

**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.

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

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Unpublished Opinion No. 2008-UP-002  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

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**REVERSED AND REMANDED**

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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), SCRPC, 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), SCRPC ("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), SCRPC. 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.**

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