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 REPLY BRIEF

February 4, 2025

s/ Christina M. Brown
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INTRODUCTION

Appellant Barbara Gail Bowick offers this Reply Brief in support of her arguments seeking reversal of the trial court's order that dismissed her case based upon a mistaken belief that the case was not commenced within the statute of limitations because the Defendant was not personally served, where the action was commenced timely and Defendant voluntarily appeared, participated in litigation, and failed to move for dismissal in accordance with Rule 12(b) timely. In the pages below, Appellant addresses a few issues from Respondent's Brief thar require clarification and/or Correction.

I. APPELLANT PROPERLY PRESERVED ALL ISSUES FOR REVIEW.

"A party need not use the exact name of a legal doctrine in order to preserve the issue for appellate review, but it must be clear the argument was presented on that ground." Jean Hoefer Toal et. al., *Appellate Practice in South Carolina* 186 (3d ed. 2016).

Appellant's arguments including all of those related to Rule 12 (including Rule 12(g) &(h)) are preserved for review. Appellant specifically raised the Rule 12 issue(s) in her Memorandum in Opposition to Defendant's Motion to Dismiss, at the hearing, and then again in her Memorandum in Support of her Motion to Reconsider. (R. p. 22 – 26, R. p. 12-13, Memo in Support of Motion to Reconsider, pp. 3-4). These arguments were also ruled on by the trial court when it denied that motion, noting that it had reviewed "the motion, the file, and submissions of the parties" (R. p. 2, Order Denying Plaintiff's Motion to Reconsider).

While Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss was not filed, a fact that has been consistently pointed out by the Respondent in his briefing, it was emailed to Judge Morgan (R. p. 64, Email to Judge Morgan – Including Brief). Judge Morgan at the hearing specifically acknowledged "I know your memorandum." (R. p. 60, line 9, Transcript, p. 10, line 9). In that memorandum, Plaintiff/Appellant specifically noted "the rules of civil procedure must

be considered in relation to one another and construed together." In other words – that Defendant's position could not be read in isolation of the rest of the Rules of Civil Procedure. Thus, the issues related to the Rules of Civil Procedure, and their interpretation are all preserved.

Similarly, the statute of limitations pleading issue is also preserved, as an additional sustaining ground. (R. p. 15-16, Plaintiff's Memo in Support of their Motion to Reconsider, pp. 6-7). This argument that was considered and ruled on by the trial court when it denied that motion, noting that it had reviewed "the motion, the file, and submissions of the parties" (R. p. 2, Order Denying Plaintiff's Motion to Reconsider). Therefore, the statute of limitations pleading issue is preserved for review.

Lastly, the idea that Appellant's justice and public policy arguments are not preserved for review is nonsensical. The thrust of Appellant's entire argument is based on the idea of justice in that a Defendant in a civil action cannot "have their cake and eat it too" by having a lawyer appear for them in a case, file an answer on the merits, litigate the case and serve discovery, file a motion to compel, and then, later, after all of these actions claim there is not valid service. (R. p. 57, lines 3-4, Transcript p. 7, lines 3-4). Rule 1 explicitly states that the Rules of Civil Procedure "shall be construed to secure the ***just***, speedy, and inexpensive determination of every action." Accordingly, these issues are preserved for review.

II. THIS COURT MUST GIVE SOME MEANING TO WHAT CONSTITUTES A VOLUNTARY APPEARANCE.

Like a statute, the Rules of Civil Procedure must be read "so that no word, clause, sentence, provision, or part shall be rendered surplusage, or superfluous." *See CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). Defendant's position that he did not make a voluntary appearance is simply not credible. The Defendant (1) filed a notice of appearance; (2) filed an answer on the merits asking for the affirmative relief of a jury trial; (3)

engaged in written discovery; (4) corresponded through counsel; (5) filed a motion to compel. These actions must be considered to be a voluntary appearance.

Burying an affirmative defense of lack of service in an Answer, and then taking every step to litigate a case while simultaneously choosing to wait for the opportune moment to attempt dismiss the case is the type "gotcha" game that is fundamentally inconsistent with our Rules of Civil Procedure. Appellant is not asking the Court to rewind the clock prior to the adoption of the South Carolina Rules of Civil Procedure -- she is only asking the Court to apply the voluntary appearance rule in the same manner it has for more than a century and has continued to apply post-adoption of the Rules of Civil Procedure. *See e.g. 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."). *See e.g. 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."); *See e.g. Stearns Bank Nat. Ass'n v. Glenwood Falls, L.P.*, 373 S.C. 331, 338, 644 S.E.2d 793, 796 (Ct. App. 2007) ("No specific act constitutes an appearance, as 'a defendant may choose to come into court with trumpets, or quietly by the back door.").

Respondent would have this Court base its decision on a contorted reading of *Wellin v. Wellin*, 427 S.C. 15, 828 S.E.2d 767 (Ct. App. 2019), which is entirely distinguishable from the case at bar. *Wellin* involved a probate action, where a trust containing an asset of $50 million was not made a party to the underlying lawsuit. *Id*. at 22-23, 828 S.E.2d at 771. There, this Court held there was not a voluntary appearance made because that party "was never made a party to the conservatorship action" and continued to raise objections to the probate court's jurisdiction. *Id*. at 25, 828 S.E.2d at 772. Unlike *Wellin*, this Defendant was unquestionably a party in this case, having appeared, filed an answer, engaged in written discovery, and filed a motion to compel.

This case is more similar to *Maybank v. BB&T Corporation*, 416 S.C. 541, 566, 787 S.E.2d 498, 511 (2016). There, BB&T removed the case to federal court, engaged in litigation, filed an amended answer, and upon remand, continued to participate in discovery leading up to trial. *Id*. Under those circumstances, our Supreme Court held that BB&T had waived its right to contest personal jurisdiction, as BB&T "gambled that it could argue personal jurisdiction on the eve of trial after actively participating in litigation over the course of two and a half years." *Id*. In this case, like *Maybank*, Respondent filed an answer and engaged in discovery. However, going a step further than BB&T in Maybank, Respondent affirmatively exercised the jurisdiction of the Court by filing a motion to compel. Such an action is consistent with a party who wishes to be in Court and fully defend the case on the merits and wholly unlike a party who wishes to avail themselves of the affirmative defense of lack of service. *Stearns Bank Nat. Ass'n v. Glenwood Falls, L.P.*, 373 S.C. 331, 338, 644 S.E.2d 793, 796 (Ct. App. 2007) (noting courts decide on a case-by-case basis whether a defendant's act demonstrates an intent to submit to the court's jurisdiction.).[1] The Defendant in this case chose to voluntarily appear, and the Court must give some objective meaning to what constitutes a voluntary appearance.

[1] A number of federal courts have determined a delay in challenging service by motion to dismiss may result in waiver, even where the defense was asserted in a timely answer. *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); *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); *Continental Bank, N.A. v. Meyer*, 10 F.3d 1293, 1296-97 (7th Cir. 1993) (holding that while the Defendants literally complied with the Rules, "they did not comply with the spirit of the rule, which is to expedite and simplify proceedings in the Federal Courts" by participating in discovery and filing various motions.); *Yeldell v. Tutt*, 913, F.2d 533, 538 (8th Cir. 1990) (noting Rule 12(h) "sets only the outer limits of waiver; it does not preclude waiver by implication.).

III. THE PLAIN LANGUAGE OF RULE 12(B) DESIGNATES INSUFFICIENCY OF SERVICE OF PROCESS AS A PRIORITY MOTION THAT MUST BE FILED BEFORE ANY FURTHER PLEADING.

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**."

South Carolina Courts have determined issues of service, including the mode of delivery or lack of delivery of the Summons and Complaint, must be raised in a Rule 12(b)(5) motion. *See Unisun Ins. Ins. v. Hawkins*, 324 S.C. 537, 542, 537 S.E.2d 559, 562 (Ct. App. 2000). The entire structure of Rule 12 is crafted to require parties to timely raise priority issues to the circuit court and to opposing parties to prevent unfair surprise and preserve the resources of both the Court and the litigants. Had Respondent appropriately raised the lack of service issue to the Court, by way of a timely Rule 12(b)(5) motion, Appellant could have cured any purported defect. However, Appellant was instead hornswoggled, as the motion was not brought until the opportune time (i.e. after the statute of limitations expired).

Respondent cites to the unpublished and still pending case of *Ex parte Liberty Mut. Ins. Co.*, No. 2023-000074, 2025 WL 2794501 (Ct. App. Oct. 1, 2025) for the proposition that this Court has rejected Plaintiff's argument(s) in that a motion to dismiss must be filed to raise the lack of service issue. That case is wholly distinguishable from the case at bar, as it involved a UIM case, which by its nature involves a statutorily created limited appearance of an insurance carrier

for a Defendant. In this case, ***the actual*** Defendant appeared in the case, filed an Answer, engaged in written discovery, and filed a motion to Compel. Unlike *Ex parte Liberty Mut. Ins. Co.*, it would be disingenuous to assert that the Defendant/Respondent in this case did not have notice that he was a Defendant in this matter, as he actually appeared and defended this case.

IV. THE STATUTE OF LIMITATIONS AFFIRMATIVE DEFENSE WAS NOT PLED AND THEREFORE SHOULD HAVE BEEN CONSIDERED WAIVED.

Counsel for Appellant had the right to rely upon Respondent's Answer in that the Statute of Limitations was not raised as a defense. Litigants have the right to rely upon the pleadings to determine the issues framed by those filings. *See e.g*. *Crocker v. Crocker*, 281 S.C. 154, 158, 314 S.E.2d 343, 346 (Ct. App. 1984) (holding it was error for court to go beyond the scope of the pleadings and grant relief on a theory which was not pleaded); *See also* Rule 8, SCRCP ("a party shall set forth affirmatively the defenses: . . .statute of limitations."). It is paramount that "[a] judgment or decree, whether in law or equity, must accord with and be warranted by the pleadings . . . . If it is not supported by the theory of action on which the pleadings were framed, it is fatally defective." *Id*. Respondent in this case did not plead the affirmative defense of the statute of limitations – had they done so, it would have alerted Appellant that time was of the essence. Instead, they strategically chose not to do so and lie in waiting for the opportune moment for the statute of limitations to expire to first assert the defense by way of a Motion. Allowing such methods effectively eliminates a parties right to rely upon the pleadings in framing a dispute. Again, this type of gamesmanship should not be condoned by this Court.

CONCLUSION

Permitting the "wait and see" approach for Rule 12(b) motions, as urged by the Respondent will have negative consequences for future litigants who may be ***forced*** to address a litany of

fundamental motions after spending time and resource litigating the case and/or on the eve of trial. Imagine a party first raising jurisdictional issues, improper venue, challenges to service, necessary parties, and/or other pending action defenses after years of litigation. Rule 12(b) treats these as priority motions for good reason, to streamline the litigation process to focus on the genuine legal and factual issues. The "wait and see" position advanced by Respondent will waste the time, resources, and efforts of litigants and our Courts. Accordingly, for the reasons set forth above, Appellant respectfully request the Court reverse the Circuit Court's decision to dismiss this case, reinstate Plaintiff's action.

February 4, 2025

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