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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

H. Steven DeBerry, IV, Circuit Court Judge

Appellate Case No. 2024-000165

Trial Court Case No. 2022-CP-32-04033

Latisha Wallace, individually, and as Parent and Natural Guardian of A.W. (minor under the age of fourteen years old) and Donald Wallace, Jr.,Appellants,

v.

Jawhar Hamin,Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I) **Whether Appellants failed to preserve the issues they seek to raise in their appeal.**
- II) **Whether the Circuit Court properly dismissed Appellants' Complaint for failure to serve Respondent within 120 days of filing the Summons and Complaint and where the Statute of Limitation has run.**

STATEMENT OF THE CASE

This case arises out of an automobile accident which occurred on or about December 1, 2019 on Interstate 20 in Lexington County, South Carolina. (*see generally* R. pp. 6-12). At the time of the accident, Appellant Donald Wallace, Jr. was a passenger in Appellant Latisha Wallace's vehicle. The Appellants filed a Complaint on November 23, 2022, alleging that the Respondent, Jawhar Hamin, caused a collision between the Appellants and Respondent's vehicles and the subsequent injuries to the Appellants.

The Appellants filed the Complaint a week prior to when Appellants Latisha Wallace and Donald Wallace, Jr.'s claims would be barred by the statute of limitations. The Appellants were unable to perfect service upon the Respondent within 120 days of the filing of the Complaint. The Respondent filed a Motion to Dismiss under Rule 12(b)(4), 12(b)(5), and 12(b)(6) of the *South Carolina Rules of Civil Procedure* as well as S.C. Code Ann. § 15-3-20(B). (R. p. 41). Judge H. Steven DeBerry heard the Respondent's Motion virtually on May 23, 2023. (R. pp. 14-20). The Court granted the Respondent's Motion as to Appellants Latisha Wallace and Donald Wallace, Jr. on December 28, 2023. (R. p. 4-5). The Appellants filed a Notice of Appeal challenging the Court's order to dismiss Appellants' claims against the Respondent on February 5, 2024. (R. p. 41).

FACTUAL AND PROCEDURAL BACKGROUND

On or about December 1, 2019, the Appellants allegedly sustained injuries in a motor vehicle accident in Lexington County, South Carolina. (*see generally* R. pp. 8-12). The Appellants filed their Complaint on November 23, 2022 (*see generally* R. pp. 8-12). On March 22, 2023, 120 days after the Appellants filed their Complaint, they had not perfected service upon the Respondent and had not filed any evidence of service or attempts at service as of that time. On April 12, 2023, Respondent filed a Motion to Dismiss the claims because the Statute of Limitations had run, and the Respondent had not been served within 120 days of the filing the Complaint. Only after that motion was filed did Appellants file an Affidavit of Non-Service, confirming no service had taken place. After Respondent's motion was set for hearing, Appellants for the first time filed a Motion to Serve by Publication, over 5 months after the filing of the Summons and Complaint. The trial court dismissed the Complaint of Appellants for lack of service by Order dated December 28, 2023 (R. p. 4-5). No Motion to Alter or Amend pursuant to Rule 59, SCRPC, was ever filed to add any issue for the trial judge to consider apart from whether service was timely accomplished.

STANDARD OF REVIEW

The trial court dismissed the Appellants' claims because there was no service on the Respondent within the 120 days of filing and the statute of limitations had run. "In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRPC, the appellate court applies the same standard of review as the trial court." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). Under Rule 12(b)(6), SCRPC, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action. *Flateau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003), cert. denied (citing *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999)). It is a well-settled principle that in resolving a Rule 12(b)(6) motion to dismiss,

the court is limited to a consideration of the allegations contained within the four corners of the complaint. *Charleston Cnty. Sch. Dist. v. Harrell*, 393 S.C. 552, 559, 713 S.E.2d 604, 608 (2011).

ARGUMENT

I) Appellants failed to preserve the issues they seek to raise in their appeal.

The issues raised by the Appellant were not addressed in the lower court's Order. The Order solely bases its ruling on the non-service of the Summons and Complaint. It is well-established that in order to preserve an issue for appellate review, an issue must have been raised to and ruled upon by the lower court. *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 148, 644 S.E.2d 705, 708 (2007). "At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. The issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge. 'It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.'" *Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014) (citing and quoting *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). See also *Abba Equip., Inc. v. Thomason*, 335 S.C. 477, 486, 517 S.E.2d 235, 240 (Ct. App. 1999); ("The same ground argued on appeal must have been argued to the trial [court]."); *U.S. Leasing Corp. v. Janicare, Inc.*, 294 S.C. 312, 319, 364 S.E.2d 202, 206 (Ct. App. 1988) (finding this court need not address arguments the appellant had not raised to the trial court). "When an issue is raised to but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion." *Chastain v. Hiltabidle*, 381 S.C. 508, 515, 673 S.E.2d 826, 829 (Ct. App. 2009) (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting that proper use of a Rule 59(e) motion is to preserve issues raised to but not ruled upon by the trial court); *Walsh v. Woods*, 371 S.C. 319, 325, 638 S.E.2d 85, 88

(Ct.App.2006) (finding issue on appeal was not preserved because the trial court did not rule on the issue and it was not raised in a Rule 59(e) motion)).

The issues which have been raised by the Appellants were not preserved for appeal and therefore, this Court should affirm the ruling of the lower court. At the hearing, the Appellants did not present any legal argument opposing the Respondent's motion for which the Court to consider or rule upon. Appellants simply indicated they were still seeking to serve Defendant. (R. p. 18, line 3-17). The Circuit Court provided the Appellants the opportunity to present an argument opposing the motion by asking whether the Appellants had "any law or anything I can consider to allow you to still serve this defendant?" (R. p. 19, line 3-5). The attorney for the Appellants replied, "Unfortunately, I do not, Your Honor. I'll be very honest about that. And so all I ask is for the Court's indulgence to be able to do that so that we can continue forward with the case. That's all I am asking." (R. p. 19, line 6-10). Following the hearing, the Appellants did not file a Rule 59(e) Motion under the *South Carolina Rules of Civil Procedure* prior to filing a Notice of Appeal.

The Appellants now raise two issues to the Court of Appeals: (1) whether the Appellants acted with due diligence to locate and effect service upon the Respondent, and (2) whether the Appellants moved for service by publication in a reasonable amount of time. Neither of these issues were presented to the lower Court as a ground for denying Respondent's motion. The Order then dismissed the case based solely on non-service. Appellants further relinquished the opportunity to raise and preserve these issues because they abstained from filing a Rule 59(e) motion. Therefore, the issues the Appellants seek to bring on appeal need not be addressed by this Court.

II) Appellants failed to timely serve Respondent.

In the alternative, if this Court determines that the Appellants raised and preserved their argument for appeal, this Court should affirm the lower court's decision to dismiss the Appellants' claims. The Appellants have not disputed the trial court's ruling that the Appellants did not properly serve the Respondent within 120 days after the filing of the Complaint. The Appellants have conceded this issue on appeal, and the trial court's ruling regarding service is law of the case and requires affirmance. *First Union Nat. Bank of S. Carolina v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (quoting *Lindsay v. Lindsay*, 328 S.C. 329, 491 S.E.2d 583 (Ct.App.1997) ("It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling.")).

Although Appellants admit failure to properly serve the Respondent, the Respondent addresses this argument as an additional sustaining ground for affirming the grant of the Motion to Dismiss in its favor. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("Under the present rules, a respondent—the "winner" in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.").

The Appellants have acknowledged that service was not perfected upon Respondent within the 120 days as required under Rule 12(b)(4) and 12(b)(5) of the *South Carolina Rules of Civil Procedure* as well as S.C. Code Ann. § 15-3-20(B). "Unless an action is commenced before expiration of the limitations period, the plaintiff's claim is normally barred." *McLain v. Ingram*, 444 S.E.2d 512 (S.C. 1994). "The statute and the rule, read together, provide that (1) an action is commenced upon filing the summons and complaint, if service is made within the statute of limitations, and (2) if filing but not service is accomplished within the statute of limitations, then

service must be made within 120 days of filing.” *Mims ex rel. Mims v. Babcock Ctr., Inc.*, 399 S.C. 341, 346, 732 S.E.2d 395, 397–98 (2012). *Mims* explains the amendment of S.C. Code Ann. § 15-3-20(B) in 2002) and Rule (in 2004) to set the requirement for commencement of an action, thereby overruling any prior case law on timeliness of service. “When service occurs outside of the statute of limitations it must occur within 120 days of filing the complaint.” *Id.*, at 341, 732 S.E.2d at 398. The Appellants filed the Summons and Complaint on November 23, 2022. Under South Carolina law, the Appellants were required to serve the Respondent on or before March 22, 2023. There is no dispute that the Appellants failed to serve the Respondent within the 120 day requirement. At the Motion to Dismiss hearing, the Appellants’ attorney stated, “I don’t have a whole lot to say about the dates. Obviously, that, I can not change. Certainly service has been attempted as is evidenced by our affidavits that were filed along with our reply ... We’re just, you know, trying to serve them as best we can. And like I said, I don’t have a whole lot to say about the dates. The dates are what they are, Your Honor.” (R. p. 18, line 3-17). Appellants still do not argue, and never did at prior stages, that emergency facts exist such that the Statute should be extended, and no evidence of such is in the record. Appellants declined to provide any authority or assert that any tolling provision applies in arguments at the hearing, and no authority is provided in their brief that issued after the *Mims* case and even the amendments discussed therein to both the statute and the Rule. This Court should affirm the lower court’s dismissal of the Appellants’ claims as the Appellants did not meet the requirements to commence an action against the Respondent. No showing has been made that the Circuit Court abused its discretion in ruling that dismissal is appropriate for non-service within the time provided under South Carolina law.

CONCLUSION

This Court should not address the arguments of the Appellants because they have not been preserved for appeal. At the time of the Motion to Dismiss hearing, the Appellants did not ask the Circuit Court to determine whether they had acted with due diligence to perfect service upon the Respondent and should be granted an order for publication, nor that they should be afforded the opportunity to perfect service by publication beyond the 120-day period. After the Order issued basing the decision solely on the absence of timely service, Appellants did not file a Rule 59(e) motion to alter or amend the judgment made by the Circuit Court. The Statute of Limitation expired and 120 days from filing ran without any service of the Summons and Complaint upon Respondent and without application to the Court for service by publication prior to that deadline. The case was properly dismissed, the Circuit Court did not abuse its discretion, and the Order should be affirmed.

Respectfully submitted,

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v.

Jawhar Hamin,Respondent.

CERTIFICATE

I, Peter E. Farr, Esquire, attorney for Respondent, certify that the Final Brief of Respondent complies with the South Carolina Supreme Court Order of April 15, 2014, the South Carolina Supreme Court Order of April 30, 2024, and with Rules 211 and 267, SCACR.


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Jawhar Hamin,Respondent.

PROOF OF SERVICE

I certify that I have served the Respondent's Final Brief on Appellants by email to their attorneys, Angela de Turbi, Esquire, Rule 262(c)(3), SCACR, on June 11, 2024.

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