judicial sale;
9. Jamileh and Synthia shall be reimbursed for their attorney's fees and costs incurred in this matter (both as noted above and incurred until the closing of the sale) from the common funds created by the sale of the Pruitt Drive house and vacant lot in Orangeburg;
10. David is in contempt of this Court's October 2008 Order as discussed above, and the Court orders the following civil contempt sanctions against him:
 - a. David is ordered to repay the Estate \$31,969.87 by providing that sum to the Special Administrator on or before March 15, 2013;
 - b. Any of that sum that David pays shall be applied to reduce the money judgment against him;
 - c. If David has not provided the Special Administrator with that full amount by March 15, 2013, the Special Administrator shall provide the Court with an affidavit stating that she has not received these funds, and the Court shall promptly issue a bench warrant for David's arrest; and
 - d. If David does not repay the Estate the full amount of \$31,969.87 on or before March 15, 2013, David shall immediately present himself to the Orangeburg County Sheriff's Department to be taken to jail to begin serving a six-month sentence, which sentence he may end at any time by paying the Estate the \$31,969.87, plus any attorney's fees and costs occasioned by his noncompliance with this Order.

11. As Special Administrator, Kathleen Palinski shall assist the Personal Representative of this Estate in assuming control of the Estate and shall be responsible for receiving monies from David as noted above, and her duties as Special Administrator shall end upon deposit of the full amount of the money received from David or upon her provision to the Court of an affidavit noting David's noncompliance, as noted above; and
12. The undersigned's successor Master-in-Equity is hereby authorized and empowered to hear any and all further proceedings in this matter, including, but not limited to, motions for reconsideration or for relief from the judgment and motions concerning compliance with or enforcement of this Order.

(R. pp. 29, 32a-32b.)

David did not make a motion to reconsider or any other post-trial motions. He filed and served a notice of appeal.

STATEMENT OF FACTS

David undertook to steal everything his father owned in life. (R. p. 22.) The "findings of fact" section of Judge Burgdorf's order describes the situation well:

Colonel Stroman died on September 21, 2006. The parties to this case are his children and his sole devisees, as his wife, Cleo Able Stroman, predeceased him. The last will and testament of Colonel Stroman introduced at the damages hearing leaves his entire estate in equal shares to Plaintiffs/Petitioners and Defendants/Respondents and names a person who predeceased Colonel Stroman as his personal representative.²

Colonel Stroman suffered a stroke in 2005. David came to Orangeburg from Washington, D.C., at that time to live in the house his father owned at 1193 Pruitt Drive, Orangeburg, South Carolina. Colonel Stroman

² Colonel Stroman apparently died with another will that left an increased share of his estate to Jamileh, but she testified that what she wants is an equal division of the estate between her and her siblings. David is in default of an allegation that he is in possession of this latest will but refuses to submit the same to be probated and, thus, admits that. Jamileh and Synthia have not been able to find this will or a copy of it, and David has not produced it.

signed a power of attorney document that states that it made David attorney-in-fact for Colonel Stroman. This power of attorney document did not state that it gave David the power to make transfers of any sort of his father's property to himself.

Colonel Stroman had several bank accounts with Bank of America. David signed new signature cards for these accounts that changed the ownership designations for at least two of his father's bank accounts to have "Samuel D. Stroman II POA" listed as a joint owner of the accounts. None of these new, changed signature cards were signed by Colonel Stroman. This did not change the ownership of the accounts or of the money in them, all of which still belonged to Colonel Stroman. At the moment of Colonel Stroman's death, the money in these accounts became the property of the Estate of Samuel D. Stroman.

The day before Colonel Stroman died, David (purporting to act as attorney-in-fact for his father) executed two purported deeds to himself of the property Colonel Stroman owned at 1193 Pruitt Drive in Orangeburg and also of a lot in Orangeburg that Colonel Stroman owned. The deed documents indicate that John Eric Fulda was the attorney who prepared them. . . .

. . . .

Shortly after Colonel Stroman died, David took all the money out of his father's Bank of America accounts and transferred it into a checking account of David's own. Ms. Palinski and Plaintiffs/Petitioners engaged in an active search to discover whether Colonel Stroman had any other bank accounts or money held by other financial institutions at the time of his death and were not able to find any such bank accounts or money other than the Bank of America accounts. As noted in Ms. Palinski's testimony and the written summary information she provided to the Court, this litigation uncovered a total amount of \$383,543.93 in money Colonel Stroman owned at the time of his death (this does not include non-liquid assets).

David testified that he had no access to any money since his father's death other than the money that he took from his father's bank accounts and put into his own account after his father's death. David further testified that the only money that has ever been in that checking account was the money he put into it from his father's accounts after Colonel Stroman died.

Since Colonel Stroman's death, David has treated what his father owned in life as belonging to David alone. He purposefully excluded his sisters from their shares of Colonel Stroman's property. The thrust of the testimony about what David said and did in the time just after Colonel Stroman's death is that David believed that his self-transfer actions under the guise of his acting as attorney-in-fact for his father had put him in a position of being able to claim sole ownership of Colonel Stroman's assets. His statements around that time (such as referring to his sisters Jamileh and Synthia as "those bitches" and stating that he would "spank them good" and that they would never get a dime of their father's money) demonstrate that he acted with a significant animus toward Jamileh and Synthia and that his aim was to enrich himself by deliberately preventing his sisters from realizing their inheritance.

David usurped all of his father's property that he could get his hands on. He lived in his father's house, wore his father's clothes and jewelry, and drove a car his father had owned. He did nothing to seek employment or otherwise earn any income since his father's death, instead living totally off of Colonel Stroman's money that he had put into his own checking account. Though David was aware at all times after the September 24, 2008, hearing that he was under Order of this Court to spend no more than 25 percent of the money in that account and that he was to account for all his expenditures of money from that account, he blithely disobeyed the Order in both of those respects. David exceeded the court-ordered spending limit from that account by around \$126,000.00, and he kept no account of how he spent that money. He testified that he did not change his spending habits at all after the September 24, 2008, hearing. He "purchased" a car from Ms. Palinski as the Estate's Special Administrator, but David's own testimony reveals that he paid for it only

with money he had taken from his father's bank accounts. David did distribute \$24,166.16 to Sherry Stroman under the guise of him giving her these sums as gifts. While David did make some expenditures that in effect preserved commonly inherited property for him and his sisters and did make some expenditures that would have been treated as estate expenses under normal circumstances, these are dwarfed by the amount of money that David spent on himself, which Ms. Palinski calculated at \$197,378.09.

....

According to Ms. Palinski's reckoning of the assets owned by Colonel Stroman at his death that passed through his estate, the total value of those assets was \$704,838.56. Even counting the estate-preservation expenditures (including those made by David, administrative fees for probate and otherwise, and the court-approved fees paid from the Estate assets to the Special Administrator) as subtracted from the total of estate assets to produce the siblings' net share amounts (and with David's purported real property transfers to himself treated as ineffective, as discussed below), this means a net share of estate assets for each of Colonel Stroman's children at \$165,408.09 (based on a division into fourths). Not counting the estate preservation expenditures, David spent \$197,378.09 of the estate assets on himself. Per Ms. Palinski's calculations, David has already received \$31,969.87 more than his share of the estate assets, assuming that all the other assets are distributed to David's siblings with nothing more distributed to David.

(R. pp. 19-23.)

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., Inc. v. Intedger Industries, Inc., 383 S.C. 601, 606-07, 681 S.E.2d 885, 888 (2009) (internal citations omitted).

ARGUMENT

I. **The plain language of Rule 5, SCRCP, disposes of the bulk of David’s appeal.**

Most of David’s appeal is taken up with argument that the amended complaint needed to be personally served on David with an attached summons. The text of Rule 5, SCRCP, disposes of this argument. Rule 5, SCRCP, reads in pertinent part:

(a)Service: When Required. Unless otherwise ordered by the court because of numerous defendants or other reasons, all (1) written orders; (2) pleadings subsequent to the original summons and complaint, which includes answers, counterclaims, cross claims, replies and amended complaints; (3) written motions, other than ones which may be heard ex parte; (4) written notices; (5) discovery requests and responses; (6) appearances; (7) demands; (8) offers of judgment; (9) designations of record or case; (10) grounds or exceptions on appeal; and (11) other similar papers shall be served upon each of the parties of record. No service need be made on parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for serving of summons in Rule 4, and notice of any trial or hearing on unliquidated damages shall also be given to parties in default.

(b)(1) Same: How Made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of

court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there be no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving a copy at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint.

...

(d) Filing. All papers required to be served upon a party except as provided in Rule 26(g)(1), shall be filed with the court within five (5) days after service thereof. The summons and complaint shall be filed before service. Proof of service shall be filed within ten (10) days after service of the summons and complaint. Upon failure to serve the summons and complaint, the action may be dismissed by the court on the court's own initiative or upon application of any party. Upon failure of a party to file other pleadings, motions, or papers, the court may permit filing or proceed as though the same had not been served.

The very words of Rule 5 provide that an amended complaint is ordinarily to be served by mailing a copy of it to the defendant's attorney. That happened here. (R. p. 484.) Per Rule 15(a), SCRCF, David was required to serve a responsive pleading to the amended petition and complaint within 20 days of September 26, 2008 (15 days under Rule 15(a), SCRCF, and an additional five days under Rule 6(e), SCRCF, since the service was by mail). (R. pp. 16, 111-12.) David did not serve a responsive pleading within the time allowed. (R. pp. 16-17, 111-12.)

David's reliance on the unpublished opinion in Venture Engineering, Inc. v. Avery, 2008-UP-002 (Ct. App. 2008), is misplaced, and not just because that opinion is "of no precedential value." Rule 220(a), SCACR. It appears that the decision in

Venture Engineering was driven by the fact that the plaintiff there did not file the amended complaint within five days of its service by mail, as is required by Rule 5(d), SCRCF. Here, the amended petition and complaint had already been filed two days before it was served. (R. pp. 97-110, 484.) Since Venture Engineering is “of no precedential value[,]” though, it really does not much matter what the reasoning was in that case. Rule 220(a), SCACR.

David argues that a summons was required to be served with the amended petition and complaint, but he seems to miss the point of a summons. A summons is served with the original pleading that begins a case because it confers personal jurisdiction over the defendant. BB&T v. Taylor, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006); Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (Ct. App. 2010). The Rules of Civil Procedure treat service of an amended complaint differently from service of the original summons and complaint for a reason: when an amended complaint is served, the court usually already has personal jurisdiction over the defendant, since the summons necessary to confer that jurisdiction was served with the original complaint. See Rules 3(a)(1), 4, 5(a)&(b), SCRCF. The plaintiff who serves an amended complaint is not commencing a new action but, rather, amending his pleading in an existing action. Rules 3(a), 5(a)&(b), 15(a), SCRCF.

Here, David was served with the summons for this case on September 13, 2007, when he was served with it along with the original petition. (R. pp. 50-51.) He appeared, was represented, and was not in default when he was served with the amended petition and complaint. (R. pp. 53-55, 484.) There was no need to serve him with a summons *again*. Rule 5(a)&(b), SCRCF.

Further, David's statement attached to his reply to the motion to appoint a special administrator cannot be considered to be an answer to the amended complaint. (R. pp. 83-96.) It is designed as a point-by-point response to an affidavit given by Jamileh in support of that motion. (R. pp. 70-75, 83-96.) It does *not* respond to the allegations of the amended petition and complaint. (R. pp. 70-75, 83-96, 97-110.) It was, thus, not an answer. See Rule 8(b), SCRCPP ("party shall state in short and plain terms the facts constituting his defenses to each cause of action asserted and shall admit or deny the averments upon which the adverse party relies").

It was certainly not error for the master to rule that David had been properly served with the amended petition and complaint and had simply let his time to answer it run and done nothing about that for nearly three years when the motion to set aside default was made. (R. p. 18.)

II. The master denied David's motion to set aside default because the motion did not satisfy the Sundown Operating test.

The standard that a party seeking for his default to be set aside must meet is "good cause." Rule 55(c), SCRCPP. This standard "requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." Sundown Operating, 383 S.C. at 608.

David did not meet this standard, which is why the master denied his motion to set aside default. (R. p. 18.) David did not put forth a satisfactory explanation for

the default. (R. p. 18.) He did not put forward any explanation for the default. (R. p. 18.) His written motion simply stated that his previous counsel in this case failed to answer the amended complaint but stated nothing about why that lawyer did not serve an answer to the amended complaint. (R. pp. 18, 113-16.)

The motion was not timely. (R. p. 18.) It was made nearly three years after the service of the amended petition and complaint. (R. pp. 18, 113-17.) The master had already provided David an opportunity to have a hearing on a motion to set aside default several months before David made his motion, and David did not take advantage of that opportunity. (R. p. 196 ln. 5-20, p. 197 ln. 1-4, pp. 488-89.) February 7, 2011, was set aside as the date for a hearing on a motion to set aside default if David decided to make one. (R. p. 18, p. 197 ln. 1-4, p. 489.) He did not make any such motion before that date, and the date passed with no motion hearing. (R. p. 18, p. 197 ln. 1-5, p. 489.) David did not make a motion to set aside default until months later, practically on the cusp of the damages hearing. (R. pp. 113-17.)

Despite the vigorous (but unspecific) contentions David now makes on appeal, he made no showing of a meritorious defense. (R. p. 18, p. 198 ln. 4-8.) He put forward no affidavit or other factual material in support of his motion that tended to show that anything alleged in the amended complaint was not true. (R. p. 18, p. 198 ln. 4-8.) As the master found, because David was in default and his liability was thus established under Rule 8(d), SCRCP, Jamileh and Synthia did not conduct the extensive discovery they might otherwise have conducted. (R. p. 18, p. 198 ln. 10-14.) They would have been prejudiced if the master had granted David's motion,

particularly since it was heard on the day that the damages hearing began. (R. p. 18, p. 198 ln. 10-14.)

The master correctly denied David's motion to set aside default.

III. Under Howard v. Holiday Inns, David did not have the right to call any witnesses to testify about anything.

Recently, our Supreme Court had “an opportunity . . . to re-examine [its] decision in Howard [v. Holiday Inns, Inc., 271 S.C. 238, 246 S.E.2d 880 (1978),] and the procedures adopted therein.” Limehouse v. Hulsey, (S.C. Sup. Ct. filed June 26, 2013) (Shearouse Adv. Sh. No. 28 at 73, 92). The Court held in Limehouse that the Howard rule that limits a defendant's participation in a default damages hearing to cross-examining witnesses and objecting to testimony and exhibits remains the law in South Carolina. Id. at 93.

David now seems to ignore this on appeal. The master did not allow David to call the Bank of America employee as a witness because that would have violated Howard. (While the expected testimony of this individual would indeed have been a legal conclusion, applying Howard was a threshold issue. Under Howard, David was not permitted to call any witnesses to testify about anything, period. See id.) David cannot expect this Court to reverse the master for *following* the law.

IV. David makes arguments to this Court that he never made below.

Most of what David now argues he never argued to the master. About the closest he comes to that is his argument that the master should have treated David's unsworn statement attached to the reply to the motion to appoint a special administrator as an answer to the amended complaint. Even that, though, is not what David's counsel argued below. David's counsel argued that he *thought* that this

statement was an answer but then discovered he was wrong about that. (R. p. 194 ln. 24 through p. 195 ln. 6.)

To be preserved for appellate review, an argument must have been both raised to and ruled upon by the trial court. E.g., Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998). Here, the Court need not reach the issue of whether the master ruled on the arguments David now makes on appeal – David never made them below. He cannot now prevail on appeal with an argument on which he never gave the master a chance to rule. Id.

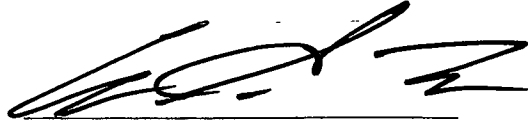
V. No appeal lies from a default judgment.

David's appeal is also of matters that are not properly appealable. Our Supreme Court has said that there is no appeal from a default judgment. See Winesett v. Winesett, 287 S.C. 332, 334, 338 S.E.2d 340 (1985) (“default judgment may not be appealed”; correct practice is to move for relief from judgment); Belue v. Belue, 276 S.C. 120, 121, 276 S.E.2d 295 (1981) (“no appeal lies for a default judgment”; correct practice is to move for relief from judgment); Jean Hoefler Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 99 (2d ed. 2002). David would have to bring a motion for relief from the judgment under Rule 60(b), SCRCP, and have that denied before he could appeal to this Court. See id. He has not done that.

CONCLUSION

For many reasons, the master did not abuse his discretion in declining to set aside David's default and in simply applying existing precedent. The master's rulings should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'A. S. Radeker', written over a horizontal line.

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January 3, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

O. Davie Burgdorf, Master-in-Equity

Court of Appeals Case Tracking No. 2013-000549
Trial Court Case No. 2008-CP-38-310

In re: Estate of Samuel D. Stroman,

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

v.

Samuel D. Stroman, II, and Sherolyn D. Stroman, Defendants,

Of whom Samuel D. Stroman is.....Appellant.

CERTIFICATE OF COUNSEL

I certify that the foregoing brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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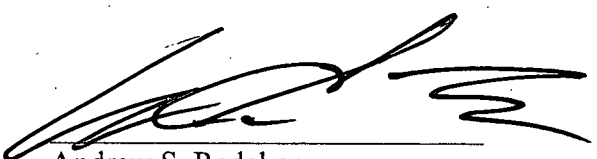
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Of whom Samuel D. Stroman is..... Appellant.

PROOF OF SERVICE

I certify that I served the Respondents' final brief on counsel for the Appellant by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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SC Court of Appeals