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

Case No. 2024-CP-26-02217

Appellate Court Case No. 2025-001556

Barbara Gail Bowick……Appellant,

v.

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

APPELLANT'S FINAL BRIEF

February 4, 2025

s/ Christina M. Brown
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STATEMENT OF ISSUE ON APPEAL

DID THE CIRCUIT COURT ERR IN DISMISSING PLAINTIFF'S CASE BASED UPON LACK OF PROPER SERVICE OF THE COMPLAINT BEFORE THE STATUTE OF LIMITATIONS WHERE THE DEFENDANT WAS SUED, MADE A VOLUNTARY APPEARANCE THROUGH COUNSEL, ANSWERED, SERVED DISCOVERY, AND FILED A DISCOVERY MOTION WITHIN THE LIMITATIONS PERIOD, AND ONLY LATER RAISED THE SERVICE ISSUE BY MOTION AFTER EXPIRATION OF THE LIMITATIONS PERIOD?

STATEMENT OF THE CASE

This is a motor vehicle wreck case that was filed on March 28, 2024. Barbara Gail Bowick (hereinafter "Bowick" or "Appellant") was a passenger in a vehicle which was rear-ended by Defendant Carlos Alejandro Gomez (hereinafter "Gomez" or "Respondent") on March 28, 2021. (R. p. 48, Complaint ¶¶7-8). Gomez, by and through counsel, filed a notice of appearance and Answer on May 2, 2024. (R. p. 40-46; p. 63; Answer). Gomez served interrogatories and requests for production on May 3, 2024. (R. p. 31-38, Discovery Requests). On June 11, 2024, a Rule 11 letter was sent by counsel for Gomez, advising of overdue discovery responses. (R. p. 39, Rule 11 Correspondence). On June 26, 3034, Gomez filed a motion to compel discovery responses. (R. p. 29 – 30, Motion to Compel).

On August 9, 2024, Gomez filed a motion to dismiss the action for failing to commence the action within the applicable statute of limitations, as Gomez was not formally served with the Summons and Complaint. (R. p. 27 – 28, Motion to Dismiss). The motion was heard on November 4, 2024. The Defendant argued that the case should be dismissed for lack of service. (R. p. 54, lines 4025, Transcript p. 4, lines 4-25). Plaintiff argued that because there was an answer to the merits of the action as well as a motion to compel filed, there was a voluntary appearance in the case and service was not necessary. (R. p. 56 line 3 – p. 57, line 8, Transcript p. 6 line 3 – p. 7 line 8); (R. p. 22 – 26, Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss).

The motion to dismiss was granted via Form 4 Order on November 7, 2024. (R. p. 7-8). With 10 days falling on a Sunday, a Motion to Reconsider was filed by Bowick on November 18, 2024. (R. p. 19 – 21, Plaintiff's Motion to Reconsider). A formal order was thereafter drafted by Defendant's counsel and entered by the Court on November 21, 2024. (R. p. 4-6). A Memorandum in Support of that Motion to Reconsider was filed on November 27, 2024. (R. p. 10 – 18, Plaintiff's

Memorandum in Support of its Motion to Reconsider). The court denied Bowick's Motion to Reconsider on July 18, 2025. This appeal follows.

STANDARD OF REVIEW

On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate Court applies the same standard of review as the trial court. *Rydde v. Morris*, 381 S.C. 643, 645, 675 S.E.2d 431, 433 (2009). That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the "facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Id*.

In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes. *Maxwell v. Genez*, 365. S.C. 617, 592 S.E.2d 26 (2003). Thus, because the resolution of this mater turns on the interpretation of Rules 3 and Rule 4(b), SCRCP, the appropriate standard of review is the same standard as the standard for the interpretation of a statute, which is an action at law. An appellate court reviews all questions of law *de novo*. *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.e.2d 803, 807 (Ct. App. 2009). "Questions of law may be decided with no particular deference to the trial court." *Clardy v. Bodolosky*, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009).

ARGUMENT

I. A VOLUNTARY APPEARANCE IS EQUIVALENT TO PERSONAL SERVICE

"Although a court commonly obtains personal jurisdiction by the service of the summons and complaint, it may also obtain personal jurisdiction if the defendant makes a voluntary appearance." *Ex Parte Cannon*, 385 S.C. 643, 658, 685 S.E.2d 814, 822 (Ct. App. 2009). "Voluntary appearance by defendant is equivalent to personal service . . . ." Rule 4(d), SCRCP; *accord* Comment to Rule 4(d), SCRCP (Rule 4(d) conforms to present State and Federal Practice,

and states specifically that "voluntary appearance is equivalent to personal service."). "**A defendant may waive any complaints he may have regarding personal jurisdiction by failing to object to the lack of personal jurisdiction and by appearing to defend his case**." *Ex Parte Cannon*, 385 S.C. at 658, 685 S.E.2d at 822.

"The term 'appearance' is used particularly to signify or designate the overt act by which one against whom suit has been commenced submits himself to the court's jurisdiction." *Stearns Bank Nat. Ass'n v. Glenwood Falls, L.P.*, 373 S.C. 331, 338, 644 S.E.2d 793, 796 (Ct. App. 2007). "An appearance may be expressly made by formal written or oral declaration, or record entry, or it may be implied from some act done with the intention of appearing and submitting to the court's jurisdiction." *Id*. "No specific act constitutes an appearance, as 'a defendant may choose to come into court with trumpets, or quietly by the back door.'" *Id. citing Stephens v. Ringling*, 102 S.C. 333, 86 S.E. 683, 685 (1915). Accordingly, courts decide on a case-by-case basis whether a defendant's act demonstrates an intent to submit to the court's jurisdiction. *Stearns Bank Nat. Ass'n v. Glenwood Falls, L.P.*, 373 S.C. 331, 338, 644 S.E.2d 793, 796 (Ct. App. 2007).

The following actions have been found to constitute voluntary appearance:

- **A letter from one attorney to another**. *See Stearns Bank Nat. Ass'n v. Glenwood Falls, L.P.* 373 S.C. 331, 338, 644 S.E.2d 793, 797 (Ct. App. 2007); *Petty v. Weyerhaeuser Company*, 272 S.C. 282, 251 S.E.2d 735 (1979).

- **Filing a General Appearance in the case**. *Beard-Laney, Inc. v. Darby*, 208 S.C. 313, 38 S.E.2d 1 (1946); *Cheraw Motor Sales Co. v. Rainwater*, 125 S.C. 509, 509, 119 S.E.237, 239 (1923) ("a general appearance operates to waive not only all defects and irregularities in process, but also an entire want of process."); *Ex parte Cannon*, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009).

- **Answering the merits of a case**. *Stephens v. Ringling*, 102 S.C. 333, 86 S.E. 683 (1915) (noting "any action by the defendant which really amounts to an intent to be in court is also a voluntary appearance."

The following actions have been found not to constitute voluntary appearance, but rather an appearance limited in nature:

- **Appearing for the limited purpose of setting aside a default**. *New Hampshire Ins. co. v. Bey Corp.*, 312 S.C. 47, 435 S.E.2d 377 (Ct. App. 1993).

- **Appearing for the sole purpose to contest jurisdiction**. *Connell v. Connell*, 249 S.C. 162, 166, 153 S.E.2d 396, 398 (1967).

Further, our state Supreme Court has held, "We have never required exacting compliance with the rules to effect service of process. Rather, we inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant, and the defendant has notice of the proceedings." *Roche v. Young Bros., Inc. of Florence,* 318 S.C. 207, 209-10, 456 S.E.2d 897, 899 (1995); *see also Walker v. Preacher*, 185 S.C. 462, 467, 194 S.E. 868, 870 (1938) ("When a person knows of a thing he has 'notice' thereof, as no one needs notice of what he already knows.").

In this case, it is undisputed that Respondent knew about this lawsuit, and the circuit court unquestionably had personal jurisdiction of the Defendant, all of which is demonstrated by Defendant's numerous actions showing his intent to submit to the court's jurisdiction and litigate his case on the merits. The first act was the filing of a notice of appearance by an attorney, which on its own has been held to constitute a voluntary appearance. *Stearns Bank Nat. Ass'n v. Glenwood Falls, L.P.*, 373 S.C. 331, 338, 644 S.E.2d 793, 796 (Ct. App. 2007) (holding a letter from one attorney to another constituted a voluntary appearance); *Petty v. Weyerhaeuser Company*, 272 S.C. 282, 251 S.E.2d 735 (1979) (where the Defendant's attorney requested an extension to answer the complaint and the Defense counsel never answered, the Defendant was placed in default, our state Supreme Court held that while service was improper, the Defendant had made a voluntary appearance).

Second, the Defendant filed an Answer on the merits, substantively replying to Plaintiff's allegations. Third, the Defendant served written discovery requests on the Plaintiff. Fourth, the Defendant sent Plaintiff a Rule 11 letter, inquiring as to the status of the overdue discovery responses. Fifth, Defendant filed a motion to compel those discovery requests, not only consenting to the Court's jurisdiction, but using it for their own benefit. *See H.S. Chisholm, Inc. v. Klinger*, 229 S.C. 8, 14, 91 S.E.2d 538, 541 (1956) ("The voluntary appearance of the defendants in this case, where they made a motion to vacate and set aside the attachment proceedings, gave the court jurisdiction of them. Any action by the defendant which really amounts to an intent to be in court is also a voluntary appearance). Each of these acts on their own constitute voluntary appearance by the Defendant; but when combined, it unequivocally demonstrates the Defendant's intent to submit to the court's jurisdiction and litigate his case on the merits. *Stearns Bank Nat. Ass'n v. Glenwood Falls, L.P.*, 373 S.C. 331, 338, 644 S.E.2d 793, 796 (Ct. App. 2007) (courts decide on a case-by-case basis whether a defendant's act demonstrates an intent to submit to the court's jurisdiction); *Stephens v. Ringling*, 102 S.C. 333, 86 S.E. 683 (1915) (noting "any action by the defendant which really amounts to an intent to be in court is also a voluntary appearance.").

In sum, because the Defendant voluntarily appeared, the lawsuit should be considered commenced on either on May 2, 2024, when the Defendant appeared and Answered the Complaint and voluntarily subjected himself to the jurisdiction of the Court, or on June 26, 2024 when Defendant filed a motion to compel discovery responses and sought fees and costs from the Plaintiff for failing to provide timely discovery responses. Critically, both dates are well within the 120 day service timeframe under Rules 3 and 4, SCRCP.

II. DEFENDANT WAIVED THE 12(b) DEFENSES OF LACK OF JURISDICTION OVER THE PERSON; INSUFFICIENCY OF PROCESS, AND INSUFFICIENCY OF SERVICE OF PROCESS BY FAILING TO MAKE A MOTION FOR THEM UNTIL AFTER FILING A GENERAL ANSWER

Our Rules of Civil Procedure are clear that motions under Rule 12(b)(2), (4), & (5) **must be made before** filing a general answer.

Rule 12(b) provides:

> "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**."

The term "shall" in a statute or court rule means that the action is mandatory. *State v. Price*, 441 S.C. 423, 438, 895 S.E.2d 633, 640 (2023) ("The term 'shall' in a statute means that the action is mandatory."); *Maxwell v. Genez*, 356 S.C. 617, 591 S.E.2d 26 (2003) ("In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes.").

It is undisputed that the Defendant in this case did not make a motion asserting lack of personal jurisdiction/insufficiency of process/insufficiency of service of process until more than three months (99 days) after filing a notice of appearance and filing his Answer. Accordingly, because the Defendant did not comply with the express provision of Rule 12(b) and file its ***motion*** to dismiss related to the service and personal jurisdiction issues before voluntarily answering the Complaint, the motion for dismissal was procedurally improper and should have been denied by the Court for this reason alone.

In fact, our Rules of Civil Procedure contemplate a Defendant's attempt to later raise a motion to dismiss for lack of personal jurisdiction and insufficiency of process. Rule 12(h)(1), and Rule 12(g), SCRCP provide:

> "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) which states 'a party who makes a motion under this rule may join with it any other motion(s) 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** . . . ."'

Defendant's argument that because he filed an answer on the merits (which included the affirmative defense of lack of service) did not constitute a "voluntary appearance" misses the mark. (R. p. 57, lines 16-19, Transcript p. 7, lines 16-19). Defendant had ample opportunity to make a proper motion regarding the service issue – but instead, chose to file a motion to compel on June 26, 2024 and proceed with litigating the case. Defendant should have raised the service issue at this point, and instead strategically chose not to do so. Our Court rules do not permit that action and accordingly, Defendant's motion is also waived and/or barred pursuant to Rule 12(h), SCRCP.

Importantly, the comments to Rule 12(g) provide that it "is the same as the Federal Rule. It is new material to **help prevent piecemeal presentation of defenses by separate motions**." The comments to Rule 12(h) provide that it "should be read together with rule 12(g) in defining those defenses which are waived if not presented by pleading or motion. While our State jurisprudence has yet to grapple with interpretation of this rule, federal courts have made clear that Rule 12(h) bars such tactics that have been employed by the Respondent in this matter. *See e.g. Patterson v. Whitlock*, 392 Fed. Appx. 185 (4th Cir. 2010) (noting "even where a defendant generally raises a service of process contention in its answer, that contention will be deemed waived if the defendant fails to adequately develop it in a reasonably prompt manner); *Accord Datskow v. Teledyne, Inc.,* 899 F.2d 1298, 1303 (2d Cir.1990) (concluding that defendant waived

defective service defense by stating it in answer, but not developing it until motion to dismiss filed four months later).

Further, it is worth noting that the statute of limitations defense which the Court based its underlying order on was **never pled by the Defendant**. Rule 8, SCRCP provides "in pleading to a preceding pleading, a party shall set forth affirmatively the defenses" including the statute of limitations. *See also Whitehead v. State*, 352 S.C. 215, 220, 574 S.E.2d 200, 220 (2002) ("The failure to plead an affirmative defense is deemed a waiver of the right to assert it."). "Waiver of [the statute of] limitations may be shown by words or conduct. Thus, waiver may result from express agreement, . . . from failure to claim the defense, or by any action or inaction manifestly inconsistent with an intention to insist on the statute. *Mende v. Conway Hosp., Inc.*, 304 S.C. 313, 315, 404 S.E.2d 33, 34 (1991). Because the statute of limitations was not pled, it should have been considered waived by the circuit court.

In this case, the words and conduct of the Defendant should be deemed an unequivocal renunciation of the Rule 12 defenses including lack of jurisdiction, insufficiency of process, and insufficiency of service of process. The defendant (1) filed an answer on the merits; (2) engaged in written discovery; (3) corresponded through counsel; (4) filed a motion to compel. All of which were done with the express intention to defend the case on the merits. Accordingly, the Rule 12 defenses were waived and the Court must reverse based on this issue alone.

III. JUSTICE AND PUBLIC POLICY CONSIDERATIONS REQUIRE REVERSAL IN THIS CASE

It is well settled that the Rules of Civil Procedure "should be liberally construed so as to promote justice and dispose of cases on the merits" and not on technicalities and missed deadlines. *In re Estate of Weeks*, 329 S.C. 251, 495 S.E.2d 454 (Ct. App. 1997); *Dixon v. Besco Eng'g.*, 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995). Rule 1, SCRCP provides that the Rules of Civil

Procedure "shall be construed to secure the ***just***, speedy, and inexpensive determination of every action."

There is nothing just about the dismissal that occurred in this case. For a Defendant to voluntarily submit themselves to the jurisdiction of the Court, litigate the case, file an offensive motion and seek affirmative relief from the Court, and then claim that the case had not commenced smacks of gamesmanship. *McCall v. IKON*, 363 S.C. 646, 652, 611 S.E.2d 315, 318 (Ct. App. 2005) ("A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice.").

Justice requires reversal in this case. The Court should not condone Defendant's attempt to shirk liability based off a technicality that it created by its silence. Further, this case sets a dangerous precedent, encouraging parties to waste time and resources, while keeping the proverbial ace up their sleeve. It is fundamentally inconsistent with our Rules of Civil Procedure.

CONCLUSION

Accordingly, for the reasons set forth above, Appellant respectfully request the Court reverse the Circuit Court's decision to dismiss this case, and allow the parties to proceed.

February 4, 2025

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