

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Appeal from Charleston County
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Civil Case No. 2013-CP-10-03054
Appellate Case No. 2014-000252

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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, M.D.,

Defendants,

Of whom Coastal Anesthesia Associates is the

Respondent.

**FINAL BRIEF OF RESPONDENT
COASTAL ANESTHESIA ASSOCIATES**

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STATEMENT OF THE ISSUES PRESENTED ON APPEAL

The Respondent would restate the issues as:

Appealability under §14-3-330

- I. Is the Order setting aside the entry of default immediately appealable where the Trial Court did not end the action as to the Defendant Coastal Anesthesia Associates?

Setting Aside Entry of Default under Rule 55(c)

- II. Did the Trial Court act within its discretion in setting aside the entry of default under the good cause standard upon a showing of an adequate explanation and that the interests of justice would best be served?

STATEMENT OF THE CASE¹

This medical malpractice action arises out of knee surgery performed on Martha Preston at the Charleston Surgery Center on April 18, 2012. On November 13, 2012, Plaintiff filed a Notice of Intent² naming as defendants Surgical Care Affiliates, LLC, Charleston Surgery Center, LP, Nurse Doe, Christine Thompson M.D, and ABC Anesthesia Group. [ROA 17; Plaintiff's Notice of Intent to File Suit, 2012-CP-10-7413.] Notably, Plaintiff did not name Coastal Anesthesia Associates as a party to the Notice of Intent.

A pre-suit mediation occurred on April 1, 2013 and James B. Hood of Hood Law Firm, LLC attended via telephone on behalf of Dr. Thompson; Chad McGowan of McGowan, Hood, & Felder attended for Plaintiff; and Jack Gresh of Hall, Booth, Smith P.C. attended on behalf of the Defendants Surgery Care Affiliates, Charleston Surgery Center, and Nurse Doe (referred to collectively as the "Surgical Care Defendants"). Since Plaintiff had not named Coastal Anesthesia Associates as a party to the Notice of Intent, Coastal Anesthesia Associates did not participate in the statutorily-mandated pre-suit mediation. The mediation ended in an impasse. [ROA 13; Mediation Results Form.]

On May 24, 2013, Plaintiff filed a Complaint in this case, naming the Surgical Care Defendants and Dr. Thompson as defendants. [ROA 18; Complaint.] Attorney Gresh accepted service on behalf of the Surgical Care Defendants and thereafter filed an

¹The issues involve only procedural facts and thus, the underlying facts of the medical treatment are not relevant and no separate Statement of the Facts is necessary.

² Pursuant to S.C. Code Ann. §15-79-125.

answer on August 9, 2013. [ROA 27, 28; Acceptance of Service, Answer.] Attorney Hood accepted service on behalf of Dr. Thompson and thereafter filed an answer on July 3, 2013. [ROA 37, 38; Acceptance of Service, Answer.]

In the Complaint -- for the first time -- without (a) amending his Notice of Intent so as to identify Coastal Anesthesia Associates as a party to this lawsuit or (b) conducting the statutorily-mandated pre-suit mediation so as to allow Coastal Anesthesia Associates to participate, the Plaintiff added a claim of vicarious liability against Coastal Anesthesia Associates based solely on the allegation that Dr. Thompson was an employee of Coastal. Coastal Anesthesia Associates filed an Answer on September 23, 2013. [ROA 44; Answer.] On September 26, 2013, the Plaintiff filed an Application for Default Judgment and Request for Damage Hearing; however, the Plaintiff did not properly serve Coastal or its Attorney. [ROA 51; Application.]

Meanwhile, a mediation conference was held with the Plaintiff and the Surgical Care Defendants, and a settlement was reached with those parties. [ROA 15; Mediation Results Form.] A hearing on the settlement was held, and an Order approving the settlement was filed on November 4, 2013. [ROA 11; Order.]

Thereafter, the Charleston County Clerk's Office scheduled a hearing on the Application for Default Judgment for December 18, 2014. [ROA 59; Motion Roster, dated November 14, 2013.] However, the Trial Court issued an Order Entering Default Judgment Against Coastal Anesthesia Associates on November 25, 2013. [ROA 10; Order.] On December 5, 2013, the Defendant Coastal filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction or, in the alternative, to Set Aside Entry of Default. [ROA 62; Motion.]

At the hearing on Defendant's motion, the Trial Court ruled that while the Order entered a default judgment, it should say "entry of default," and therefore, the Defendant's motion would be considered under Rule 55 rather than Rule 60. [ROA 294-296; Tr. 4-6.] An order was filed on the same day as the hearing (December 18, 2013), stating:

The Court's order of November 25, 2013, states that the Plaintiff is entitled to a Judgment of Default. This is scrivener's error and should have stated that the Plaintiff is entitled to an entry of default pursuant to Rule 55 of the South Carolina Rules of Civil Procedure, rather than a default judgment. Therefore, this order superseded the order of November 25, 2013. [ROA 9; Order.]

The Plaintiff's Counsel acquiesced in that ruling and has not appealed from that Order. [ROA 295; Tr. 5, lines 13-14.]

The Defendant's motion to dismiss for lack of subject matter jurisdiction was based on the fact that the Plaintiff had not named Coastal Anesthesia Associates in the Notice of Intent or served the notice on Coastal as required by S.C. Code Ann. § 15-79-125, which is a jurisdictional prerequisite to filing a civil action alleging medical malpractice. The Trial Court denied the motion to dismiss, finding that "while failure to comply with the Notice of Intent procedures under § 15-79-125 may lead to dismissal of a Complaint, it was not the legislative intent to completely deprive the circuit court of subject matter jurisdiction over the action." [ROA 2; Order, filed January 17, 2014, p. 4.]³

³ Defendant Coastal maintains that the Trial Court lacked power over the civil action because the Plaintiff did not comply with § 15-79-125 which mandates certain steps that MUST be accomplished by a plaintiff prior to filing or initiating any civil action for medical malpractice. Specifically, the plaintiff's NOI "*must name all adverse parties as defendants*," and all those defendants must be served with the NOI. Despite the undisputed facts that Coastal was not named in the NOI, and was not served with the

The Defendant Coastal Anesthesia also sought relief under Rule 55(c) and Rule 6, asking the Court to set aside the entry of default for good cause, and in the alternative, to allow a late Answer under Rule 6. In support of that motion, Coastal presented evidence that the Complaint was not properly served, in that the Complaint was mailed – certified return receipt requested to Coastal’s Registered Agent – Dr. Randall Kerns at 2690 Lake Park Drive in North Charleston; however, receipt was not restricted to the addressee, and a “Jody Hawkins” signed for it. [ROA 56; Ex. A to Plaintiff’s Application for Default Judgment.] Coastal Anesthesia presented evidence that Jody Hawkins is an employee of former Defendant Charleston Surgery Center, not Coastal, and that she was not authorized to accept service of process for Coastal. [ROA 289; Affidavit of Jody Hawkins, filed December 13, 2013. See also ROA 158, 155; Affidavits of Wendy Sanders and Dr. Randall Kerns.] Coastal also presented evidence that Dr. Thompson is

NOI, the Trial Court denied the motion on the reasoning that the circuit court has subject matter jurisdiction over medical malpractice cases.

“Jurisdiction is generally defined as ‘the authority to decide a given case one way or the other. Without jurisdiction, a court cannot proceed at all in any cause; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause.’ Specifically, ‘[j]urisdiction is composed of three elements: (1) personal jurisdiction; (2) subject matter jurisdiction; and (3) the court’s power to render the particular judgment requested.’” Limehouse v. Hulsey, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013) (citations omitted). In Limehouse, the Court held that the trial court lacked the power to act where the remand order from the federal court did not comply with a federal statute.

Coastal Anesthesia Associates submits that while it may be that the circuit court generally has subject matter jurisdiction over medical malpractice cases, the General Assembly in §15-79-125 has imposed a precondition to that jurisdiction which limits the court’s power to act in a medical malpractice civil action unless and until a NOI has been filed and served.

not an employee of Coastal, but rather, an independent contractor. [ROA 68, 71, 155, 238; Affidavits of Dr. Kerns and Dr. Thompson.]

The Trial Court granted Defendant's Rule 55(c) motion, finding that Coastal Anesthesia had shown good cause and that the interests of justice would best be served by setting aside the entry of default. [ROA 2; Order, filed January 17, 2014.]

Plaintiff served his Notice of Appeal on February 11, 2014, and filed the Notice with the Court of Appeals that same day. Plaintiff did not, however, file the Notice of Appeal with the lower court as required by Rule 203(d)(1)(A), SCACR.

ARGUMENT

I. The Order settling aside the entry of default is not immediately appealable because the Trial Court did not end the action as to the Defendant Coastal Anesthesia Associates.

As a threshold jurisdictional matter, the Order setting aside entry of default and allowing Coastal to answer is an interlocutory order and the Plaintiff's appeal should be dismissed. Jefferson by Johnson v. Gene's Used Cars, Inc., 295 S.C. 317, 368 S.E.2d 456 (1988) (granting a Rule 55(c) motion to set aside entry of default is not directly appealable). The Plaintiff asserts that his interlocutory appeal is permitted under the holding in Wetzel v. Woodside Development Ltd. Partnership, 364 S.C. 589, 615 S.E.2d 437 (2005), that an order granting a motion to quash an affidavit of default was immediately appealable because the trial court held that the defendant had not been properly served, which ended the action as to that defendant, and thus it was equivalent to granting a motion to dismiss under Rule 12(b)(5), SCRCP. However, the Plaintiff misperceives the precise nature and practical impact of the Trial Court's ruling, which does not end the action as to Coastal Anesthesia.

In Wetzel, the plaintiff had named several companies and one individual in the complaint, and served the named entities who all answered. When the plaintiff filed a motion for default judgment as to the individual (Steele), he filed a motion to quash the affidavit on default on the ground of insufficient service of the complaint. The trial court held that he had not been properly served because the attempted delivery by mail was not restricted to the addressee, and granted the motion. In addressing the question of appealability, the Court stated “the effect of granting the motion and holding that Steele has not been properly served is equivalent to granting a motion to dismiss under Rule 12(b)(5), SCRCF, since it ends the action as to Steele. Therefore, it is immediately appealable.” 615 S.E.2d at 439 (footnotes omitted).

In Thornton v. S. Carolina Elec. & Gas Corp., 391 S.C. 297, 303, 705 S.E.2d 475, 478 (Ct. App. 2011), the Court of Appeals describes the Wetzel holding as “on unique facts that an order granting a motion to set aside default was immediately appealable because it had ‘the effect of ... granting a motion to dismiss under Rule 12(b)(5), SCRCF, since it ends the action as to [one party].’” In Graham Law Firm, P.A. v. Makawi, 396 S.C. 290, 300-01, 721 S.E.2d 430, 436 (2012), there was no issue of appealability, but the Supreme Court cited to Wetzel in holding that the plaintiff law firm was entitled to discovery and a merits hearing on a challenge to service raised in a Rule 60(b) motion for relief from a default judgment, in part because the ruling on service would be determinative of the defendant’s statute of limitations defense.

In this case, the Defendant Coastal did not move to quash service of process and the Trial Court’s holding has not ended the action as to Coastal Anesthesia; to the contrary, the Court expressly ordered that “Coastal Anesthesia will have 30 days upon

proper service of the Summons and Complaint to Answer or otherwise responsively plead to the Complaint.” [ROA 8; Order, p. 7.] Furthermore, unlike in Graham, there is no statute of limitations defense since the medical treatment at bar occurred in April 2012.

Accordingly, the Order setting aside the entry of default is not immediately appealable, and this appeal should be dismissed as interlocutory.

II. The Trial Court acted within its discretion in setting aside the entry of default under the good cause standard.

Rule 55(c) – “Good Cause” Standard

In Sundown Operating Co., Inc. v. Intedged Indus., Inc., 383 S.C. 601, 607-08, 681 S.E.2d 885, 888 (2009), the Supreme Court clarified the appropriate standard for a Rule 55(c) motion to set aside entry of default as *mere* good cause:

Rule 55(a) provides that when a party fails to respond to a complaint, the clerk shall record an entry of default. However, Rule 55(c) permits a party to move to set aside the entry of default. The standard for granting relief from an entry of default under Rule 55(c) is mere “good cause.” Rule 55(c), SCRPC. 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. Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct.App.1989). 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. Dixon v. Besco Engineering, Inc., 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct.App.1995). A motion under Rule 55(c) is addressed to the sound discretion of the trial court. Williams v. Stalnaker, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct.App.1994).

See also White Oak Manor, Inc. v. Lexington Ins. Co., 407 S.C. 1, 753 S.E.2d 537, 542 (2014).

The standard of review on appeal is abuse of discretion: “Determining whether to set aside an entry of default lies solely within the sound discretion of the circuit court and that decision will not be overturned absent a clear showing of an abuse of discretion.” White Oak Manor, supra (citing Richardson v. P.V., Inc., 383 S.C. 610, 614, 682 S.E.2d 263, 265 (2009)). The Trial Court applied the correct good cause standard and his exercise of discretion should not be overturned.

A. The confusion created by the Plaintiff’s improper service of the Complaint is a satisfactory explanation for the default.

The Trial Court found that “Coastal Anesthesia has adequately provided an explanation for the default and provided reasons why vacating the entry of default serves the interests of justice.” [ROA 8; Order, p.7.] More specifically, the Trial Court accepted Coastal Anesthesia’s explanation for the confusion that was created by the facts that Plaintiff had served Dr. Thompson with the Notice of Intent “NOI” and Complaint, but never served Coastal with the NOI, never amended the NOI to identify Coastal as a party, never participated in a pre-mediation with Coastal and then failed to properly serve the Complaint on Coastal:

In light of the fact that Coastal Anesthesia had not been named in the Notice of Intent and was not properly served with the Complaint, Dr. Kerns, with knowledge of the lawsuit against Dr. Thompson, could reasonably conclude that no further actions were needed on the part of Coastal Anesthesia. Because Dr. Thompson was in the process of defending the lawsuit, and given the fact that the only avenue of recovery against Coastal Anesthesia is premised upon the alleged vicarious liability (or non-delegable duty of care) of its independent contractor Dr. Thompson, it was reasonable for Dr. Kerns to conclude that her defenses applied equally to Coastal Anesthesia. Further, Coastal Anesthesia was not given the opportunity to participate in the mandatory pre-suit mediation process. [ROA 7-8; Order, p. 6-7.]

The Trial Court also expressly found that the interests of justice would best be served by setting aside default to allow the case to be resolved on the merits in light of the Plaintiff's own failure to name Coastal in the pre-suit Notice of Intent and improper service of the Complaint. In reviewing the Wham factors, the Trial Court found that:

- (1) Coastal meets the timing element in that the default order was filed the week of Thanksgiving, and the Defendant filed the motion to set aside the next week;
- (2) Since the claim against Coastal is premised upon vicarious liability for Dr. Thompson, the defenses raised in her answer and affidavit are sufficient to satisfy the meritorious defense requirement; and
- (3) Allowing the case to proceed will not prejudice to the Plaintiff since the civil action has not progressed beyond written discovery.

The Plaintiff does not challenge the Trial Court findings on the Wham factors. Instead, his appellate argument challenging the Trial Court's discretionary decision centers on the improper service issue. He argues that his service of the complaint on Coastal Anesthesia Associates complied with Rule 4 and that any problem with the service was waived by Coastal's Answer. As discussed above, Coastal Anesthesia submits that the Plaintiff misperceives the context and precise nature of the Trial Court's ruling on the service issue because the Defendant did not move to quash service. Rather, the Defendant moved to set aside entry of default and the Trial Court properly considered both the failure to name Coastal in the NOI and improper service of the Complaint as well as the Plaintiff's failure to name Coastal in the NOI as an acceptable explanation under the correct Rule 55(c) good cause standard.

Plaintiff argues that he properly served Coastal -- an LLC -- by mail in compliance with Rule 4.

Rule 4(d)(3) provides for service on corporations and partnerships:

Upon a corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the 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 and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

S.C. Code Ann. § 15-9-210 also provides for service by mail:

(a) A domestic business or nonprofit corporation's registered agent is the agent of the corporation for service of any process, notice, or demand required or permitted by law to be served, and the service is binding upon the corporation.

(b) The business or nonprofit corporation may be served under Rule 4(d)(8) of the South Carolina Rules of Civil Procedure by registered or certified mail, return receipt requested, addressed to the office of the registered agent, or the office of the secretary of the corporation at its principal office. Service is effective upon the date of delivery as shown on the return receipt. *Entry of default and default judgments shall be subject to the conditions of Rule 4(d)(8).* (Emphasis added.)

As referenced, Rules 4(d)(8) provides:

(d)(8) Service by Certified Mail. Service of a summons and complaint upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule may be made by the plaintiff or by any person authorized to serve process pursuant to Rule 4(c), including a sheriff or his deputy, 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. (Emphasis added.)

In compliance with S.C. Code Ann. § 33-44-108⁴, Coastal has designated Randall Kerns as its Registered Agent for service of process. Plaintiff contends that he fully complied with Rule 4(d)(8). However, while the Plaintiff addressed its mailing to Dr. Kerns at the correct address, the return receipt clearly shows that delivery was not restricted to the addressee as required by Rule 4(d)(8) and that Dr. Kerns did not sign for it. The return receipt was signed by Jody Hawkins. The Defendant proved, as the Trial Court found, that Jody Hawkins is an employee of the former Defendant Charleston Surgery Center, not Coastal Anesthesia, and she was not authorized person to accept service for Coastal. Accordingly, under the express terms of Rule 4(d)(8), such service “shall not be the basis for the entry of default,” and the default “shall be set aside.”

At the hearing the Plaintiff argued that Ms. Hawkins was an agent of Coastal and, in the alternative, that she served the Complaint on him “because she qualifies as someone over the age 18, not an attorney, and not related to the case. So under Rule 4, she served Dr. Kern. And that's totally legitimate service.” [ROA 322; Tr. 32, line 11-15; see also ROA 326; Tr. 36, lines 19-24 “she has now become our agent of service”.] The Trial Court rejected that argument, stating that “under Rule 4(c), SCRCPP, service may not

⁴Which provides:

(a) A limited liability company and a foreign limited liability company authorized to do business in this State shall designate and continuously maintain in this State:

(1) an office, which need not be a place of business in this State; and

(2) an agent and street address of the agent for service of process on the company.

(b) An agent must be an individual resident of this State, a domestic corporation, another limited liability company, or a foreign corporation or foreign company authorized to do business in this State.

be made by 'a party to the action' upon another party. As an employee and agent of Charleston Surgery Center, L.P., another Defendant in this case as of July 8, 2013, Ms. Hawkins was unable to serve Coastal Anesthesia." [ROA 7; Order, p. 6.] Now, on appeal, the Plaintiff argues that he never contended that Ms. Hawkins performed service of process, but maintains that Ms. Hawkins was served as an agent of Coastal. [Appellant's Brief, p. 14-15.] However, the Plaintiff has no evidentiary support for his argument that Ms. Hawkins was an agent of Coastal or expressly authorized to accept service for Coastal Anesthesia, nor that she had the apparent authority "established by Coastal's customary operating practices." [Appellant's Brief, p. 10.]

By affidavit, Wendy Sanders, the office manager for Coastal Anesthesia, testifies that Jody Hawkins is not an employee, agent or representative of Coastal. [ROA 73, 158.] By affidavit, Ms. Hawkins confirms that she is employed by the Surgery Center as a receptionist, and that she was never authorized to accept service of process for Coastal. [ROA 289.] As to the alleged "customary operating practices," Ms. Hawkins represented to the Court, through Defendant's counsel,⁵ that she does patient intake for the Surgery Center, and that while Coastal has an anesthesiologist or certified nurse anesthetist on duty, the Surgery Center staff has no official role on their behalf. In response to inquiry from the Court, information was provided by Ms. Hawkins that she does not answer the phone for Coastal, [ROA 311; Tr. 20-21], and while she does not deny that she signed the return receipt, she is very clear that she was not authorized to accept service of process for Coastal. The Plaintiff did not present any evidence to rebut

⁵ Ms. Hawkins was present for the hearing, and Defendant sought to have her testify, but the Court directed Defense Counsel to ask the questions and relay her answers. [See ROA 310; Tr. 20, lines 5-14.]

the affidavits submitted by Coastal which established that Jody Hawkins was an employee of the Surgery Center and she was not authorized to accept service for Coastal.

A trial court's finding of fact as to authorization to accept service is "binding on the appellate court unless wholly unsupported by the evidence or controlled by error of law." Roberson v. S. Fin. of S. Carolina, Inc., 365 S.C. 6, 8, 615 S.E.2d 112, 114 (2005); Richardson v. P.V., Inc., 383 S.C. 610, 682 S.E.2d 263, 266 (2009); see also Graham Law Firm, P.A. v. Makawi, 396 S.C. 290, 298, 721 S.E.2d 430, 434 (2012)(trial court finding sufficiently support by lack of evidence to rebut defendant's affidavit). The evidence of Record supports the Trial Court's holding that Jody Hawkins was not authorized to accept service of process for Coastal, and should not be reversed.

The Trial Court's holding in this case is consistent with the decision in Roberson, where the Supreme Court set aside a default judgment under Rule 4(d)(8). In that case, the plaintiffs had the summons and complaint mailed to the named defendant's registered agent by certified mail with return receipt requested, but a clerical employee of the registered agent signed the return receipt. In the face of proof that the clerk had no express authorization to accept service of process, the Court considered whether apparent authority would even be legally sufficient to show authorization to accept service by certified mail under Rule 4, but noted that it was an unsettled question and did not make a holding on that precise point. Rather, the Court found that there was no evidence to support a legal relationship between the clerk and the defendant to effectuate service, relying upon the clerk's testimony that she has never been authorized to accept service and the absence of any evidence in the record that the defendant had, in any way, manifested the clerk was its apparent agent.

Plaintiff also argues that Coastal Anesthesia waived any complaints about the sufficiency of service by filing an Answer on September 23, 2013, citing to Rule 12(b), SCRPC, and Unisun Ins. v. Hawkins, 342 S.C. 537, 543, 537 S.E.2d 559, 562 (Ct. App. 2000). In Unisun, the Court held that the defendant waived a statute of limitations defense by failing to properly plead the defense of insufficiency of service of process either by motion or in his answer. In contrast, the Defendant Coastal has not asserted insufficiency of service of process as a defense to the action; rather, Coastal has moved to set aside entry of default as specifically provided in Rule 4(d)(8). As discussed above, the confusion with the service of the Complaint was part of Coastal's explanation, as is required by Sundown, in addition to the fact that while Dr. Thompson had been served with both a NOI and a Complaint, Plaintiff never served Coastal with the NOI, never amended the NOI to identify Coastal as a party and never participated in a pre-mediation with Coastal..

The Trial Court allowed the Defendant to raise the sufficiency of service as a ground for setting aside entry of default because it would "not serve the interests of justice to permit a plaintiff to hold a defendant in default based upon the date an answer was filed, when no entry of default was entered, and simultaneously conclude that certain defenses were waived because not asserted in the untimely answer." [ROA 7; Order, p. 6.] The Trial Court did not abuse its discretion in so holding, and the Order should be upheld.

B. Vacating the entry of default serves the interests of justice.

The Plaintiff argues that the Trial Court's order allows Coastal "to evade service without repercussions," "effectively punishes Appellant for complying with Rule 4," and "rewards Coastal for having assigned an agency task to an agent that is not directly compensated." [Appellant's Brief, p. 15.] However, as discussed above, factually, the Plaintiff's argument fails because the return receipt evidences that he did not comply with Rule 4, and there is no evidence that Coastal assigned Ms. Hawkins the task of accepting service of process. The reality of the facts as shown in this Record is that the Plaintiff created the current situation when he first failed to comply with the NOI preconditions for asserting a civil suit against Coastal Anesthesia, by never serving Coastal with the NOI, never amending the NOI to identify Coastal as a party, never participating in a pre-mediation with Coastal and then failing to properly serve the Complaint on Coastal so as to comply with Rule 4.

Again, the Trial Court did not quash service, but it did find that the Plaintiff was responsible, at least in part, for the confusion. Dr. Kerns was aware that Dr. Thompson had been named in the NOI and served with a Complaint and that she was defending that lawsuit, but he was also aware that Coastal had not been named in the NOI and that Dr. Thompson was an independent contractor, so he could have reasonably concluded that no further action was needed by Coastal.

An additional factor considered by the Trial Court in setting aside the entry of default was the posture of the case. In particular, Plaintiff has not asserted any independent acts of negligence by Coastal, but asserts only a claim of vicarious liability

for alleged negligence by Dr. Thompson. Dr. Thompson denies any negligence and has submitted her affidavit and that of Dr. Kerns in support that her treatment did not deviate from the standard of care, which presents a meritorious defense for Coastal. Thus, Plaintiff cannot recover against Coastal without proving that Dr. Thompson was negligent. See Comer-Marquardt v. A-1 Glassworks, LLC, 806 N.E.2d 883, 888 (Ind.App. 2004) (setting aside default against employer because the liability of the defaulting defendant was completely dependent upon the liability of a non-defaulting codefendant employee – “final judgment should not be entered against the defaulting defendant unless the codefendant has been found liable.”)(quoting Rothman v. Hebebrand, 720 So.2d 595, 596 (Fla.Dist.Ct.App.1998)).

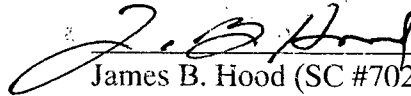
On all the evidence and given the posture of the claim against Dr. Thomson, the Trial Court acted within his discretion in concluding that the interests of justice would be served by allowing Coastal to answer and defend on the merits.

CONCLUSION

Based on the foregoing, the Respondent Coastal Anesthesia Associates respectfully submits that the appeal from the Order setting aside the entry of default is interlocutory and not immediately appealable under §14-4-330. In addition, the Respondent maintains that the Order should be affirmed on the merits because the Trial Court acted within its discretion in setting aside the entry of default under the Rule 55(c) good cause standard upon a showing of an adequate explanation and that the interests of justice would best be served.

Respectfully submitted,

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Certification of Counsel

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The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



James B. Hood

September 25, 2014