IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable G.D. Morgan, Circuit Court Judge

Appellate Case No. 2025-001556

Barbara Gail Bowick ……..……..…….……Appellant,

v.

Carlos Alejandro Gomez …….……..….....Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I. **Whether the Circuit Court properly dismissed this auto accident case where the Plaintiff failed to commence the action within the statute of limitations even after Defendant raised lack of service and insufficiency of service of process in his Answer?**

STATEMENT OF THE CASE

Through this appeal, Appellant attempts to avoid the consequences of failing to commence her action within the statute of limitations. Specifically, even though Respondent asserted lack of service in his Answer, Appellant failed to serve Respondent with the Summons and Complaint within one hundred twenty (120) days of filing the lawsuit. As a result, Respondent moved to dismiss the case, and the Circuit Court granted Respondent's Motion.

FACTUAL AND PROCEDURAL BACKGROUND

According to the Complaint, on March 28, 2021, the Appellant was involved in an auto accident with the Respondent. (Compl. ¶ 5). On March 28, 2024 – exactly three (3) years from the date of the auto accident – Appellant filed her Complaint against the Respondent. (Compl.). *See* S.C. Code § 15-3-530(5) (stating that an action for "assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law" must be commenced with three (3) years). Appellant did not serve Respondent with the Summons and Complaint on March 28, 2024. Consequently, Appellant had "one hundred twenty [120] days after filing" to accomplish "actual service" of her Summons and Complaint for her action to be commenced within the statute of limitations – or until July 26, 2024. *See* Rule 3(a)(2), SCRCP. However, Appellant did not serve Respondent with the Summons and Complaint on or before July 26, 2024.

On May 2, 2024, Respondent Carlos Alejandro Gomez filed an Answer. (Answer). In his Answer, he specifically asserted "Insufficiency of Service/Process" as affirmative defenses. (Answer ¶¶ 27-28). His Answer stated:

> The Defendant would assert that the Plaintiff has failed to properly serve the Defendant and that this matter should be dismissed for insufficiency of process and insufficiency of service of process in accordance with Rule 12(b)(4) and Rule 12(b)(5) of the South Carolina Rules of Civil Procedure.

(Answer ¶ 28). Despite Respondent's Answer pointing out lack of service, Appellant still failed to timely serve Respondent within the 120 days – i.e. on or before July 26, 2024.

Ten (10) business days after the July 26, 2024 deadline for service expired, Respondent filed a Motion to Dismiss. (August 9, 2024 Mot. to Dismiss). In his Motion, Respondent sought dismissal because the Appellant failed to serve him within one hundred twenty (120) days of filing her Complaint and, consequently, failed to commence her action within the statute of limitations. (*Id.*). Appellant did not file a response in opposition.[1] (Public Index).

On November 6, 2024, the Circuit Court held a hearing on the Motion. (Hearing Transcript). On November 7, 2024, the Circuit Court entered a Form 4 Order granting Respondent's Motion to Dismiss and indicating that a formal order would follow. (*Id.*). On November 18, 2024, Appellant filed a Motion to Reconsider. (Mot. to Reconsider).

On November 21, 2024, the Circuit Court entered a formal Order dismissing the action, which concluded:

> Here, the suit was not served within the statute of limitations, which expired on March 28, 2024, and Plaintiff failed to serve the Defendant within the statute of limitations or within 120 days of filing the Summons and Complaint. Therefore, this cause of action was never commenced, and Plaintiff's claims are barred by the statute of limitation. Plaintiff's claims are hereby dismissed.

(November 21, 2024 Order, p. 2). On July 18, 2025, the Circuit Court entered an Order denying Appellant's Motion to Reconsider. (July 18, 2025 Order).

[1] Appellant emailed an opposition prior to the hearing on the Motion. At the hearing on the Motion, the Circuit Court noted that the opposition had not been filed. (Nov. 6, 2024 Hr'g Tr. 10:8-11).

STANDARD OF REVIEW

When reviewing a dismissal of a claim pursuant to Rule 12, the appellate court applies the same standard of review as the trial court. *Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 616–17, 698 S.E.2d 879, 882 (Ct. App. 2010). "[T]he plaintiff has the burden to establish that the Court has personal jurisdiction over the defendant." *Jensen v. Doe*, 292 S.C. 592, 594, 358 S.E.2d 148, 149 (Ct. App. 1987) (citing *Yarborough & Co. v. Schoolfield Furniture Indus., Inc.*, 275 S.C. 151, 153, 268 S.E.2d 42, 43 (1980)). The plaintiff has "the burden to show that service of process was correctly made." *Id.* at 594, 358 S.E.2d at 148.

ARGUMENT

"Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." *City of N. Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 231–32, 599 S.E.2d 462, 465 (Ct. App. 2004); *see also Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 176, 609 S.E.2d 548, 552 (Ct. App. 2005) (stating that statutes of limitations are "fundamental to our judicial system" and "discourage plaintiffs from sitting on their rights").

Here, the Appellant's case was properly dismissed because she did not commence her action within the applicable statute of limitations. The Appellant never served Respondent with the Summons and Complaint. Even after Respondent's Answer pointed out that she had not served him with the Summons and Complaint, Appellant still failed to commence her action within the statute of limitations. Consequently, the Circuit Court properly dismissed her action.

In this appeal, Appellant attempts to cure her lack of service by raising voluntary appearance and waiver arguments. Many of her arguments are not preserved for appellate review. In addition,

Respondent appeared at all times subject to the affirmative defenses of insufficiency of service and insufficiency of process set forth in his Answer – his first filing with the court. His conduct was in accordance with the current South Carolina Rules of Civil Procedure and was not a "voluntary" appearance. Therefore, the Circuit Court should be affirmed.

I. Appellant's case was properly dismissed because she did not commence her action within the applicable statute of limitations.

According to her Complaint, the Appellant was involved in an auto accident with the Respondent on March 28, 2021. (Compl. ¶ 5). By statute, an action "for assault, battery, or any injury to the person or rights of another, not arising on contract" shall be commenced "[w]ithin three years." S.C. Code §§ 15-3-530(5); 15-3-510. Thus, Appellant's action has a three-year statute of limitations. Appellant chose to wait until March 28, 2024 – exactly three (3) years from the date of the auto accident – to file her Complaint against the Respondent. (Compl.).

Pursuant to Rule 3 of the South Carolina Rules of Civil Procedure, a civil action is commenced when the summons and complaint are filed with the clerk of court if:

> (1) The summons and complaint are served within the statute of limitations in any manner prescribed by law; or
>
> (2) If not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

Rule 3(a), SCRCP. Therefore, although Appellant may have filed the Summons and Complaint on the last possible day, the action would not be commenced unless she served Respondent that same day or within one hundred twenty (120) days of filing. *See also Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 119, 687 S.E.2d 29, 34 (2009) ("Under Rule 3(a)(2), SCRCP, even if the limitations period has run, service may still be effected if it is accomplished within 120 days of filing of the summons and complaint").

Appellant did not serve Respondent within the statute of limitations (i.e. on or before March 28, 2024) or within one hundred twenty (120) days of filing. Appellant admits that she never served Respondent with the Summons and Complaint. (Appellant's Br., p. 6 ("…Gomez was not formally served with the Summons and Complaint.")). Consequently, she did not commence her action within the statute of limitations, and the Circuit Court properly dismissed the case. *See City of N. Myrtle Beach*, 360 S.C. at 236, 599 S.E.2d at 467; *McMaster v. Dewitt*, 411 S.C. 138, 143, 767 S.E.2d 451, 453 (Ct. App. 2014); *Kreutner v. David*, 320 S.C. 283, 287, 465 S.E.2d 88, 90 (1995).

II. Respondent specifically raised affirmative defenses of insufficiency of service and insufficiency of process in his Answer.

Defendant Gomez's first appearance in this case was the Answer he filed on May 2, 2024. (Answer). In his Answer, Respondent specifically asserted "Insufficiency of Service/Process" as affirmative defenses. (Answer ¶¶ 27-28). His Answer stated:

> The Defendant would assert that the Plaintiff has failed to properly serve the Defendant and that this matter should be dismissed for insufficiency of process and insufficiency of service of process in accordance with Rule 12(b)(4) and Rule 12(b)(5) of the South Carolina Rules of Civil Procedure.

(Answer ¶ 28). Respondent never amended his Answer to withdraw these defenses. Thus, at all times, Respondent appeared subject to his affirmative defenses of insufficiency of service and insufficiency of process.

Despite the separately-enumerated affirmative defense in Respondent's Answer, Appellant argues (incorrectly) that Respondent's Answer constitutes a voluntary appearance that somehow waives the expressly-pled defense of lack of service. Appellant's argument asks this Court to rewind the clock back forty years. Prior to the South Carolina Supreme Court's 1985 promulgation of the Rules of Civil Procedure, a defendant was required to either make a "special appearance" objecting to jurisdiction or make a "general appearance." When making a "special appearance," a defendant

would only raise challenges to jurisdiction. However, South Carolina's courts abandoned the "special appearance" practice when they adopted the present South Carolina Rules of Civil Procedure. As this Court explained in *Dunbar v. Vandermore*:

> *Security Management* was decided under the law in effect prior to July 1, 1985, the effective date of the South Carolina Rules of Civil Procedure. Of course, the Rules have since become the governing authority on civil procedure in this state….
>
> ***
>
> Under the procedure which existed when *Security Management* was decided, an objection based on lack of jurisdiction over the person was typically raised by special appearance pursuant to Section 15–13–380 of the Code of Laws of South Carolina, 1976. H. Lightsey & J. Flanagan, *supra*, at 273. (In some circumstances, this objection could also be raised by a demurrer or a motion to quash service. *Id.*). It is clear that this procedure no longer exists. **Under Rule 12, an objection based on lack of jurisdiction over the person must be raised, either by responsive pleading or, at the option of the pleader, by motion. "[T]he special appearance has been eliminated." *Smalls*, 291 S.C. at 261, 353 S.E.2d at 156. Therefore, a general appearance is the only appearance a party can make under existing procedure.** The procedure which existed when *Security Management* was decided cannot still be followed because it has been expressly abolished by the Rules. **If we were to hold, consistent with *Security Management*, that an objection based on lack of jurisdiction over the person is waived by making a general appearance, there would then be no way a person could raise this objection without simultaneously waiving it.**

295 S.C. 493, 495–96, 369 S.E.2d 150, 151 (Ct. App. 1988) (emphasis added). The Rules now provide for only a general appearance and specifically address how to preserve jurisdictional defenses when making a general appearance.

Rule 12(b) of the South Carolina Rules of Civil Procedure provides in pertinent part:

> Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, ***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***: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6)

> failure to state facts sufficient to constitute a cause of action, (7) failure to join a party under Rule 19, (8) another action is pending between the same parties for the same claim. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. ***No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion***.

Rule 12(b), SCRCP (emphasis added). Thus, "at the option of the pleader" (and as recognized in the above-quoted passage from *Dunbar*) the defenses of insufficiency of process and insufficiency of service of process may be made in a responsive pleading – i.e. an answer – or by pre-answer motion. *Id.*; *see also Glenn v. Sch. Dist. No. Five of Anderson Cnty.*, 294 S.C. 530, 534, 366 S.E.2d 47, 49 (Ct. App. 1988) ("Rule 12(b) requires a defendant to set forth every defense he has in his answer, except those defenses which **may** be raised by pre-answer motion.") (emphasis added).

In *Beckham v. Durant*, this Court set forth the text of Rule 12 and specifically stated: "[U]nder Rule 12(a) and (b), such a defense as insufficiency of process must be made ***either by responsive pleading or motion within the time period allowed for responding***." 300 S.C. 329, 333, 387 S.E.2d 701, 704 (Ct. App. 1989) (emphasis added). The notes to the Rule specifically state:

> This important Rule 12(b) enables a party to: (1) raise ***by motion or answer*** all of the defenses now raised by demurrer, and (2) ***eliminates the necessity of the awkward "special appearance to object to jurisdiction" under present State practice***. The motion should be made before answer for early disposition of cases; but ***the defenses enumerated may be made in the responsive pleading and are not waived by being stated in a pleading rather than by motion.***

Rule 12, SCRCP, Advisory Committee Notes. Thus, the Advisory Committee notes specifically state that defenses may be raised in responsive pleadings and are not waived by being placed in a pleading rather than a motion.

Moreover, in such responsive pleading (like an answer), Rule 12(b) defenses may also be joined with any other defenses or objections. The Rule specifically states: "No defense or objection

is waived by being joined with one or more other defenses or objections in a responsive pleading…." Rule 12(b), SCRCP.

Appellant argues that Respondent waived these defenses by asserting them first in an answer, instead of a motion to dismiss, and that Respondent "voluntarily appeared" by "fil[ing] an Answer on the merits, substantively replying to Plaintiff's allegations" – i.e. by including other defenses and objections in his Answer. (Appellant's Br., pp. 7-11 (arguing Respondent voluntarily appeared and waived these defenses "because [he] did not comply with the express provision of Rule 12(b) and file [his] ***motion*** to dismiss related to the service and personal jurisdiction issues before voluntarily answering the Complaint")) (emphasis in orig.). As shown above, these arguments are incompatible with the Rules of Civil Procedure and are without merit. A defendant is permitted to first raise these defenses in an answer, instead of a pre-answer motion, and is permitted to join "other defenses or objections in a responsive pleading" without waiving the Rule 12(b) defenses. Rule 12(b), SCRCP.[2]

Because Rule 3 and South Carolina Code § 15-3-20 specifically give a plaintiff one hundred twenty (120) days after filing the Summons and Complaint to perfect service, a motion to dismiss for lack of service would be premature before the passage of one hundred twenty (120) days. Therefore, it was completely proper for Respondent to raise service defenses in his Answer – just as the plain language and notes to Rule 12(b) discuss. And Respondent did not sleep on his rights. Respondent filed his Motion to Dismiss just ten (10) business days after the July 26, 2024 service deadline.

Appellant's Brief fails to set forth any case law demonstrating that the conduct at issue in this case rises to the level of a voluntary appearance. In the first argument section of her Brief, Appellant

[2] This Court recently rejected similar arguments. *See Ex parte Liberty Mut. Ins. Co.*, No. 2023-000074, 2025 WL 2794501, at *5 (S.C. Ct. App. Oct. 1, 2025) ("Although 12(b) requires that a motion asserting insufficient service of process be made before pleading, this does not preclude Carriers from raising such defense in their answer and then arguing the issue along a with a defense of expiration of the statute of limitations in a motion for summary judgment.").

cites seven (7) pre-1985 cases – all before South Carolina adopted its Rules of Civil Procedure and eliminated "special appearances." (Appellant's Br., pp. 7-10). In contrast, she only cites two (2) post-1985 cases in support of her argument, both of which are readily distinguishable in fundamental ways. (Appellant's Br., pp. 7-10 (citing: (1) *Ex parte Cannon*, 385 S.C. 643, 659, 685 S.E.2d 814, 823 (Ct. App. 2009); and (2) *Stearns Bank Nat. Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 644 S.E.2d 793 (Ct. App. 2007)).

In *Ex parte Cannon*, David Cannon argued that "he was never made a party to any proceedings in his capacity as trustee." 385 S.C. at 657, 685 S.E.2d at 822. This Court held that the circuit court had personal jurisdiction over him. It based its ruling on: (1) a trustee statute (S.C. Code § 62-7-202(a)); (2) his counsel signing "an 'Acknowledgment of Service,' which waived all objections to defects in service of process"; (3) his appearance with counsel at numerous hearings wherein he argued the merits without ever making a motion or an objection as to personal jurisdiction; and (4) him "specifically consent[ing]" to the terms of the prior order at issue. *Id.* at 658–59, 685 S.E.2d at 822–23. In addition, his counsel conceded at oral argument that the circuit court had personal jurisdiction over Cannon. *Id.* at 660 n.2, 685 S.E.2d at 823 n.2.

Here, Respondent appeared subject to the express affirmative defenses of insufficiency of service and insufficiency of process, which were set forth in his first filing with the Court. (Answer). Appellant has not argued that there is any statute that makes Respondent subject to personal jurisdiction. Respondent's counsel has never signed an "acknowledgement of service" nor has Respondent appeared at hearings to argue the merits of the action. Therefore, the *Ex Parte Cannon* holding and analysis are not applicable to this case.

In *Stearns Bank Nat. Ass'n v. Glenwood Falls, LP*, defendant Glenwood Falls, LP, was properly served with the summons and complaint in a foreclosure action. Another defendant then

brought a cross-claim against Glenwood Falls. 373 S.C. at 335, 644 S.E.2d at 795. The attorney for the other defendant attempted to serve Glenwood Falls with the cross-claim. *Id.* He "mailed the cross-claim via certified mail to Glenwood Falls' registered agent, Cathy Kleiman, but Kleiman did not sign the return receipt. Instead, an unauthorized person signed it." *Id.* Nevertheless, the registered agent received the cross-claim, and counsel for Glenwood Falls then reached out by letter to the cross-claimant's counsel. *Id.* In the letter, the counsel for Glenwood Falls "not only announces his representation of Glenwood Falls without reservation but also expresses an intent to reach the merits of the case." *Id.* at 341, 644 S.E.2d at 798. As this Court specifically noted, the letter – i.e. Glenwood Falls' first communication – "contains not the slightest hint of a desire to challenge service of process." 373 S.C. at 341, 644 S.E.2d at 798. Only several months after the court entered a default judgment against Glenwood Falls did the partnership raise the issue of proper service for the first time. *Id.* at 336, 644 S.E.2d at 795. The Court held that the letter constituted a voluntary appearance. *Id.* at 341, 644 S.E.2d at 798.

Here, unlike the cross-claimant in *Stearns*, Appellant admits she never served the Summons and Complaint upon Respondent, and, thus, she had no reasonable basis to believe that she had properly served Respondent. *See* (Appellant's Br. (never arguing that Appellant served or attempted to serve Respondent and stating "Gomez was not formally served with the Summons and Complaint")). More importantly, Respondent filed an Answer specifically raising insufficiency of service and insufficiency of process in his very first appearance in the case. (Answer ¶¶ 27-28). This is more than a "slight[] hint of a desire to challenge service of process." *See Stearns Bank Nat. Ass'n*, 373 S.C. at 341, 644 S.E.2d at 798. Consequently, there has been no "voluntary" appearance in this

case, only an appearance subject to the defenses of insufficiency of service and insufficiency of process – exactly as Rule 12(b) requires.[3]

This case is much more similar to *Wellin v. Wellin*, 427 S.C. 15, 25, 828 S.E.2d 767, 772 (Ct. App. 2019), where this Court found there was no voluntary appearance. In that case, the defendants voiced their objections to the court having jurisdiction over the trust that had not been served with a summons and complaint. *Id.* Although the defendants' counsel at times participated in the exchange among the parties regarding depositing trust assets into the court, this Court held that this "conduct did not rise to the level of a waiver of personal jurisdiction on behalf of the Trust" because the defendants continued to voice their objections to personal jurisdiction. *Id.*

Like the defendants in *Wellin*, Respondent here voiced his objections to service in his Answer. As soon as a motion to dismiss became ripe – after the time lapsed for Appellant to effectuate service under Rule 3 and § 15-3-20 – Respondent filed his Motion to Dismiss – reiterating his objection based on lack of service. In other words, Respondent raised lack of service as soon as he appeared in the case and then moved on that defense as soon as it was ripe.

Appellant's argument that a Motion to Compel – one that was never heard and that was only necessitated by Appellant's failure to respond to basic discovery – somehow waives service defenses is nonsensical. By its plain language, Rule 12 permits defenses to be raised in an answer or in an initial motion. Raising a defense in an answer puts all parties on notice of the defense. In fact, it is not at all uncommon for a Rule 12 answer to ultimately require some level of discovery – making the issue one that will be addressed later in the case, sometimes through summary judgment. Parties may

[3] Also, the standard of review that applied in *Stearns* was one of deference to the trial court's discretion because the order on appeal was a denial of a motion for relief from a default judgment. *Stearns*, 373 S.C. at 336, 644 S.E.2d at 795. Thus, the Court of Appeals was required to affirm in *Stearn* unless the trial court abused its discretion in denying the motion to set aside the default judgment.

conduct discovery on personal jurisdiction ((12(b)(1)), venue ((12)(b)(3)), service of process (12(b)(4) and (5)), or whether joinder of another party is required ((12(b)(7)). It is nonsensical to argue that by serving discovery after raising an affirmative defense under Rule 12, a party thereby waives its Rule 12 defenses. Such an interpretation flies in the face of the plain language of the rules. Likewise, suggesting that moving to compel responses to discovery somehow waives Rule 12 defenses would reward a plaintiff who files suit and then fails to respond to discovery. Unsurprisingly, Appellant does not cite any caselaw to support this contention, and the plain language of Rule 12 refutes Appellant's argument.[4]

Respondent raised its Rule 12(b)(4) and (5) defenses in its initial responsive pleading, putting Appellant on notice of those defenses. Appellant failed to heed those warnings and failed to serve Respondent within one hundred twenty (120) days of filing the Summons and Complaint, as required by Rule 3, SCRCP and § 15-3-20. As soon as the one hundred twenty (120) days passed, Respondent moved to dismiss based on the failure to serve within the statute of limitations. Appellant's arguments that Respondent "voluntarily appeared" despite immediately raising the defense in his Answer and then immediately moving on that defense as soon as it was ripe are simply incorrect. The Circuit Court properly granted that Motion to Dismiss.

[4] Rule 12(h)(1) specifically addresses how a defense of insufficiency of process or insufficiency of service of process may be waived: "(A) if omitted from a motion in the circumstances described in subdivision(g)" – not applicable here because Respondent did not file such a motion – or "(B) if it is 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" – again, not applicable because Respondent did assert these defenses in his responsive pleading. Appellant essentially asks this Court to write into the Rule additional forms of waiver that the Rule's drafters chose not to include.

III. Appellant's other arguments are not preserved for appellate review.

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003). "An issue may not be raised for the first time in a motion to reconsider." *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009). An issue raised for the first time in a motion to reconsider is not preserved for appellate review. *Id.*; *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004); *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999) ("Further, because the transcript of the proceedings below is omitted from the record, it appears the first time Commercial Credit made this argument was in its Rule 59(e) motion for reconsideration. Accordingly, this issue is not properly preserved for our review."). "An issue that was not preserved for review should not be addressed by the Court of Appeals…." *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 694.

A. Appellant's Rule 12(g) and 12(h) arguments are not preserved for appellate review and are inapplicable.

Appellant argues that Respondent waived his insufficiency of process defense by failing to comply with Rule 12(g) and (h), but those arguments are not preserved for appellate review and neither of those rules are applicable under the procedural facts of this case. *See* (Appellant's Br., pp. 11-13). Appellant's un-filed Response in Opposition to Respondent's Motion to Dismiss did not include these arguments. *See* (Pl.'s Resp. in Opp.). Her counsel did not raise this argument at the hearing on this matter. (November 6, 2024 Hearing Transcript). The Circuit Court's Orders did not rule on this matter. *See* (November 7, 2024 Order); (November 21, 2024 Order). Even if Appellant had raised this issue in a motion to reconsider, it would not be preserved for appellate review. As this Court explained in *RRR, Inc. v. Toggas*:

> [I]n order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the circuit court. It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the circuit court to be preserved. *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006). Moreover, a party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not. *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (issue raised for first time in Rule 59, SCRCP, motion is not preserved for review).

378 S.C. 174, 185, 662 S.E.2d 438, 443 (Ct. App. 2008), *cert. granted*, *decision aff'd*, 381 S.C. 490, 674 S.E.2d 170 (2009); *see also Eaddy v. Oliver*, 345 S.C. 39, 44, 545 S.E.2d 830, 833 (Ct. App. 2001) (holding that an issue first raised in a post-trial motion is not preserved for appellate review); *Bank of New York v. Sumter Cnty.*, 387 S.C. 147, 159, 691 S.E.2d 473, 479 (2010) ("It is axiomatic that an issue cannot be raised for the first time in a post-trial motion."). Therefore, this issue is not preserved for appellate review.

Moreover, given the procedural history of this case, these sections of the Rule are inapplicable. Rule 12(g) states:

> **(g) Consolidation of Defenses in Motion**. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

Rule 12(g), SCRCP (emphasis added). Thus, the trigger for Rule 12(g) waiver is a party making a motion under Rule 12 that omits a Rule 12 defense. Here, Respondent did not make any Rule 12 motion prior to his Motion to Dismiss, which included the defenses of insufficiency of process and insufficiency of service of process. *See* (Mot. to Dismiss). Thus, Rule 12(g)'s waiver provision was

never triggered under the procedural history of this case, and Appellant's Rule 12(g) waiver argument is without merit.[5]

Rule 12(h) provides in pertinent part:

> **(h) Waiver or Preservation of Certain Defenses**.
>
> (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, or that another action is pending between the same parties for the same claim is waived (A) if omitted from a motion in the circumstances described in subdivision (g) or (B) if it is 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.

Rule 12(h)(1), SCRCP (emphasis added). Thus, the triggers for Rule 12(h) waiver are: (A) the defenses being omitted from a prior Rule 12 Motion; or (B) the defenses neither being made by motion "nor included in a responsive pleading." *Id.* As explained above, Respondent did not file any Rule 12 motion before filing his Motion to Dismiss, which included these defenses. Therefore, the section (A) trigger is not met. Additionally, these defenses were included in a responsive pleading (the Answer) and in a Rule 12 motion (the Motion to Dismiss). Therefore, the section (B) trigger is not met. Consequently, Appellant's argument that Rule 12(h)'s waiver provision applies is without merit.

Moreover, Rule 12(h)(1) further demonstrates that these defenses can be asserted for the first time in a responsive pleading, like an answer. The Rule specifically states that these defenses are only waived if they are "**neither** made by motion under this rule **nor** included in a responsive pleading…." Rule 12(h)(1). This Rule sets forth alternative ways to avoid waiver of these defenses – make them by motion or include them in a responsive pleading. Thus, the language of this Rule further

[5] To the extent Appellant premises her Rule 12(g) waiver argument on the Motion to Compel, a motion to compel is not "a motion under this rule," as required to trigger the waiver provision. *See* Rule 12(g), SCRCP. The "motion[s] under this rule" are only the Rule 12(b) motions, Rule 12(c) motions for judgment on the pleadings, Rule 12(d) motions for a more definite statement, and Rule 12(f) motions to strike. *See* Rule 12, SCRCP.

undermines Appellant's argument that Respondent waived these defenses by asserting them as affirmative defenses in his Answer before including them in his Motion to Dismiss. Consequently, no waiver relieves Appellant of her failure to timely commence her action.

B. Appellant's statute of limitations pleading argument is not preserved for appellate review, and the statute of limitations issue was tried by implied consent.

To the extent Appellant argues that the Circuit Court erred in ruling on the statute of limitations issue because it was not included as an affirmative defense in the Answer, such issue is not preserved for appellate review. *See* (Appellant's Br., p. 13). Appellant's un-filed Response in Opposition to Respondent's Motion to Dismiss did not include this argument. *See* (Pl.'s Resp. in Opp.). Her counsel did not raise this argument at the hearing on this matter. *See* (November 6, 2024 Hearing Transcript). The Circuit Court's Orders did not rule on this matter. *See* (November 7, 2024 Order); (November 21, 2024 Order). Even if Appellant had raised this issue in a motion to reconsider, it would not be preserved for appellate review. *See RRR, Inc.,* 378 S.C. at 185, 662 S.E.2d at 443; *Eaddy*, 345 S.C. at 44, 545 S.E.2d at 833; *Bank of New York*, 387 S.C. at 159, 691 S.E.2d at 479. Therefore, this issue is not preserved for appellate review.

Additionally, when Respondent raised the service defenses in his May 2, 2024 Answer, Appellant still had over two months to timely serve Respondent and commence this action within the statute of limitations – i.e. by July 26, 2024. Consequently, Respondent would not have had a valid statute of limitations defense at that time. Moreover, "[t]he statute of limitations is not a defense listed under Rule 12(b) which may be raised by pre-answer motion. It also is not listed under any other subdivision of Rule 12 and, therefore, is not a defense or objection which Rule 12 permits to be raised by pre-answer motion." *Glenn*, 294 S.C. at 534, 366 S.E.2d at 49–50. Appellant's opportunity to timely commence her action through service expired on July 26, 2024. Thereafter, Respondent timely filed his Motion to Dismiss on August 9, 2024 – a mere ten (10) business days later. (Mot. to Dismiss).

Pursuant to Rule 15(b), "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Rule 15(b), SCRCP. At the hearing on the Motion to Dismiss, Appellant did not object on the basis that the statute of limitations defense was not raised in the Answer. (November 6, 2024 Hearing Transcript). Consequently, the statute of limitations issue was tried by implied consent at the November 6, 2024 hearing.[6]

C. Appellant's "justice and public policy" arguments are not preserved for appellate review.

Likewise, Appellant's "justice and public policy" arguments are not preserved for appellate review. *See* (Appellant's Br., pp. 13-14). Appellant did not raise these issues in her un-filed Response in Opposition. (Pl.'s Resp. in Opp.). Her counsel did not raise "justice and public policy" arguments at the hearing on this matter. (November 6, 2024 Hearing Transcript). The Circuit Court's Orders did not rule on these arguments. *See* (November 7, 2024 Order); (November 21, 2024 Order). Therefore, these arguments are not preserved for appellate review.

In her Brief, Appellant alleges that her failure to comply with the statute of limitations was "based off a technicality that [Defendant] created by [his] silence." (Appellant's Br., p. 14). But Respondent was not silent. To the contrary, Respondent specifically raised Rule 12(b)(4) and (5) in his Answer. According to this Court, "***statutes of limitations are not simply technicalities***. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." *City of N.*

[6] Had this issue been raised before the Circuit Court, Respondent could have simply moved pursuant to Rule 15 to amend his Answer due to the fact that the statute of limitations became a potential defense after the passage of one hundred twenty (120) days from the filing of the Summons and Complaint. Because leave to file amendments is to be freely given, there is no reason to believe the Circuit Court – which granted Respondent's Motion to Dismiss – would have denied such a request. However, the lack of record on this issue merely highlights the fact that Appellant was required to raise this issue to the Circuit Court in order to preserve it for appellate review, and she did not do so.

Myrtle Beach, 360 S.C. at 231–32, 599 S.E.2d at 465 (citations omitted) (emphasis added). On May 2, 2024 – several months before the Appellant's 120 days for service were up, Respondent filed an Answer that specifically asserted insufficiency of service and process as affirmative defenses. (Answer ¶¶ 27-28). If anything, Respondent's actions should have alerted Appellant of her need to timely serve Respondent. All she had to do was read his Answer. *See* (*id.*). Public policy cannot override the statute of limitations and South Carolina's statutory and rule-based requirements for commencement of a lawsuit. Respondent's Answer warned Appellant that she had not yet commenced her lawsuit. Despite that warning, Appellant failed to timely complete service. Public policy requires enforcement of South Carolina law, meaning the Circuit Court properly granted Respondent's Motion to Dismiss based on Respondent's failure to commence her lawsuit within the statute of limitations.

CONCLUSION

For the above-stated reasons, the Circuit Court's dismissal of this case should be affirmed. Appellant failed to commence this action within the statute of limitations. She never served Respondent with the Summons and Complaint even after Respondent raised lack of service as a defense in his Answer. Respondent appeared at all times in this action subject to the affirmative defenses of insufficiency of service and insufficiency of process, which he asserted in his first filing with the court. Appellant has failed to show that Respondent ever abandoned that defense. To the contrary, Respondent promptly moved on that issue as soon as the issue became ripe. Therefore, the Respondent respectfully requests that this Court affirm the Circuit Court's dismissal.

Respectfully submitted,

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CERTIFICATE

I, Wesley B. Sawyer, Esquire, attorney for Respondent, certify that the Respondents' Initial Brief and Designation of Matter comply with the South Carolina Supreme Court Order of August 13, 2007.

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