THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Charleston COUNTY
Court of Common Pleas

J. C. Nicholson, Circuit Court Judge

Case No. 2013-CP-10-03054

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SC Court of Appeals

Willie Preston, individually and as the Personal Representative of the Estate of Martha Preston, Deceased. .....Appellant,

v.

Surgical Care Affiliates, LLC; Charleston Surgery Center, L.P.; Laura Bilancione, R.N.; Coastal Anesthesia Associates; and Christine Thompson, MD..... Defendants,

Of Whom

Coastal Anesthesia Associates is the, ... Respondent,

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Statement of the Case

Appellant Willie Preston, individually and as the Personal Representative of the Estate of Martha Preston, filed a Notice of Intent to File Suit against Surgical Care Affiliates, LLC; Charleston Surgery Center, L.P. ("CSC"); Nurse Doe; ABC Anesthesia Group; and Christine Thompson, MD on November 9, 2012.[1] (Notice of Intent to File Suit). On April 1, 2013, the parties held a pre-suit mediation. In that mediation, Appellant believed Attorney Jamie Hood appeared on behalf of Dr. Thompson and Coastal Anesthesia Associates ("Coastal"), as he later identified ABC Anesthesia Group as Coastal, and no one at mediation indicated that Coastal was not present. (Affidavit of Chad McGowan).

Following an unsuccessful pre-suit mediation, on May 24, 2013, Appellant filed a Summons and Complaint against all Defendants, and served Coastal's Registered Agent, Dr. Randall Kerns at the address stated on the South Carolina Secretary of State's website. (Summons and Complaint; Registered Agent Information; and Proof of Service). Thirty days passed without Coastal answering or otherwise appearing in the case.

On September 23, 2013, the parties participated in mediation. Appellant subsequently filed an Application for Default, which was mailed on September 24, 2013, and filed by the Clerk of Court on September 26, 2013. (Public Records Index). On September 23, 2013, Coastal filed an Answer, but Appellant did not receive the Answer and was not aware it had been sent until September 27, 2013.[2] (Chad McGowan's Affidavit and Coastal's Answer). In its

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[1] Appellant reached a settlement agreement with Defendants CSC and Laura Bilancione, RN (originally listed as Nurse Doe), which was approved by the circuit court on November 4, 2013. (Transcript pg. 15, Line 22-25).

[2] Upon learning an Answer had been filed, Chad McGowan, on behalf of Appellant, wrote the circuit court bringing this matter to Court's attention and ensuring compliance with the South Carolina Rules of Civil Procedure. (Letter).

Answer, Coastal did not allege that it had not been properly served with Appellant's Complaint. (Answer).

An Order of Default was entered on November 21, 2013, by the circuit court. On December 5, 2013, Coastal filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, or in the Alternative, to Set Aside Entry of Default. (Coastal Motion to Dismiss) (Coastal's Memorandum in Support). On December 17, 2013, Appellant filed a Memorandum in Opposition to Coastal's motion. On December 18, 2013, the circuit court conducted a hearing on the motion. (2013 Transcript). On January 17, 2014, the circuit court filed a Form 4 Order and a written Order denying Coastal's Motion to Dismiss and granting Coastal's Motion to Set Aside Entry of Default. Appellant filed his Notice of Appeal on February 11, 2014.

Statement of Facts

On April 18, 2012, Appellant's wife, Mrs. Martha Preston, went to CSC for an out-patient knee surgery. (Comp. ¶ 6). Following surgery, Mrs. Preston was administered Dilaudid, in excess of Dr. Thompson's orders. At the time of her discharge, Mrs. Preston could not walk or stay awake due to the heavy amounts of medication she had been administered. A few hours after returning home, Mrs. Preston was not breathing. Emergency services were called and she was transported to the Medical University of South Carolina ("MUSC"). On April 23, 2012, MUSC pronounced Mrs. Preston brain dead from a lack of oxygen. (Complaint). The cause of death was determined to be a "probable mixed drug toxicity." (Complaint).

Appellant filed a Notice of Intent to File Suit against Surgical Care Affiliates; CSC; Nurse Doe; ABC Anesthesia Group; and Dr. Thompson on November 9, 2012. (Notice of Intent to File Suit). On April 1, 2013, the parties held a pre-suit mediation. In that mediation, Attorney Jamie Hood appeared on behalf of Dr. Thompson. Appellant believed Mr. Hood also appeared on behalf of Coastal, as he later identified ABC Anesthesia Group as Coastal, and no

one at mediation indicated that Coastal was not present. (Affidavit of Chad McGowan). After an unsuccessful pre-suit mediation, Mr. Hood declined to accept service on behalf of Coastal. (Affidavit of Chad McGowan).

On May 24, 2013, Appellant filed a Summons and Complaint against all Defendants, and served Coastal's Registered Agent, Dr. Kerns, at the address stated on the South Carolina Secretary of State's website by certified mail. (*See* Summons and Complaint; Registered Agent Information; Proof of Service; Transcript pg. 15, lines 18-19). On July 8, 2013, Jody Hawkins signed the return receipt and accepted service on behalf of Coastal. (Transcript- pg. 15 Lines 9-15; pg. 17, Lines 23-25). Ms. Hawkins worked as a receptionist at CSC and viewed herself as an employee of CSC despite receiving and accepting service on behalf of Coastal and Dr. Kerns. (Transcript pgs. 17-18). She has worked for the CSC for 14 years. (LinkedIn page, Transcript 17-22)

Coastal's registered address with the Secretary of State is the same address as CSC. (Transcript pg. 18, Lines 2-7). CSC and Coastal are effectively the same principal place for the purpose of receiving all mail, including certified mail. In fact, CSC and Coastal also have the same phone number. (Transcript pg. 21, Line 4). Ms. Hawkins's standard practice is to sign for all certified mail and deliver the mail to the addressed recipient be it a recipient at CSC or Coastal. (Transcript pg. 27, Lines 19-23, LinkedIn). Ms. Hawkins has no memory of receiving the Summons and Complaint, but "she does receive certified letters, and she would put them in the office – or whomever it was directed to." (Transcript pg. 19, Lines 14-19). This precedent includes receiving and signing other legal documents such as subpoenas for medical records sent to Coastal and CSC. (Transcript pg. 19, Lines 20-25).

Thirty days passed without Coastal answering or otherwise appearing in the case. Parties participated in mediation on September 23, 2013. During mediation, Joe Costi, Defendant CSC's insurance adjuster called Chad McGowan, Appellant's counsel, and acknowledged that Coastal was in default. (Affidavit of Chad McGowan). Appellant subsequently filed an Application for Default, which was sent on September 24, 2013, and filed by the Clerk of Court on September 26, 2013. (*See* Public Records Index).

Coastal filed an Answer on September 23, 2013. (Affidavit of Chad McGowan and Coastal's Answer). Appellant received the Answer by U.S. mail on September 27, 2013. (Transcript 16, Lines 2-18). Until that time, Appellant was unaware of its existence. (Chad McGowan's Affidavit and Coastal's Answer). In its Answer, Coastal did not allege that it had not been properly served with Appellant's Complaint. (Coastal's Answer).

On November 21, 2013, the circuit court filed an Order Entering Default Judgment against Coastal. (November 21, 2013 Order). On December 5, 2013, Coastal filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, or in the Alternative, to Set Aside Entry of Default. (Coastal Motion to Dismiss) (Coastal's Memorandum in Support). Coastal argued the circuit court lacked the necessary subject matter jurisdiction to hear the case and that good cause existed to set aside the entry of default. On December 17, 2013, Appellant filed a Memorandum in Opposition to Coastal's motion and argued that any argument of improper service was waived because Coastal did not raise those defenses in its Answer and service was proper under Rule 4, SCRCP. Further, Appellant contended that Coastal failed to establish good cause.

On December 18, 2013, the circuit court conducted a hearing on the motion. (2013 Transcript). On January 17, 2014, the circuit court filed a Form 4 Order and a written Order denying Coastal's Motion to Dismiss and granting Coastal's Motion to Set Aside Entry of

Default. The circuit court held, "I find that Jody Hawkins is not, has never been, and was not on July 8, 2013[,] an employee, agent or representative of [Coastal]." (Order, page 2). The circuit court also found that Coastal had shown good cause and should be granted relief from the entry of default by meeting the *Wham* factors.[3] (Order). Under a Rule 55, SCRCP, analysis, the circuit court held that service of the Summons and Complaint on Coastal "was insufficient under Rule 4, SCRCP." The circuit court rejected Appellant's arguments of waiver under Rule 12, SCRCP, because "this court entered default against [Coastal], and [Coastal] did not have the permission of [Appellant] or the leave of court to answer the [Appellant's] Complaint, the answer submitted by Coastal was null and cannot act to waive a defense of insufficiency of service of process." This appeal followed.

STANDARD OF REVIEW

"The power to set aside a default judgment is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent a clear showing of an abuse of discretion." *Melton v. Olenik*, 379 S.C. 45, 50, 664 S.E.2d 487, 489-90 (Ct. App. 2008). "An abuse of discretion arises when the court issuing the order was controlled by an error of law or when the order, based upon factual conclusions, is without evidentiary support." *Id.*, at 50, 664 S.E.2d at 490.

ARGUMENTS

I. A Court Order Granting a Party Relief from Default is Immediately Appealable Because it is Equivalent to the Granting of a Motion to Dismiss.

South Carolina law entitles a litigant to immediately appeal an interlocutory order that affects substantial rights. *See* S.C. Code Ann. § 14-3-330(2)(1991). Moreover, an interlocutory order that affects a substantial right may be appealed immediately, or the issue is waived.

[3] *Wham v. Shearson Lehman Brothers, Inc.*, 3298 S.C. 462, 4381 S.E.2d 499 (Ct. App.1989).

Fulmer v. Cain, 380 S.C. 466, 670 S.E.2d 652 (2008); *see Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997). Setting aside of an entry of default based on improper service is the equivalent of granting a motion to dismiss and is immediately appealable. *Wetzel v. Woodside Development Limited Partnership*, 364 S.C. 589, 615 S.E.2d 437 (2005) (holding the granting of the motion to set aside entry of default and holding a party was not properly served is equivalent to a motion to dismiss); *see Doe v. Marion*, 361 S.C. 463, 605 S.E.2d 556 (Ct. App. 2004) (holding the grant of a motion to dismiss is immediately appealable); *see also Lebovitz v. Mudd*, 289 S.C. 476, 347 S.E.2d 94 (1986) (granting of a partial motion to dismiss is immediately appealable). Furthermore, appellate courts have continually focused on "the effect of the order, not the label given to the motion or the order granting it." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 303, S.E.2d 475, 478 (Ct. App. 2011).

By ruling Coastal "was not properly served with the Complaint," the circuit court's Order is the equivalent of dismissing Appellant's action. Unlike a typical grant of relief from default, a determination that service never occurred immediately dismisses this action. Therefore, this case is immediately appealable and properly before this Court.

II. Service on Coastal Was Proper Because Coastal Waived Any Argument that it was Not Properly Served and Appellant's Service Complied With Rule 4, SCRCP.

The circuit court erred in allowing Coastal to raise an improper service defense as a basis for granting relief from default and finding Coastal was not properly served pursuant to Rule 4, SCRCP. Coastal waived any objections to improper service by failing to raise those objections in its Answer to Appellant's Complaint or in a timely motion made pursuant to Rule 12, SCRCP. Furthermore, Appellant complied with the service requirements under Rule 4, SCRCP, by serving Coastal's registered agent by certified mail. The dispositive issue on appeal is whether

the circuit court's finding of improper service is a basis upon which it could properly rely in granting relief from entry of default when a finding of improper service is unsupported by South Carolina Rules of Civil Procedure and case law.

A. Coastal Waived Any Argument that it was Not Properly Served

The circuit court's reliance on Coastal's improper service arguments was in error because Coastal's objections were untimely and procedurally improper. Rule 12(b), SCRCP, provides in pertinent part:

> Every defense . . . to a cause of action in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (5) insufficiency of service of process . . . . A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

Rule 12(h)(1), SCRCP, "expressly provides that the defense of insufficiency of service of process is waived 'if neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.'" *Unisun Ins. v. Hawkins*, 342 S.C. 537, 541, 537 S.E.2d 559, 561 (Ct. App. 2000).

Coastal filed an Answer to Appelalnt's Complaint on September 23, 2013. Coastal responded to every paragraph of the Complaint and asserted several affirmative defenses, but did not assert a defense or objection based on alleged improper service. (Coastal's answer). Additionally, Coastal did not file a motion to dismiss based on improper service prior to answering the Complaint. *See* Rule 12(b), SCRCP, (permitting pre-answer motion asserting various defenses). For an improper service defense, failure to raise the defense in a pre-answer motion or in the answer results in waiver. Rule 12(h)(1), SCRCP. As a result, Coastal waived any objection to the service it received in this case. *See Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993) (concluding defendants "waived improper service as a defense to this action

by their failure to raise the issue in their answers"); *Unisun Insurance*, 342 S.C. at 541, 537 S.E.2d at 561 (citing James F. Flanagan, *South Carolina Civil Procedure* 100 (2d ed. 1996) ("The . . . waiver provision affects not only the motion itself but any argument based on the alleged defect.")).

The circuit court rejected Appellant's waiver argument under the guise that Coastal "did not have permission of [Appellant] or the leave of court to answer the [Appellant's] Complaint, the answer submitted by [Coastal] was null and cannot act to waive a defense of insufficiency of service of process." (Order 5-6). The circuit court's holding ignores and excuses the most basic fact that Coastal filed an Answer on September 23, 2013. (Answer). Coastal was aware it was untimely and in default, however it still chose to file an Answer and strategically proceeded without asserting an improper service defense. Coastal should be bound by its' own waiver. The circuit court's ruling grants an unprecedented procedural mulligan, disregarding the very purpose of Rule 12 defenses and their waiver. *See Garner,* 312 S.C. at 488, 435 S.E.2d at 850 (concluding defendants "waived improper service as a defense to this action by their failure to raise the issue in their answers").

Coastal should not receive a benefit from its own tardiness and failure to assert an affirmative defense. On its face, Coastal filed an Answer to which it was prepared to be bound to and did not assert the necessary defense to argue improper service. As such, that defense is waived. Therefore, the circuit court erred in finding Coastal was not properly served.

B. Appellant's Service on Coastal Was Proper

Furthermore, Appellant's service on Coastal was proper and satisfied the South Carolina Rules of Civil Procedure. The circuit court's finding that service was improper because Ms. Hawkins was not an agent of Coastal and service may not be made on "a party to the action"

upon another party, disregards the well-established and customary agency relationship established between Coastal and Ms. Hawkins. Appellant fully complied with the procedural requirements of Rule 4, SCRCP, based upon the information provided and represented by Coastal, and, as such, should not be punished for the agency arrangement established by Coastal's customary operating practices, which were followed by Ms. Hawkins on July 8, 2013.

Rule 4, SCRCP, "confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action." *Mull v. Ridgeland Realty, LLC*, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (Ct. App. 2010) (quoting *Roche v. Young Bros., Inc. of Florence,* 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995)). Fundamentally, the objective of service is "to give notice to the defendant corporation of the proceedings against it." *Mull*, 387 S.C. at 485, 693 S.E.2d at 30 (quoting *Burris Chem., Inc. v. Daniel Constr. Co.*, 251 S.C. 483, 487, 163 S.E.2d 618, 620 (1968)). Accordingly, South Carolina courts have "never required exacting compliance with the rules to effect service of process" so long as the defending party was on notice of the plaintiff's claims. *Colleton Preparatory Acad., Inc. v. Beazer East, Inc.*, 223 F.R.D. 401, 404 (D.S.C. 2004) (quoting *Roche*, 318 S.C. at 209-10, 456 S.E.2d at 899). Corporations, like Coastal, may be served by delivering a summons and complaint to "an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process." Rule 4(d)(3), SCRCP. Corporations, like individuals, may be served by certified mail. Rule 4(d)(8), SCRCP. Rule 4(d)(8), SCRCP, sets forth requirements for effective service of process by certified mail in relevant part:

> **Service by Certified Mail.** Service of a summons and complaint upon [an individual or corporate]a defendant . . . may be made by . . . registered or certified mail, return receipt requested and delivery restricted to the addressee. Service is effective upon the date of delivery as shown on the return receipt. Service pursuant to this paragraph shall not be the basis for the entry of a default or

> a judgment by default unless the record contains a return receipt showing the acceptance by the defendant. Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the return receipt was signed by an unauthorized person. If delivery of the process is refused or is returned undelivered, service shall be made as otherwise provided by these rules.

Appellant met all of Rule 4's, SCRCP, requirements for serving a corporation by certified mail. Appellant's mailing was addressed to Dr. Kerns, whom Coastal has identified as its registered agent for service. Appellant's mailing included a request for return receipt as required by Rule 4(d)(8). By complying with all rules for certified mail service, Appellant is entitled to a presumption that service was proper. *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 295, 721 S.E.2d 430, 433 (2012) (quoting *Roche*, 318 S.C. at 211, 456 S.E.2d at 900).

Furthermore, Coastal failed to meet its burden of presenting evidence sufficient to overcome the presumption of proper service. *Makawi*, 396 S.C. at 295, 721 S.E.2d at 433 (quoting Rule 4(d)(8), SCRCP). Under Rule 4(d)(8) the defendant, not the plaintiff, must prove that the receipt was signed by an unauthorized person. *Roche*, 318 S.C. at 211, 456 S.E.2d at 900. The plaintiff is only required to show compliance with the rules. *Id.* When the South Carolina Rules of Civil Procedure on service are followed, there is a presumption of proper service. *Id.* Rule 4(d)(8) requires that the return receipt be restricted to the addressee and show acceptance by the defendant. "The rule simply does not require the specific addressee to sign the return receipt." *Roche*, 318 S.C. at 211-12, 456 S.E.2d at 900.

South Carolina appellate courts have previously addressed equally untraditional workplace scenarios and found that an individual, like Ms. Hawkins, is an agent for the purpose of service. In *Burris Chemical, Inc. v. Daniel Construction, Co.*, the defendant Daniel Construction Company, contracted with the plaintiff, Burris Chemical Inc., to build an industrial

plant for Burris Chemical in York, South Carolina. 251 S.C. 483, 163 S.E.2d 618. A dispute later arose between the parties following the completion of the building and Burris Chemical sued Daniel Construction. *Id.* at 485, 163 S.E.2d at 619. Daniel Construction disputed service because service of process was performed on an employee at a construction site in Colleton County. *Id.* at 486, 163 S.E.2d at 619. The project in Colleton was being built for a separate entity, Stevens Company. *Id.* at 486, 163 S.E.2d at 620. On Stevens's property there was a mobile trailer that was being used as an office for Daniel Construction. *Id.* Daniel Construction argued service was improper because the company did not own the property and did not transact business on the property at that address as intended by the code section. *Id.* The South Carolina Supreme Court disagreed and opined that the question was "whether the employee was an agent for the purposes of service within the meaning of the [code section]." *Id.* at 487, 163 S.E.2d at 620. The court explained

> The principal object of service of process is to give notice to the defendant corporation of the proceedings against it. Service upon a common laborer would normally be insufficient because such would not likely give notice to the corporation. It cannot be logically argued that the superintendent in charge of all of the remaining employees at a project of this magnitude is not such a representative of the corporation as contemplated by the legislature to apprise the corporation that an action had been commenced. *The lower court was justified in finding that the person served was such an agent of the construction company. The service could reasonably be expected to result in prompt notice to the corporation with adequate opportunity to defend.*

Id. (emphasis added). The crux of the Supreme Court's reasoning examines the role the person served, not the physical layout of the office or the operational logistics of a company's management. *Id.* In this case, Ms. Hawkins was charged with signing for certified mail regardless of her official employment status with Coastal. In fact, no one disputes she signed for those documents. As in *Burris Chemical*, it was reasonable to expect notice to Coastal occurred

because Ms. Hawkins served as an agent for Coastal. She willingly, knowingly, and routinely asserted expressed or apparent authority to sign for Coastal's certified mail.[4] Ms. Hawkins was Coastal's agent for the purpose of agency under Rule 4, SCRCP.

In *Mull v. Ridgeland Realty, LLC*, 387 S.C. 479, 693 S.E.2d 27 (2010), the South Carolina Court of Appeals addressed whether service was proper when a plaintiff served a registered agent by certified mail to a registered agent's actual address that was out of state and served the summons and complaint by certified mail to the defendant's physical address. On appeal, the defendant argued the service upon the registered agent at the out of state address was ineffective because it was not sent to the address listed with the Secretary of State. *Id.* at 485, 693 S.E.2d at 30. The Court found service was proper based on statutory construction. *Id.* at 486-87, 693 S.E.2d at 31. Looking to Rule 4, SCRCP, section 15-9-210(b) of the South Carolina Code (1996), the Court noted corporations "may be served . . . by registered or certified mail, return receipt requested, *addressed to the office of the registered agent*, or to the office of the secretary of the corporation at its principal office."' *Id.* at 487, 693 S.E.2d at 31 (emphasis in the original). The Court found "even though the defendant's office was not located at the South Carolina address, the service was nonetheless 'addressed to the office of the registered agent' as mandated by section 15-9-210(b)." *Id.* The Court of Appeals in *Mull*, demonstrates both a

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[4] The South Carolina Supreme Court explained in *Roberson v. S. Fin. of S. Carolina, Inc.*, 365 S.C. 6, 10-11, 615 S.E.2d 112, 115 (2005):

> "An agent's authority is composed of his or her actual authority, whether express or implied, together with the apparent authority which the principal by his or her conduct is precluded from denying. Thus, an agent's authority must be either expressed, implied, or apparent. While actual authority is expressly conferred upon the agent by the principal, apparent authority is when the principal knowingly permits the agent to exercise authority, or the principal holds the agent out as possessing such authority."

flexible reading of Rule 4 with a focus on actual service and actual notice taking place. In this case, no one denies that Ms. Hawkins was served or that Coastal was informed of the service. Service effectively occurred on July 8, 2013. By complying with all rules for certified mail service, Appellant is entitled to a presumption that service was proper. *Roche*, 318 S.C. at 211, 456 S.E.2d at 900.

While Coastal attempted to meet its burden of showing improper service with the affidavits of Dr. Kerns and Wendy Sanders, Coastal made no effort to explain why Ms. Hawkins expressly represented herself as Dr. Kerns's agent when accepting Appellant's certified mailing. (Affidavits of Kerns and Sanders). This is because Ms. Hawkins served as the agent of Dr. Kerns, even if her paycheck did not come directly from Dr. Kerns or Coastal. Ms. Hawkins was acting within the expressed or apparent authority established by the operating arrangement with Coastal. *Roberson v*, 365 S.C. at 10-11, 615 S.E.2d at, 115. Again, the address provided on the Secretary of State's website for Dr. Kerns is also the same as that of CSC.[5] Nowhere in Dr. Kerns's affidavit, or in any affidavit presented by Coastal does Dr. Kerns state he did not receive actual notice of the Summons and Complaint. Further, the insurance adjuster for Coastal called Appellant's counsel and acknowledged that he was in default, implying that he had actual notice and time to reply within the time frames provided by the South Carolina Rules of Civil Procedure. (Chad McGowan's affidavit).

C. Reliance on Rule 4, SCRCP, Circumvents the Established Agency Relationship

Additionally, the circuit court's reliance on Rule 4(c), SCRCP, misrepresents the fact that Ms. Hawkins received service. Appellant never contended Ms. Hawkins performed service of

[5](Charleston Surgery Center-Directions & More, http://www.charlestonsurgerycenter.com/Directionsandmore (accessed Dec. 16, 2013)).

process. Additionally, reliance on Rule 4(c), SCRCP, ignores the basic premise that Ms. Hawkins was served as Dr. Kerns's agent. Rule 4(c) states:

> **(c) By Whom Served.** Service of summons may be made by the sheriff, his deputy, or by any other person not less than eighteen (18) years of age, not an attorney in or a party to the action. Service of all other process shall be made by the sheriff or his deputy or any other duly constituted law enforcement officer or by any person designated by the court who is not less than eighteen (18) years of age and not an attorney in or a party to the action, except that a subpoena may be served as provided in Rule 45.

Ms. Hawkins did not serve any document on Dr. Kerns. Rule 4(c) outlines the qualifications of a person completing service. Ms. Hawkins was served as an agent. She in no way was expected to provide service on Dr. Kerns. Service occurred when Ms. Hawkins signed for the Summons and Complaint. Further, Ms. Hawkins was acting for the benefit of Coastal. The office practices of CSC and Coastal created Ms. Hawkins's expressed or apparent agency. This agency is analogous to a company that serves as a registered agent for multiple defendants, which is viewed as separate and distinct service on each entity. In this case, Ms. Hawkins acted within her established role, which included an expectation for her to sign for the Summons and Complaint on behalf of Dr. Kerns.

The circuit court's Order allows Coastal to evade service without repercussions. It effectively punishes Appellant for complying with Rule 4, SCRCP, and rewards Coastal for having assigned an agency task to an agent that is not directly compensated. The Order elevates form over substantive and actual notice, in defiance of South Carolina's established precedents, which continually refuses to demand exacting compliance with service rules where the party served clearly had notice of the claims against it. Therefore, this Court should reverse the circuit court's finding of improper service.

III. Because Service was Proper and Any Argument of Improper Service was Waived by Coastal, the Circuit Court Erred in Finding Coastal Satisfied the Necessary Good Cause Standard to Grant Relief From Default

The circuit court erred in finding Coastal demonstrated good cause warranting relief from entry of default. The circuit court's reliance on improper service was the basis of the circuit court's Order granting relief from default. As discussed *supra*, service of the Summons and Complaint was proper and, even if improper, any argument of improper service was waived by Coastal. In the absence of improper service as a basis for relief, Coastal was unable to satisfy the necessary good cause standard of Rule 55, SCRCP, to grant relief from default.

Rule 12(a) of the South Carolina Rules of Civil Procedure provides, "A defendant shall serve his answer within 30 days after the service of the complaint upon him . . . ." Coastal failed to answer within 30 days of service, and default was entered. Rule 55(c) of the South Carolina Rules of Civil Procedure provides, "For good cause shown the court may set aside an entry of default. . ." In deciding whether "good cause" exists, the offering of a valid reason for the default is necessary before the circuit court may consider the application of Rule 55(c)'s, SCRCP, three factors to set aside the default. Rule 55(c), SCRCP, requires the party seeking relief to provide an explanation for default. Upon such explanation, the circuit court considered the following factors: (1) the timing of the defendant's motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if the relief is granted. *Wham,* 298 S.C. at 465, 381 S.E.2d at 501-02.

In the absence of an improper service argument, Coastal failed to set forth any valid reason for failing to respond to Appellant's Summons and Complaint. *See* Rule 12(h) SCRCP; 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1391 (1990) (Rule 12(h)(1) "advises a litigant to exercise great diligence in challenging personal jurisdiction,

venue or service of process. If he wishes to raise [any] of these defenses he must do so at the time he makes his first significant defensive move . . . ."). *See, e.g., Strickland v. Consolidated Energy Products Company,*274 S.C. 554, 265 S.E.2d 682 (1980) (upholding trial court's finding that any defect in service of process was waived by defendant's appearance requesting to be allowed to file a later answer after the entry of default).

Further, the circuit court's reliance on Appellant's failure to comply with the pre-suit mediation requirements of South Carolina Code § 15-79-125 as a justification for granting relief from default is misplaced. Whether Coastal participated in the pre-suit mediation process has no bearing on the fact that Coastal was properly served with a Summons and Complaint and failed to answer it in a timely fashion. An objection to incompliance with a pre-suit mediation could have been asserted in an answer. A pre-suit mediation issue does not bypass Coastal's failure to assert an affirmative defense in an Answer to a Summons and Complaint that was properly served. The circuit court's analysis should have been focused on Coastal's action prior to the default upon proper notice of service of the Summons and Complaint along with the entry of default. *See Ricks v. Weinrauch*, 293 S.C. 372, 374, 360 S.E. 2d 535, 536 (Ct. App. 1987). Where the default is a defendant's fault, the court should not reopen the case. *See Brown v. Lifford*, 524 S.E.2d 587, 590 (N.C. Ct. App. 2000) (noting that the "degree of attention or inattention shown by the [d]efendant is 'particularly compelling' as to whether the Defendant was diligent"). In the present case, the fact Coastal has presented a potential defense to Appellant's claims has no bearing on its failure to file a timely answer to Appellant's Complaint.

Because Coastal failed to meet the initial burden of providing a valid reason to justify "good cause," the circuit court should have denied Coastal' s motion.[6] The circuit court abused its discretion by issuing an order granting relief for Coastal when that decision is controlled by an error of law. *Melton*, 379 S.C. at 50, 664 S.E.2d at 490. Therefore, this Court should reverse the circuit court's grant of relief from default.

CONCLUSION

Based on the forgoing reasons, Appellant respectfully requests this Court reverse the circuit court's order granting Coastal's Motion to Set Aside Entry of Default.

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[6] *See Sundown Operating Co., Inc. v. Intedge Indus., Inc.*, 383 S.C. 602, 608, 682 S.E.2d 885, 888 (2009) ("The trial court need not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause."); *Regions Bank v. Owens*, 402 S.C. 642, 649, 741 S.E.2d 51, 55 (Ct. App. 2004) ("[b]ecause we find the master did not err in findings Owens failed to show good cause for failing to answer the complaint, we need not consider the *Wham* factors.").

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