THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Circuit Court Judge

Appellate Case No. 2014-000252

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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Arguments

I. The case is immediately appealable.

Respondent Coastal Anesthesia Associates ("Coastal") argues this appeal is interlocutory, and therefore not immediately appealable. Coastal, however, overlooks Appellant's basis for filing this appeal. Appellant fully acknowledges that an order setting aside an entry of default is not *ordinarily* appealable. Yet, Appellant filed this appeal to preserve this issue for consideration by this Court. As explained in Appellant's initial brief, failure to raise this issue could result in waiver. *Fulmer v. Cain*, 380 S.C. 466, 670 S.E.2d 652 (2008) (holding an interlocutory order that affects a substantial right may be appealed immediately, or the issue is waived); *see Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997); *see also* S.C. Code Ann. § 14-3-330(2) (1991) (entitling a litigant to immediately appeal an interlocutory order that affects substantial rights). An order setting aside 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, 705 S.E.2d 475, 478 (Ct. App. 2011).

Coastal negates Appellant's reliance on *Wetzel*, because Coastal "did not move to quash service of process," rather it moved to set aside an entry of default. (Respondent's Brief, p. 6) Coastal is narrowly reading the Court's reasoning in *Wetzel*. Certainly, the party in *Wetzel* did

file a motion to quash the affidavit of default on the ground of insufficient service of the complaint, however the Court's holding was not restricted only to a motion to quash. 364 S.C. at 592, 615 S.E.2d at 438. The Court found that when an order finds a party has not been properly served it is "equivalent to granting a motion to dismiss." *Id.* "Therefore[,] it is immediately appealable." *Id.* This holding allows for a generally interlocutory issue to become immediately appealable when two prongs are met: (1) a finding that service has not been properly made (2) that is the equivalent of granting a motion to dismiss. *Id.*

The circuit court found service was improper because Coastal was not properly served the Summons and Complaint, and relied on that finding to set aside the entry of default. The finding of improper service meets the first prong. In regards to the second prong, despite the words used by the circuit court, the effect of the order is to grant a motion to dismiss. *Thornton*, at 303, 705S.E.2d at 78. Coastal contends because the circuit court's order states "Coastal Anesthesia will have 30 days upon proper service of the Summons and Complaint to Answer or otherwise responsively plead to the Complaint" this action cannot be immediately appealed. (Respondent's Brief p. 7).

Coastal's argument against appealability is incorrect. It is well settled that our appellate courts will look to the practical effect of the order, not the label. *Thornton*, 391 S.C. at 303, S.E.2d at 478. Despite the words used, the circuit court order's practical effect is to grant a motion to dismiss. Specifically, it is the equivalent of a motion to dismiss without prejudice. While Appellant has not been required to pay a new filing fee, all other effects of the circuit court's order equate to a motion to dismiss as contemplated by the *Wetzel* court. 364 S.C. at 592, 615 S.E.2d at 438. The fact that Coastal will be required to answer in thirty days from the time of service bears no weight in the order's effect. Requiring Coastal to answer upon the service of

the Summons and Complaint is merely requiring the same procedural compliance for any answer for a newly filed and served summons and complaint. Rule 12, SCRCP ("A defendant shall serve his answer within 30 days after the service of the complaint upon him . . .").

Additionally, a finding that the Summons and Complaint were not properly served dismantles the circuit court's jurisdictional authority over Coastal and negates reliance on the circuit court's order instructing Coastal to answer within thirty days as credence for now attacking the appealability of the order. Pursuant to Rule 4, SCRCP, the summons invokes the jurisdiction of the court. Because the Court found that service was improper, it begs the question of whether the circuit court believed it had the authority to instruct Coastal to answer through the order if in actuality the filing of the Answer sufficed.[1] As a practical matter, the circuit court has not created a special instruction, rather the circuit court has required Appellant to start again, effectively granting a motion to dismiss without prejudice.

II. The circuit court committed an error of law in not finding Coastal waived issues of service.

Coastal challenges Appellant's perception of this case under the guise that this appeal is nothing more than a discretionary decision by the circuit court and a confusion by Appellant regarding the significance of the service of process to set aside default. Thus, implying a limitation of available remedies by this Court based on the standard of review. Coastal finds great solace in the fact that it filed a motion to set aside default not a motion to dismiss for improper service. The procedural mechanism that led to the circuit court's hearing is irrelevant. The focus for this Court is on the fact that Coastal filed an Answer to Appellant's Summons and

[1] The circuit court's jurisdiction will be discussed in detail in Section II of this brief on the merits. For the purpose of appealability, the circuit court's ruling implies and ignores for practical purposes the issue of jurisdiction in its order by finding there was no service of the Summons and Complaint and requiring a new filing of those documents. The practical effect is a motion to dismiss, while creating an error of law as discussed in Section II.

Complaint never asserting a defense or objection regarding service prior to the filing of an entry of default judgment, thereby waiving personal jurisdiction arguments including service, and then subsequently raised the issue of service as a justification for granting relief from the entry of default. Reliance on any argument alleging defective service was effectively waived the day Coastal's Answer was filed. Therefore, the circuit court committed an error of law in finding improper service.

Coastal first suggests Appellant misconstrues the issue by challenging the trial court's finding of improper service instead of appealing the finding that Coastal met the good cause standard, pursuant to *Wham v. Shearson Lehman Brothers, Inc.*, 3298 S.C. 462, 4381 S.E.2d 499 (Ct. App. 1989). Coastal is mistaken. "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. The circuit court based its determination on whether to set aside the default, pursuant to *Wham*, on the premise that service was improper. *Id.* If the fundamental basis for the circuit court's finding that the good cause standard was satisfied was in error regarding the service of the Summons and Complaint, this Court may address such an error.

This case is rooted in procedural confusion for a variety of reasons discussed by both Appellant and Coastal. Despite the noted discrepancies with the Notice of Intent, Coastal subjected itself to the personal jurisdiction of the circuit court by filing an Answer on September 23, 2013. By filing an Answer it waived any argument of defect in service of process. *Bakala v. Bakala,* 352 S.C. 612, 629, 576 S.E.2d 156, 165 (2003) (holding objections to personal

jurisdiction are waived unless raised); *see Stickland v. Consol. Energy Products Co.*, 274 S.C. 554, 555, 265 S.E.2d 682, 683 (1980) (A general appearance constitutes a voluntary submission to the jurisdiction of the court and waives any defects and irregularities in the service of process.") *see also* Rule 4(d), SCRCP ("Voluntary appearance by defendant is equivalent to personal service . . . ."). Coastal's Answer effectively discharged any Notice of Intent issue, bringing it within the purview of the Court.

In fact, Coastal's Answer responded to every paragraph of the Complaint and asserted defenses, but did not assert a defense or objection based on any alleged improper service. (Coastal answer). Any issue or objection regarding service of the Summons or Complaint had to be addressed at that time. By failing to raise improper service in its Answer, Coastal should be barred from relying on improper service for any purpose, including a subsequent argument based on defective service under Rule 4(d)(8), SCRCP. *See*, Rule 12(H), SCRCP; *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.")).

Coastal attempts to evade the issue of wavier by arguing it was only addressing improper service for the purpose of setting aside default as allowed under Rule 4(d)(8), SCRCP, and it never raised nor was required to raise improper service as a 12(b) defense to avail itself of an improper service argument. (Respondent's Brief, p. 15). This argument disregards the fact that Coastal filed an Answer, and in doing so subjected itself to the personal jurisdiction of the court, waived objections concerning defective service, chose not to set forth a 12(b)(5) motion, and became subject to 12(h)(1). Because Coastal made the procedural decision to file an Answer on September 23, 2013, Coastal was required to avail itself of all available procedural defenses or

be subject to waiver. Personal jurisdiction, which includes defects in service and process may be waived if not asserted. *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 8-9, 753 S.E.2d 537, 541 (2014); *see also Neirbo Co. v. Bethlehem Shipbuilders Corp.*, 308 U.S. 165, 167-68 (1939) (finding personal defenses may be waived for failure to timely raise the defense, by formally submitting oneself to the jurisdiction of the court, or submission through conduct.).

Had Coastal not filed an Answer, there potentially would be a different outcome. However, when Coastal took the affirmative action to file the Answer and not address any issue of service, it forwent the right to later attack service and process. In *Unisun Ins. v. Hawkins*, the court found because a party failed "to properly plead the defense of insufficiency of service of process by motion or in his answer, [he] waived the defense." [cite]. Because he failed to challenge the service of process, the court found he also waived a separate and subsequent issue, whose argument was grounded in a defective service theory. *Unisun*'s reasoning is analogous to this present case. Coastal should not be allowed to assert insufficiency of service pursuant to Rule 4 (d)(8), after choosing to not to address any issue with service of process in its Answer. *See Garner v. Houck,* 312, S.C. 481, 488, 435 S.E.2d 847, 850 (1993) (concluding defendants "waived improper service as a defense to this action by their failure to raise the issue in their answers").

III. Service on Coastal was proper because Coastal waived any argument that it was not properly served, thus Appellant's service Complied with Rule 4, SCRCP

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. Service became satisfied when Coastal filed an Answer. If this Court disagrees, Appellant believes service was still satisfied because of the well-settled flexibility for service in South Carolina.

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.

Appellant's Summons and Complaint 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). At the circuit court hearing, Appellant's counsel argued service was proper under both apparent and "actual authority because, according to [Ms. Hawkins], she'd been there for 14 years, and that's the way she'd done it every time." (Transcript pg. 31). Appellant explained to the circuit court there was only one phone line and that Ms. Hawkins has previously signed for other legal documents like subpoenas. In fact, Coastal's council explained "it's a slightly unusual scenario." (Transcript 21).

Coastal ignores the generally flexible reading of the rules to argue that the circuit court's finding of fact on the authorization to accept service is "binding on the appellate court unless wholly unsupported by the evidence or controlled by error of law." (Respondent's Brief, p. 14) (*Roberson v. South Finance of South Carolina, Inc.*, 365 S.C. 6, 8, 615, S.E.2d 112, 114 (2005). This case is distinguishable from prior South Carolina case law on this issue because of the fact that Coastal answered. In *Roberson*, the plaintiffs mailed a summons and complaint to the named defendant's registered agent by certified mail with return receipt requested, but an

employee of the registered agent signed the return receipt. The defendant testified he never received the summons and complaint, never answered the complaint, and then plaintiffs filed a motion for default. *Id.* at 9, 615 S.E.2d at 114. The Court evaluated the fact that the agent had no express authority to accept the service of process, but chose not to answer the unsettled question of whether apparent authority would have been legally sufficient to show authorization to accept service by certified mail under Rule 4, SCRCP. The Court ultimately determined evidence failed to support an agency relationship between the employee and the registered agent to accept service. While at first glance this case appears to settle the issue before this Court, it fails to account for the clash between the traditional notions of flexibility in service and the fact that Coastal's Answer was filed. To rely on the reasoning of *Roberson*, turns a blind eye to the fact that Coastal, unlike the defendant in *Roberson*, received the Summons and Complaint and filed an Answer. Coastal was informed of the litigation and chose not to object to the service prior to the filing of the Answer. Those two facts drastically change the application of *Roberson*.

While there is no direct case on point, this Court addressed a similarly complicated procedural issue in *Stearns Bank National Association v. Glenwood Falls, LP*, 373 S.C. 331, 644 S.E.2d 793 (2007). In *Stearns*, a master found that a party was not properly served under Rule 4(d)(8) because an unauthorized person signed the receipt, but denied relieving the defendant from default from because the defendant made a voluntary appearance. This Court explained "*Normally*, this would be a suitable ground to grant relief from judgment [under Rule 55(c) or] Rule 60(b)(4)." *Id.* at 338, 644 S.E.2d at 796 (citing Rule 4(d)(8) ("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 authorized person.")) (emphasis added). However, this Court affirmed the master finding that a voluntary appearance

submitted the defendant to the jurisdiction of the court, thereby equating to personal service. This reasoning demonstrates the flexibility of the rules, especially in regards to Rule 4(d)(8), SCRCP, and is analogous to this present case.

Appellant's service of the Summon and Complaint combined with South Carolina's well-established flexibility on the issue of service and the fact that Coastal chose to file an Answer equates to effective service. The circuit court's ruling was in error. The fundamental purpose of service is notification. The facts of this case demonstrate that Coastal was informed of this lawsuit, which can be established through Coastal's decision to file an Answer and a choice to make a voluntary appearance. Therefore service was satisfied. A procedural decision was made not to raise an improper service argument. Coastal should be bound by that decision.

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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Of Whom

Coastal Anesthesia Associates is the, ... Respondent,

PROOF OF SERVICE

I, Whitney B. Harrison, Attorney with McGowan, Hood & Felder, LLC do hereby certify that on August 11, 2014, I served a copy of the following ***Appellant's Initial Reply Brief*** by depositing in the United States mail in Columbia, South Carolina with proper postage prepaid to the following:

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August 11, 2014

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Dear Ms. Kitchings:

Enclosed please find one copy of Appellant's Initial Reply Brief and proof of service. If you have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am

Whitney B. Harrison

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