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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

C. Stephen Bennett, Special Referee

Case No.: 2017-CP-27-115

Richard L. Winslow and Charmayne Winslow, ... Respondents,

v.

Matthew W. Hudson, Waste Pro USA, Inc. and
Waste Pro of South Carolina, Inc ..... Defendants,

Of which Matthew W. Hudson is the. ..... Appellant.

MOTION TO INTERVENE
AND TO STAY OR DISMISS APPEAL

Pursuant to Rules 201, 240, and 260, SCACR, Waste Pro USA, Inc. and Waste Pro of South Carolina, Inc. ("Waste Pro Defendants"), Defendants below, hereby move to intervene in the above-captioned appeal, which either should be stayed or dismissed without prejudice. This case has a complicated and unusual procedural history which underlies and is necessary to understand the Waste Pro Defendants' critical need to intervene in this appeal. As a result of the posture of the underlying case, as well as that of a duplicate case filed by Plaintiffs, if the Waste Pro Defendants are not allowed to intervene in Appeal No. 2018-001955, they may be bound by decisions rendered in this appeal in one or both of the underlying lawsuits without having had any opportunity to defend themselves.

Respondents Richard L. Winslow and Charmayne Winslow, Plaintiffs below, filed a Summons and Complaint with the Court of Common Pleas, Jasper County, on March 20, 2017 alleging a negligence cause of action against Appellant Matthew W. Hudson and the Waste Pro Defendants arising out of a November 4, 2015 motor vehicle collision. The Waste Pro Defendants' liability, if any, is solely vicarious, based on the alleged actions of their former employee, Hudson. (Summons and Complaint, filed March 20, 2017, Exhibit A). This case was assigned Civil Action No. 2017-CP-27-00115.

After filing their Summons and Complaint, Plaintiffs sought to perfect service of process on Hudson, as a non-resident motorist, by delivering a copy of the Summons and Complaint on April 3, 2017 to the Director for the South Carolina Department of Motor Vehicles. Hudson did not file a timely Answer or otherwise appear.

Plaintiffs admittedly did not serve the Waste Pro Defendants. (*See* Notice of Motion and Motion to Dismiss Waste Pro Defendants Only, filed August 28, 2018, Exhibit B). Instead, Plaintiffs obtained an Order of Default and Order of Reference against Hudson, (Order of Default and Order of Reference, filed August 30, 2017, *see* Exhibit C), and moved forward with a damages hearing, of which the Waste Pro Defendants had no notice. (*See* Notice of Damages Hearing, filed September 26, 2017, Exhibit D).[1]

The damages hearing was conducted by Special Referee C. Stephen Bennett, III on October 12, 2017 in Ridgeland, South Carolina. Unsurprisingly, Plaintiffs, along with their counsel, were the only parties present. Subsequently, the Special Referee filed an Order of

[1] The Waste Pro Defendants note that the Certificate of Service attached to the Notice of Damages Hearing indicates a "Mr. Matthew W. Watson" was served with the notice at the same address Plaintiffs previously and unsuccessfully attempted to serve Hudson with their Complaint. In addition to the address being outdated, the notice apparently was not even addressed to Hudson, but to a Mr. Watson. (*See* Exhibit D).

Judgment awarding Plaintiffs a total of $1,960,444.66 in actual and punitive damages. (*See* Order of Judgment filed October 13, 2017, Exhibit E). Plaintiffs, having never served the Waste Pro Defendants with the Complaint or notified them of the Order of Default or damages hearing, then sought to have them satisfy the Default Judgment. (*See* Letter from Patrick W. Carr to Liberty Mutual Insurance Group, dated November 13, 2017; *see also* Email Communication from Patrick Carr to JD Smith dated November 21, 2017, attaching the Default Judgment, Exhibit F). Hudson later filed a motion to vacate the default judgment. (Defendant Hudson's Notice of Motion and Motion to Vacate Default Judgment, filed January 19, 2018, Exhibit G).

Although they were never served in this action, the Waste Pro Defendants filed an Answer on August 9, 2018, and an Amended Answer on September 7, 2018 contesting both liability and damages. (Defendants Waste Pro USA, Inc. and Waste Pro of South Carolina, Inc.'s Amended Answer to Plaintiff's Complaint, filed September 7, 2018, Exhibit H). The Waste Pro Defendants also moved for a withdrawal of Circuit Court's order of reference and or for relief from the default judgment as to Hudson. (Defendants Waste Pro USA, Inc. and Waste Pro of South Carolina, Inc.'s Motion for Withdrawal of Order of Reference and/or For Relief from Default Judgment as to Defendant Hudson, filed August 31, 2018, Exhibit I) ("Motion to Vacate").[2]

Upon receipt of the Waste Pro Defendants' Answer, Plaintiffs took two actions. Plaintiffs moved to dismiss the Waste Pro Defendants from the pending proceeding, without prejudice, (Exhibit B), which the Waste Pro Defendants opposed. (Memorandum in Opposition

[2] The Waste Pro Defendants later filed a memorandum in support of their Motion to Vacate, (Memorandum in Support of Defendants Waste Pro USA, Inc. and Waste Pro of South Carolina, Inc.'s Motion for Withdrawal of Order of Reference and/or for Relief from Default Judgment as to Defendant Hudson, fled December 8, 2018, Exhibit J), arguing, among other things, that such relief is particularly warranted in this case where their sole potential liability is vicarious.

to Plaintiffs' Motion to Dismiss Waste Pro Defendants Only, filed December 8, 2018, Exhibit K) ("Memorandum in Opposition").

Plaintiffs also filed a new claim against only the Waste Pro Defendants. That case was assigned Civil Action No. 2018-CP-27-00442. (Summons and Complaint in Civil Action No. 2018-CP-27-00442, filed August 23, 2018, Exhibit L). The claims in the second, duplicate action arise out of the exact same set of facts and the relief sought in that action is exactly the same as the relief sought in Civil Action No. 2017-CP-27-00115. The Waste Pro Defendants moved to dismiss the duplicate tort case or, in the alternative, have it consolidated with Civil Action No. 2017-CP-27-00115. (Defendants' Joint Motion to Dismiss Pursuant to Rule 12(b)(8), or Alternatively, Motion to Consolidate, filed September 25, 2018 in Civil Action No. 2018-CP-27-00442, Exhibit M) ("Motion to Dismiss").

While these various motions were pending, Special Referee Bennett denied Hudson's Motion to Vacate the Default Judgment. (Order Denying Defendant Matthew W. Hudson's Motion to Vacate Default Judgment, filed October 5, 2018, Exhibit N). Hudson filed a timely appeal to this Court, naming himself as Appellant and the Winslow Plaintiffs as Respondents. Even though the Waste Pro Defendants were properly listed as Defendants in the caption, they were not named as parties to this appeal.

Meanwhile, the hearing on the pending motions was continued from the October 11, 2018 hearing date. In her order continuing the hearing, Judge Carmen T. Mullen noted that the Waste Pro Defendants' Motion to Dismiss in Civil Action No. 2018-CP-27-00442 would be scheduled on the same roster as the other motions in Civil Action No. 2017-CP-27-00115. (Form 4 Order, filed October 9, 2018, Exhibit O). The Waste Pro Defendants filed memoranda in support of their Motion to Vacate in Civil Action No. 2017-CP-27-00115, and their Motion to

Dismiss in Civil Action No. 2018-CP-27-00442. (Memorandum in Support of Defendants Waste Pro USA, Inc. and Waste Pro of South Carolina, Inc.'s Motion for Withdrawal of Order of Reference and/or for Relief from Default Judgment as to Defendant Hudson, filed December 8, 2018, Exhibit J) (Memorandum in Support of Defendants' Joint Motion to Dismiss Pursuant to Rule 12(b)(8), or Alternatively, Motion to Consolidate, filed December 8, 2018, Exhibit P).

In their Memorandum in Support of the Motion to Vacate and Memorandum in Opposition (in Civil Action No. 2017-CP-27-00115) (Exhibit Nos. J and K), the Waste Pro Defendants pointed out that both cases involve a common nucleus of facts and, in both cases, the Waste Pro Defendants' only potential liability is vicarious, based on the alleged actions of their former employee, Hudson. They also raised the long-standing concern about the potential for "incongruous and illegal" results where a court grants a default judgment against only one of multiple defendants, citing Frow v. De La Vega, 82 U.S. 552 (1872) and United States use of Hudson v. Peerless Ins. Co., 374 F.2d 942 (4th Cir. 1967).

In their Memorandum in Support of their Joint Motion to Dismiss, (in Civil Action No. 2018-CP-27-00442) (Exhibit P), the Waste Pro Defendants likewise pointed out that both actions involved the same parties and the same claim, with their potential liability being solely vicarious in both, as well as the risk of obtaining incongruous results. As the Waste Pro Defendants pointed out, "Plaintiffs readily admit that they failed to timely serve waste Pro with the Complaint filed in in Civil Action No. 2017-CP-27-00115, (which allowed them to obtain a default judgment against Waste Pro's former employee without giving Waste Pro a chance to appear and defend), and that their underlying purpose in attempting to dismiss Waste Pro from the pending action in in Civil Action No. 2017-CP-27-00115 is so that 'the default judgment against Defendant Hudson can proceed in the normal course without the necessity of those

Defendants who were not served in the earlier filed action.'" (Memorandum in Support, Exhibit P, p. 4).

On January 4, 2019, Judge Murphy's law clerk reached out to the parties indicating that the motions to dismiss in both cases (Civil Action No. 2017-CP-27-00115 and Civil Action No. 2018-CP-27-00442) and the Motion to Vacate would not be decided but, instead, would be held in abeyance pursuant to Rule 205, SCACR, pending this Court's resolution of the instant appeal. In response, the parties sought clarification, with Plaintiffs' counsel seeking confirmation that "the Waste Pro defendants have no standing to argue as to a matter that was applicable only to defendant Hudson and which was previously ruled upon by the Special Referee and is now subject to appeal." When counsel for the Waste Pro Defendants sought clarification that both matters (Civil Action No. 2017-CP-27-00115 and Civil Action No. 2018-CP-27-00442) are "affected by the appeal" and, therefore stayed pending the disposition of the instant appeal, counsel for Plaintiffs objected, asserting that "[t]he only action under appeal is the 2017 action. The 2018 action is not under appeal and as such we should be permitted to conduct discovery and proceed in the normal course on that action." (Email Communications among Chandler D. Rowh, Law Clerk to Judge Maite Murphy, Patrick Carr and Ben Davis, dated January 4, 2019, Exhibit Q).

I. The Waste Pro Defendants Should Be Allowed to Intervene.

The Waste Pro Defendants, named as defendants below, should be allowed to intervene in this appeal. By intentionally not serving them, or even notifying them that a case had been filed against them and Hudson, Plaintiffs have deprived them of any opportunity to appear and defend the claims against them in Civil Action No. 2017-CP-27-00115.

As set out above, after Plaintiffs filed suit against both Hudson and the Waste Pro Defendants, they attempted unsuccessfully to serve Hudson but, admittedly, did not even attempt to serve or to notify the Waste Pro Defendants, whose sole liability is vicarious liability, of the pending case against them. (*See* Exhibit B). Instead, when the out-of-state Defendant Hudson failed to file a timely Answer, Plaintiffs obtained an Order of Default and proceeded with a damages hearing, again, without notice to the Waste Pro Defendants. (*See*, Exhibits C, D, and E). As a result and by design, the only participants at the damages hearing were Plaintiffs. The Waste Pro Defendants first became aware of the pending lawsuit was when Plaintiffs demanded payment of the Default Judgment – knowing that the Waste Pro Defendants were unaware even that a suit had been filed. (Exhibit F).

When the Waste Pro Defendants filed an Answer to the Complaint and moved to dismiss the Default Judgment, raising issues and arguments that Hudson, by virtue of default, was unable to raise, Plaintiffs promptly moved to dismiss them from Civil Action No. 2017-CP-27-00115, (Exhibit B), and turned around and filed the exact same claim in Civil Action No. 2018-CP-27-00442 against the Waste Pro Defendants. (Exhibit L).

Plaintiffs clearly are attempting to have their cake and eat it too. By naming, but not serving the Waste Pro Defendants with the Complaint, the Order of Default or notice of the damages hearing in Civil Action No. 2017-CP-27-00115, Plaintiffs ensured that the Waste Pro Defendants would not appear and defend the claim against their former employee. As soon as the Waste Pro Defendants entered their appearance and began defending the action, Plaintiffs moved to dismiss them and then re-filed the very same suit against them in Civil Action No. 2018-CP-27-00442. And, while Plaintiffs agree that Civil Action No. 2017-CP-27-00115 should be stayed pending the outcome of this appeal, they are asserting that "the Waste Pro defendants

have no standing to argue as to a matter that was applicable only to Defendant Hudson and which was previously rule upon by the Special Referee and is now subject to appeal." Plaintiffs also have made it clear that they fully intend to move forward with their identical claims in Civil Action No. 2018-CP-27-00442. (*See* Exhibit Q).

To the extent Hudson's liability and the damages award against him are confirmed on appeal, one of two things will happen. Either the Waste Pro Defendants, whose liability is solely vicarious, will be bound by this Court's resolution of the issues on appeal, never having had the opportunity to defend themselves below due to the Plaintiffs' purposeful orchestration of the posture of Civil Action No. 2017-CP-27-00115; or, if not, and the Waste Pro Defendants prevail in the pending action in Civil Action No. 2018-CP-27-00442, the result will be precisely the incongruous results prohibited under Frow and its progeny. Neither outcome is tenable. As a result, the Waste Pro Defendants should be allowed to intervene in this appeal.

II. This Appeal Should Be Stayed or Dismissed.

This appeal either should be stayed or dismissed without prejudice, pending resolution of the claims against all parties below. This is because, as is stated in Frow and its progeny, the Default Judgment against Hudson, standing alone and under the circumstances of this case, is not a final judgment subject to appeal. Furthermore, allowing this appeal to go forward, even if the Waste Pro Defendants are allowed to intervene, may result in extreme prejudice to the Waste Pro Defendants and/or incongruous verdicts.

In Frow, the United States Supreme Court was confronted with a case where fourteen defendants were charged with conspiracy to defraud the plaintiff of a parcel of land. Thirteen of the defendants filed timely answers but the fourteenth, Frow, did not. The plaintiff obtained a default judgment against Frow and the court awarded title in the land to the plaintiff.

Meanwhile, the case against the thirteen answering defendants proceeded to a defense verdict. The Supreme Court reversed the default judgment, characterizing the incongruous result reached by the lower court as "unseemly and absurd, as well as unauthorized by law." The Supreme Court explained:

> The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree pro confesso against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has merely lost his standing in court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence, he cannot be heard at the final hearing. But if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike – the defaulter as well as the others. If it be decided in the complainant's favor, he will then be entitled to a final decree against all. But a final decree on the merits against the defaulting defendant alone, pending the continuance of the cause, would be incongruous and illegal.

82 U.S. at 554. More recent courts have confirmed the ongoing viability and applicability of Frow to cases such as the instant case, where a non-defaulting defendant's liability depends (entirely or in part) on the liability of a defaulting defendant. *See, e.g.*, Neilson v. Chang (In re First D. & Inv. Inc.), 253 F.3d 520, 532 (9th Cir. 2001) (citing Frow to find the bankruptcy court had abused its discretion in certifying a default judgment against defaulting defendants before the matter had been adjudicated as to all the defendants); Hudson v. Peerless Ins. Co., 374 F.2d at 945 (extending the ruling in Frow to cases where liability is not only joint liability, but also to cases where it is "joint and/or several"); Phoenix Renovation Corp. v. Gulf Coast Software, Inc., 197 F.R.D. 580, 582 (E.D. Va. 2000) (the "avoidance of logically inconsistent judgments in the same action and factually meritless default judgments provide 'just reason'" for purposes of Rule

54(b)); United Fin. Cas. Co. v. Lewis, No.: 4:08-cv-4014-TLW-TER, 2009 U.S. Dist. LEXIS 85860 *4-5 (D. S.C. Aug. 13, 2009) (relying on Frow to delay entry of judgment against defaulting defendants because entering judgment on the merits against defaulting defendants "pending the continuance of the case against the remaining defendants would be 'incongruous' and 'absurd'"); Jefferson v. Briner, Inc., 461 F. Supp. 2d 430, 434-435 (E.D. Va. 2006) (noting that, while some federal courts have narrowed the application of Frow in light of current Rule 54(b), it still serves as a "cautionary warning to the courts: logically inconsistent judgments resulting from an answering defendant's success on the merits and another defendant's suffering of a default judgment are to be avoided," and noting the Fourth Circuit's embrace of Frow).[3] Here, as was true in Phoenix Renovation, "[t]his is clearly a case in which premature entry of default judgment against one defendant risks unavoidable inconsistency with a later judgment concerning the other defendant in the same action." 197 F.R.D. at 583.

As the Fourth Circuit stated in Hudson v. Peerless, in cases where liability against multiple defendants is joint and/or several and a default judgment is obtained against one or some, but not all of them, that judgment is not final and, "[a]s such, [is] subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of *all* the parties." 374 F.2d at 944. As a result, the Default Judgment in this case is not final until adjudication of Plaintiffs' claims against all the defendants, specifically the Waste Pro Defendants. Furthermore, Plaintiffs' attempt to dismiss the Waste Pro Defendants from Civil Action No. 2017-CP-27-00115 does not cure the problem; dismissal of the answering defendants

[3] Even in those jurisdictions where the ruling of Frow has been narrowed, it still applies "in situations where the liability of one defendant necessarily depends upon the liability of the others." International Controls Corp. v. Vesco, 535 F.2d 742, 746 n.4 (2nd Cir. 1976). That is precisely the situation here – the Waste Pro Defendants' liability depends entirely upon the liability of the defaulting party, Hudson.

does not make the default judgment against the defaulting defendant final "because the plaintiffs not only have the right under Rule 41 to reinstitute the complaint but actually intend doing so." 374 F.2d at 944. Here, Plaintiffs not only had the right to reinstitute their claims against the Waste Pro Defendants, but have done so by filing their duplicate Complaint in Civil Action No. 2018-CP-27-00442. Pursuant to Hudson v. Peerless, 374 F.2d at 944, this Court should hold that: 1) the Default Judgment is not final, and 2) dismiss without prejudice or, at the very least, stay this appeal pending the resolution of the Waste Pro Defendants' potential liability in the underlying actions.

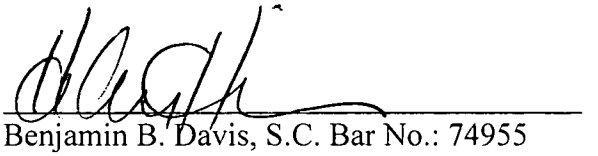
CONCLUSION

For all the reasons stated herein, this Court should grant the Waste Pro Defendants' Motion to Intervene in this appeal. In addition, this Court should hold that the Default Judgment against Hudson alone is not a final judgment and either stay or dismiss this appeal without prejudice. Finally, the Waste Pro Defendants request that the briefing schedule in this appeal be suspended until this Motion has been decided.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, LLC

January 11, 2019



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mgc

Reply To
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January 11, 2019

Via U.S. Mail
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Richard L. Winslow and Charmayne Winslow v. Matthew W. Hudson and Waste Pro USA, Inc., and Waste Pro of South Carolina, Inc., and Liberty Mutual Fire Insurance Co., and Liberty Mutual Insurance Group, Inc.
Civil Action No.: 9:18-cv-426-MBS (Beaufort)
Date of Incident: November 4, 2015
Carrier Claim No.: AB505-382519-01
MGC File No.: 2095.17210
Appeal No.: 2018-001955

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Waste Pro USA, Inc. and Waste Pro of South Carolina, Inc.'s Motion to Intervene and to Stay or Dismiss Appeal, and the original and one copy of the Proof of Service in the above-referenced matter. Please file the originals and return a clocked-in copy in the enclosed self-addressed, stamped envelope.

Also enclosed is our firm's check in the amount of $50 for filing the motion.

If you have any questions, please do not hesitate to contact me.

Sincerely,
McAngus Goudelock & Courie, LLC

Helen F. Hiser

Enclosures
cc: Patrick W. Carr, Esquire
David S. Cobb, Esquire
Douglas Sleezer, Liberty Mutual Insurance