

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-809

No. COA21-530

Filed 6 December 2022

Hoke County, No. 20 CVS 179

ANTHONY JOHNSON as the administratrix of the Estate of Virginia M. Johnson, Deceased, ANTHONY JOHNSON, individually, Plaintiffs,

CHARLES JOHNSON, THOMARINE JACKSON, CYNTHIA MCPHAUL, TERRY JUANITA JOHNSON, Nominal Plaintiffs or Defendants,

v.

DERWIN JOHNSON, VERONICA JOHNSON, and HARLEY E. JOHNSON individually and in his capacity as personal representative of the Estate of Harley T. Johnson, Defendants.

Appeal by plaintiff and nominal plaintiff Charles Johnson from order entered 14 December 2020 by Judge Michael A. Stone in Superior Court, Hoke County. Heard in the Court of Appeals 22 February 2022.

*Oak City Law LLP, by Samuel Pinero II, for plaintiff-appellant and nominal plaintiff-appellant Charles Johnson.*

*Ray Law Firm PLLC, by Steven J. O'Connor, for defendant-appellees Derwin Johnson and Veronica Johnson.*

STROUD, Chief Judge.

¶ 1

Plaintiff Anthony Johnson and Nominal Plaintiff Charles Johnson appeal from a Superior Court order dismissing Plaintiff Anthony Johnson's claims under North

Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6). Because the trial court properly dismissed the complaint under Rule 12(b)(6) based upon expiration of the statutes of limitations, we affirm. We also dismiss Defendants' cross-appeal for lack of jurisdiction.

### I. Background

¶ 2

On 9 March 2020, Plaintiff Anthony Johnson (“Plaintiff Anthony”), individually and in her capacity as administratrix of the Estate of Virginia M. Johnson filed a *pro se* complaint alleging claims arising from the disposition of property of her parents, Virginia M. Johnson and Harley T. Johnson, based upon various transactions and events prior to their deaths; both died intestate. Plaintiff Anthony designated Charles Johnson, Thomarine Jackson, Cynthia McPhaul, and Terry Juanita Johnson as “Nominal Plaintiffs or Defendants” as other heirs at law to the estate of Virginia Johnson. Harley T. Johnson died in 2013 and Virginia Johnson died in 2015; the other parties are all children of Virginia and Harley T. Johnson.<sup>1</sup> Plaintiff Anthony alleged Defendants Derwin Johnson (Derwin) and Harley E. Johnson (Harley) had “access to Virginia Johnson and Harley T. Johnson as caretakers” prior to their deaths. Plaintiff Anthony’s claims all arise from several documents and transactions she alleges Defendant Derwin procured fraudulently,

---

<sup>1</sup> Defendant Harley E. Johnson was sued both in his individual capacity and as administrator for Harley T. Johnson, father of all the siblings.

JOHNSON V. JOHNSON

2022-NCCOA-809

*Opinion of the Court*

resulting in the transfer of five lots owned by Virginia and Harley T. Johnson to Defendants Derwin and Harley and the transfer of other assets, including cash, to Derwin. The claims include a claim to quiet title; breach of fiduciary duty, by means of several fraudulent documents; constructive fraud; fraud and conspiracy (between Defendants Derwin, Veronica, and Harley); punitive damages; and an accounting. The allegedly fraudulent documents, including deeds, a power of attorney, trust, and will, were executed at various times as early as 2009; the most recent was in 2015.<sup>2</sup> Plaintiff Anthony’s complaint did not allege that any prior lawsuit based upon the same claims had been previously dismissed.<sup>3</sup>

¶ 3

Our record includes one Summons, issued 9 March 2020, directed to Defendant Harley E. Johnson and “Nominal Plaintiff[ ] or Defendant[ ]” Cynthia J. McPhaul, and one Summons, issued on 17 April 2020, directed to Defendants Derwin and Veronica Johnson. No summonses were issued to the other parties. There is no indication in the record on appeal the Summonses and complaint were ever served upon any defendant and no indication of acceptance of service. Our record also has

---

<sup>2</sup> The complaint alleges the “Fraudulent Will” of Virginia Johnson, executed in 2011, was “found to be invalid by the Hoke County Clerk of Court.”

<sup>3</sup> According to the trial court’s order dismissing this action, Plaintiff Anthony filed her first complaint including the same claims in 2019, but the action was voluntarily dismissed 7 March 2019. Defendants Derwin and Veronica state the action was dismissed 18 March 2019 in a motion filed before this Court adding an addendum to their brief, but the record does not include any information regarding the 2019 action other than the trial court’s order.

JOHNSON V. JOHNSON

2022-NCCOA-809

*Opinion of the Court*

no indication any of the “Nominal Plaintiffs or Defendants” were served with the complaint. At the hearing before the trial court, Appellants’ counsel informed the court he was making a general appearance on behalf of one of the “Nominal Plaintiffs or Defendants,” Charles Johnson, in addition to representing “the Estate of Virginia Johnson” and “Anthony Johnson, individually.”<sup>4</sup> None of the other “Nominal Plaintiffs or Defendants” appeared before the trial court.

¶ 4 On approximately 29 May 2020, Defendants Derwin and Veronica served an “Answer and Counter-claim/Crossclaim” raising several affirmative defenses, specifically: “Interest held not in entirety”; expiration of the statute of limitations of three years based on N.C. Gen. Stat. § 1-52(3); “Failure to State a Claim for Relief,” without reference to any rule or statute; “Lack of Subject matter Jurisdiction,” based upon N.C. Gen. Stat. § 28A-2-4 which gives original jurisdiction over matters involving Virginia Johnson’s Trust Agreement and will to the Clerk of Superior Court; “Failure to Join Necessary Parties,” alleging other persons who may own an interest

---

<sup>4</sup> The Record is not clear on how or why Anthony Johnson was named Plaintiff in this case and Charles Johnson was named as a Nominal Plaintiff or Defendant. The Appellants’ brief also does not clarify the relationship between the parties. Appellants’ brief makes references to “Plaintiff,” “Plaintiffs,” “Appellant,” and “Appellants,” and sometimes uses inconsistent labels in the same paragraph. We therefore refer to the individual parties by first name as necessary, and refer to Anthony Johnson and Charles Johnson together as “Appellants.” We also refer to counsel for Anthony Johnson and Charles Johnson as “Appellants’ counsel,” even when discussing his statements before the trial court, because Anthony Johnson and Charles Johnson retained the same counsel both at trial and on appeal.

JOHNSON V. JOHNSON

2022-NCCOA-809

*Opinion of the Court*

in the real property; “Statute of Limitations” as to the claims for breach of fiduciary duty, constructive fraud, and fraud and conspiracy based upon N.C. Gen. Stat. §§ 1-52(1) and 1-52(9); and “Lack of Subject Matter Jurisdiction” based upon N.C. Gen. Stat. § 28A-2-4 which gives original jurisdiction over matters involving the estate of Harley T. Johnson to the Clerk of Superior Court.<sup>5</sup> Defendants also answered the allegations of the Complaint, denying the substantive allegations. They alleged a “Counterclaim/Crossclaim” for adverse possession under color of title. We note this answer did not raise any motion to dismiss based upon insufficiency of process or lack of service of process.

¶ 5

On or about 29 July 2020 Plaintiff Anthony, individually and in her capacity as administratrix, served an Answer to Defendants Derwin and Veronica’s counterclaim. Plaintiff Anthony denied the allegations of the counterclaim, with the exception that Defendant Derwin was in actual possession of some of the disputed lots. Plaintiff Anthony also asserted two affirmative defenses, that Defendants Derwin and Veronica failed to state a claim under Rule 12(b)(6) and “Reservation and

---

<sup>5</sup> This document is also not file-stamped but the certificate of service states it was served upon all parties on 29 May 2020. We note that many of the documents in the record were apparently served but not file-stamped. *See* N.C. R. App. P. 9(b)(3) (“Every pleading, motion, affidavit, or other document included in the printed record should show the date on which it was filed and, if verified, the date of verification and the person who verified it. Every judgment, order, or other determination should show the date on which it was entered.”). We will refer to the documents without file stamps as “served” instead of “filed.”

JOHNSON V. JOHNSON

2022-NCCOA-809

*Opinion of the Court*

Non-Waiver,” in which Plaintiff Anthony “reserve[d] the right to amend and assert additional defenses to Plaintiff’s [sic] claims, which may be adduced through further investigation, discovery or trial.”

¶ 6 Defendant Harley filed an “Amended Answer, Motion to Dismiss, Motion for Attorney Fees, and Counterclaim” on 21 August 2020.<sup>6</sup> He moved to dismiss based upon lack of subject matter jurisdiction, insufficiency of process, insufficiency of service of process, improper venue or division, and failure to state a claim upon which relief can be granted. He also raised the affirmative defenses of the statute of limitations and laches. His counterclaim was for adverse possession under color of title.

¶ 7 On or about 17 September 2020, Plaintiff Anthony, individually and in her capacity as administratrix, served an unsigned Answer to Defendant Harley’s counterclaim.<sup>7</sup> Again, our record does not indicate if this Answer was ever filed with the trial court. Plaintiff Anthony denied the substantive allegations of Defendant Harley’s adverse possession counterclaim and denied Defendant Harley’s claim for

---

<sup>6</sup> Defendant Harley’s counsel signed the initial Answer, Motion to Dismiss, and Motion for Attorney Fees filed on or about 3 August 2020; the initial Answer in our record is not file-stamped. It raised the same defenses and motion to dismiss as the Amended Answer which was filed.

<sup>7</sup> Although the Answer and the Certificate of Service were both unsigned, no Defendant raised this issue before the trial court. And again, this Answer does not have a file-stamp confirming it was filed with the court.

JOHNSON V. JOHNSON

2022-NCCOA-809

*Opinion of the Court*

attorney's fees. Plaintiff Anthony also asserted two affirmative defenses: that Defendant Harley failed to state a claim pursuant to Rule 12(b)(6) and that "Defendant [sic] reserves the right to amend and assert additional defenses to Plaintiff's [sic] claims, which may be adduced through further investigation, discovery, or trial."<sup>8</sup>

¶ 8 On 26 October 2020, the motions to dismiss were heard in the trial court.<sup>9</sup> The only notice of hearing in our record is a Notice of Hearing filed on or about 3 August 2020 by Defendant Harley for 21 August 2020 on his Motion to Dismiss and Motion for Attorney's Fees. Our record does not reveal who scheduled the hearing on 26 October or which other motions were noticed for hearing, but based upon the transcript, the trial court was clearly addressing the motions to dismiss. In any event, none of the parties present at the hearing on 26 October 2020 raised any objection as to notice of hearing or any questions regarding which motions were being addressed.

¶ 9 At the beginning of the hearing, the trial court noted it was unable to find some of the motions and other documents in the court file. The trial court noted, "I'm just wondering how we're all here, inasmuch as there's no perfect -- perfected service of

---

<sup>8</sup> Plaintiff Anthony Johnson asserted this defense as "Reservation and Non-Waiver."

<sup>9</sup> Defendant Harley also filed a "motion for entry of default," and counsel for Defendant noted this at the beginning of the hearing, but the trial court did not rule on this motion.

JOHNSON V. JOHNSON

2022-NCCOA-809

*Opinion of the Court*

process in this case.” Appellants’ counsel responded, “Your Honor, there’s no affidavit of service yet, and some folks have not been served yet.” Appellants’ counsel continued, referring to the Defendants, “they filed the motions, Your Honor, noticing . . . for hearing.” He then explained that when Plaintiff Anthony had filed the complaint, *pro se*, “the clerk handed her back a bunch of summonses and said they were duplicates. But they weren’t duplicates. It was just a clerical error.” He continued that the case “is just too much for a *pro se* client to handle” and he planned to “clean up the file, including issuing affidavits of service.” The trial court responded,

THE COURT: Well, do you realize, at this juncture, inasmuch as there’s no service of process perfected, there’s no service of any summons in this case, and the amount of time that has lapsed -- you do realize that there’s no subject-matter jurisdiction for this Court at this juncture? You realize that. Right?

¶ 10 Counsel for Derwin and Veronica then responded that he did not know if his clients had been served, but “I filed a general appearance with an answer, understanding that that might constitute a waiver of there being no service . . . .” Counsel for Harley responded that “that’s why I’m here, because there isn’t any service,” and noted she had raised insufficiency of process and service of process in the motions. After further argument from Appellants’ counsel and counsel for Derwin and Veronica, the trial court rendered its ruling that “this case is dismissed for failure to obtain subject-matter jurisdiction.”



JOHNSON V. JOHNSON

2022-NCCOA-809

*Opinion of the Court*

¶ 11 The trial court later entered a written order 14 December 2020 granting Defendant Harley E. Johnson’s “12(b)(1) Motion to Dismiss for lack of Subject Matter Jurisdiction”<sup>10</sup> and concluded:

The Court having reviewed the file concludes as a matter of law that all of the Plaintiff’s claims should be dismissed due to lack of subject matter jurisdiction. There is no service of process on any of the defendants and the initial summons was issued March 9, 2020.

In addition, this case was previously dismissed March 7, 2019 and refiled on March 9, 2020.

...

Plaintiff’s claims and this action are dismissed with prejudice pursuant to Rule 12(b)(1) and 12(b)6 [sic] of the North Carolina Rules of Civil Procedure for a lack of subject matter jurisdiction.

All Defendants’ counterclaims were also “necessarily dismissed[,]” and Plaintiff Anthony’s “Notice of Lis Pendens” filed at the same time as her complaint was “extinguished and cancelled.” Plaintiff Anthony, both in her individual and representative capacity, and Nominal Plaintiff or Defendant Charles Johnson appealed to this Court 21 January 2020. Our Record also includes a Notice of Appeal by Defendants Derwin and Veronica, signed and dated as of 28 January 2020 noting

---

<sup>10</sup> A summons was issued to Defendant Harley Johnson on 9 March 2020, but the summons was never served and his motion to dismiss raised insufficiency of process under Rule 12(b)(1). A summons was issued to Defendants Derwin and Veronica; they were not served, but they waived service of process by filing a general appearance. Defendant Harley Johnson did not file a brief on appeal.

that they appeal only from the dismissal of their counterclaim and that they “first received actual notice on January 28, 2021 that Plaintiffs had filed an appeal on January 19, 2021.” Like many documents in this record, this notice of appeal has no file-stamp indicating when or if was filed with the trial court.

## II. Jurisdiction over Cross-appeal

¶ 12 As noted above, many of the documents in the record on appeal were not file-stamped and thus we cannot confirm if the documents were filed with the trial court or when they were filed. This is not an idle concern; the trial court also noted, upon perusing the file at the hearing, that many documents seemed to be absent or misplaced, inspiring the trial court to ask: “Is there another file, Madam Clerk?” None of the parties contend any of the documents in our record on appeal were not filed, but we cannot overlook the fact the notice of appeal from Defendants Derwin and Veronica was not file-stamped either.

¶ 13 An appellant must demonstrate that the notice of appeal was timely filed; failure to show that the notice of appeal was timely filed with the trial court is a jurisdictional error which requires dismissal of the appeal. Our Court discussed this jurisdictional error in *Bradley v. Cumberland County*:

[T]here is no indication that Plaintiff’s notice of appeal was timely filed, which is a jurisdictional error. *E.g., Strezinski v. City of Greensboro*, 187 N.C. App. 703, 710, 654 S.E.2d 263, 268 (2007) (dismissing the defendant’s cross-appeal from a decision of the Industrial Commission because the

JOHNSON V. JOHNSON

2022-NCCOA-809

*Opinion of the Court*

notice of appeal was not timely filed), *disc. rev. denied*, 362 N.C. 513, 668 S.E.2d 783 (2008). Plaintiff’s counsel allegedly filed his notice of appeal—on his firm’s letterhead—via the Industrial Commission’s Electronic Document Filing Portal. The notice of appeal does not bear a time stamp, file stamp, or any other designation that the Industrial Commission received the notice of appeal. Plaintiff’s counsel requested that Commissioner Baddour confirm receipt of the notice; however, Plaintiff failed to include any acknowledgment from the Industrial Commission indicating receipt of Plaintiff’s notice of appeal in the record on appeal. The notice of appeal is dated “December 5, 2017,” which would have been timely, but that date was affixed by Plaintiff’s counsel, and again, not confirmed by proof of service. We will not assume the notice of appeal was timely filed solely based upon Plaintiff’s unverified notice of appeal. *See Dogwood [Development and Management Co., LLC v. White Oak Transport Co., Inc.]*, 362 N.C. [191, ] 197, 657 S.E.2d [361, ] 365 [2008] (citing *Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 563-64, 402 S.E.2d 407, 408 (1991) (per curiam) (holding that because of the failure to include the notice of appeal in the record, in violation of Rule 3, the Court of Appeals had no jurisdiction and the appeal must be dismissed); *In re Lynette H.*, 323 N.C. 598, 602, 374 S.E.2d 272, 274 (1988) (holding that the State violated Rule 3 by failing to give timely notice of appeal, resulting in a lack of jurisdiction)).

“[I]t is [the appellant’s] burden to produce a record establishing the jurisdiction of the court from which appeal is taken, and his failure to do so subjects th[e] appeal to dismissal.” *State v. Phillips*, 149 N.C. App. 310, 313-14, 560 S.E.2d 852, 855, *appeal dismissed*, 355 N.C. 499, 564 S.E.2d 230 (2002). Subject matter jurisdiction cannot be waived by this Court or the parties, *Inspection Station No. 31327 v. N.C. Div. of Motor Vehicles*, 244 N.C. App. 416, 428, 781 S.E.2d 79, 88 (2015), and because such violation of Rule 3 is jurisdictional, plaintiff’s appeal must be

dismissed.

262 N.C. App. 376, 382, 822 S.E.2d 416, 420-21 (2018) (alterations made to citations).

¶ 14 The cross-appeal of Defendants Derwin and Veronica is therefore dismissed for lack of jurisdiction under Rule 3 of the Rules of Appellate Procedure.

**III. Appeal by Plaintiff Anthony Johnson and Nominal Plaintiff or Defendant Charles Johnson**

¶ 15 Appellants state two issues presented on appeal:

I. Did the trial court err in finding that it did not have subject matter jurisdiction because there was no certificate of service filed and the clerk of court failed and refused to issue summons to all the parties and some parties expressly waived service?

II. Did the trial court err in dismissing plaintiff's claims for failure to state a claim under rule 12(b)(6) after failing to hear argument concerning same and finding that the court did not have subject matter jurisdiction?

¶ 16 Defendants Derwin and Veronica do not attempt to rebut Appellants' arguments but instead argue the trial court lacked subject matter jurisdiction with respect to two of Plaintiff Anthony's underlying claims because the "[t]he Clerk of Superior Court has original jurisdiction over [wills and] estates in North Carolina under N.C. Gen. Stat. § 28A-2-4 . . . ." Defendants Derwin and Veronica also address other issues they note were "not argued or decided by the trial court's decision which is the subject of this appeal." After diligently seeking to reconcile the record, with all its deficiencies, and the arguments in the briefs, which are like two ships passing in

the night, with what actually happened in the trial court, as indicated by the transcript and court order, we will address the trial court's order based upon the two stated grounds for dismissal for "lack of subject matter jurisdiction" under Rules 12(b)(1) and 12(b)(6).

¶ 17 The procedural defects noted above implicate several subsections of Rule 12(b) and Defendant Harley's motion raised several of these directly, unlike the parties who filed briefs in this appeal.

(b) How Presented.--Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, 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 or division,
- (4) Insufficiency of process,
- (5) Insufficiency of service of process,
- (6) Failure to state a claim upon which relief can be granted,
- (7) Failure to join a necessary party.

N.C. Gen. Stat. § 1A-1, Rule 12 (2020). We note the trial court's order gave two alternative grounds for dismissal of Plaintiff Anthony's complaint, and as noted

above, the parties' briefs address several issues which were neither argued or decided. We will address only the issues the Appellants raised on appeal and the trial court decided based upon the substance of the order, if not the exact wording.

#### **A. Dismissal under Rule 12(b)(1)**

¶ 18 The trial court's order identifies as its first basis for dismissal the lack of subject matter jurisdiction under Rule 12(b)(1), "lack of jurisdiction over the subject matter."<sup>11</sup> *See id.* As noted above, the Summonses were only issued to Defendant Harley E. Johnson and Nominal Plaintiff or Defendant Cynthia J. McPhaul on 9 March 2020 and Defendants Derwin and Veronica on 17 April 2020; no summonses were issued to the other parties. Failure to issue a summons is "insufficiency of process" under Rule 12(b)(4), since the summons is an indispensable part of the "process." But if no summons is issued, the trial court acquires no subject matter jurisdiction, which falls under Rule 12(b)(1).

"[S]ubject matter jurisdiction is a prerequisite to the exercise of personal jurisdiction." *Tart v. Prescott's Pharmacies, Inc.*, 118 N.C. App. 516, 519, 456 S.E.2d 121, 124 (1995). "[P]arties cannot stipulate to give a court subject matter jurisdiction where no such jurisdiction exists." *Northfield Dev. Co. v. City of Burlington*, 165 N.C. App. 885, 887, 599 S.E.2d 921, 924, *disc. review denied*, 359 N.C. 191, 607 S.E.2d 278 (2004). A "lack of jurisdiction of

---

<sup>11</sup> Derwin and Veronica waived service of process, so at least as to these Defendants, it would appear the trial court had both subject matter and personal jurisdiction. As to the other Defendants for whom no Summonses were issued, the trial court would not have subject matter jurisdiction.

JOHNSON V. JOHNSON

2022-NCCOA-809

*Opinion of the Court*

the subject matter may always be raised by a party, or the court may raise such defect on its own initiative.” *Dale v. Lattimore*, 12 N.C. App. 348, 352, 183 S.E.2d 417, 419, *cert. denied*, 279 N.C. 619, 184 S.E.2d 113 (1971). In the present case, we raise the issue of lack of jurisdiction over the subject matter *ex mero motu*. See *In re N.R.M., T.F.M.*, 165 N.C. App. 294, 296–97, 598 S.E.2d 147, 148–49 (2004).

“A civil action is commenced by filing a complaint with the court.” N.C. Gen. Stat. § 1A–1, Rule 3(a) (2005). Rule 4 of the Rules of Civil Procedure provides as follows: “Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days.” N.C. Gen. Stat. § 1A–1, Rule 4(a) (2005). The comment to Rule 4(a) makes clear that “[t]he five-day period was inserted to mark the outer limits of tolerance in respect to delay in issuing the summons.” N.C.G.S. § 1A–1, Rule 4(a), Comment. Our Court has held that where a summons does not issue within five days of the filing of a complaint, the action abates and is deemed never to have commenced. *Roshelli v. Sperry*, 57 N.C. App. 305, 308, 291 S.E.2d 355, 357 (1982).

*Conner Bros. Mach. Co., Inc. v. Rogers*, 177 N.C. App. 560, 561, 629 S.E.2d 344, 345 (2006).

[A] summons has independent legal significance. *Collins v. Edwards*, 54 N.C. App. 180, 182, 282 S.E.2d 559, 560 (1981) (stating that where proper summons was not issued, the action was never commenced). . . . Summonses were never served in this case and, therefore, this action is deemed never to have commenced.

*Charns v. Brown*, 129 N.C. App. 635, 638, 502 S.E.2d 7, 9 (1998).

¶ 19 Thus, at least as to the defendants for whom no summonses were issued *and* who did not waive service of process *and* who did not appear, the trial court correctly

dismissed under Rule 12(b)(1), although that dismissal may be more properly based upon lack of personal jurisdiction under Rule 12(b)(2).

### **B. Dismissal of all claims under Rule 12(b)(6)**

¶ 20 The trial court also stated a second ground for dismissal, and this basis for dismissal would apply to all Defendants including Derwin and Veronica. The trial court's order found "[i]n addition, this case was previously dismissed March 7, 2019 and refiled on March 9, 2020[.]" and dismissed under Rule 12(b)(6). However, a Rule 12(b)(6) dismissal normally does not address subject matter jurisdiction; that falls under Rule 12(b)(1). Since the trial court's rationale under Rule 12(b)(6) does not implicate subject matter jurisdiction, at least as to Defendants Derwin and Veronica, that portion of the order is not entirely correct. But even if the trial court cited the wrong rule, if the result is correct and is supported by the law, we must uphold the order.

“[E]ven if dismissal was for the wrong reason, a trial court's ruling must be upheld if it is correct upon any theory of law, and thus it should not be set aside merely because the court gives a wrong or insufficient reason for [it].” *Templeton v. Town of Boone*, 208 N.C. App. 50, 54, 701 S.E.2d 709, 712 (2010) (internal quotation marks omitted); *see also Payne v. Buffalo Reinsurance Co.*, 69 N.C. App. 551, 555, 317 S.E.2d 408, 411 (1984) (“[A] judgment that is correct must be upheld even if it was entered for the wrong reason.”).

*State v. Turner*, 239 N.C. App. 450, 455, 768 S.E.2d 356, 359 (2015).



¶ 21

Although the record on appeal does not include documents from Plaintiff Anthony’s prior “duplicate complaint”—to use the parties’ own description in their briefs—the trial court and counsel discussed the prior lawsuit and dismissal at the hearing. In addition, Defendants Derwin and Veronica note in their brief the complaint “was a refile on March 9, 2020 of a duplicate complaint which had been dismissed on March 7, 2019.” And considering the dates alleged in the complaint, a prior action filed within the time before the statutes of limitations expired would be the only way Plaintiff Anthony’s claims could possibly survive, as all the alleged events were far more than three years before the filing of the complaint.<sup>12</sup> Expiration of the statute of limitations is an affirmative defense under North Carolina Rule of Civil Procedure 8(c) and this is a defense which can be waived and must be plead, which all Defendants did. *See Georgia-Pacific Corp. v. Bondurant*, 81 N.C. App. 362, 363-64, 344 S.E.2d 302, 304 (1986) (citations omitted) (“North Carolina, apparently

---

<sup>12</sup> One of Plaintiff Anthony’s claims is to “quiet title” to the real property. “There is no express statute of limitations governing actions to quiet title under N.C. Gen. Stat. 41–10. It thus is necessary to refer to plaintiffs’ underlying theory of relief to determine which statute, if any, applies.” *Poore v. Swan Quarter Farms, Inc.*, 79 N.C. App. 286, 289, 338 S.E.2d 817, 819 (1986). Plaintiff Anthony’s claims here are all based upon either fraud or breach of fiduciary duty. The three-year statute of limitations for a fraud claim “shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.” N.C. Gen. Stat. § 1-52 (2020). Plaintiff Anthony’s complaint alleges the deeds relevant to the quiet title claim were recorded in 2010. Plaintiff Anthony does not allege when they discovered the recorded deeds. They do allege they discovered the “fraudulent will and trusts . . . sometime after March 4, 2015” when the trust was filed with the clerk of court.

JOHNSON V. JOHNSON

2022-NCCOA-809

*Opinion of the Court*

alone among American jurisdictions, continues to adhere to the rule that once the statute of limitations has been properly pleaded in defense the burden of proof shifts to the plaintiff to show that the action was filed within the statutory period. . . . This anomalous rule survived the adoption of the Rules of Civil Procedure, which specifically list the statute of limitations as an affirmative defense and operate generally to place the burden of proof of those defenses on the party raising them.”)

“A Rule 12(b)(6) motion tests the legal sufficiency of the pleading.” *Sterner v. Penn*, 159 N.C. App. 626, 628, 583 S.E.2d 670, 672 (2003). When determining whether a complaint is sufficient to withstand a Rule 12(b)(6) motion to dismiss, the trial court must discern “whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.” *Shell Island Homeowners Ass'n. Inc. v. Tomlinson*, 134 N.C. App. 217, 225, 517 S.E.2d 406, 413 (1999). “When considering a 12(b)(6) motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff’s recovery.” *Locus v. Fayetteville State University*, 102 N.C. App. 522, 527, 402 S.E.2d 862, 866 (1991).

“ ‘Dismissal of a complaint is proper under the provisions of Rule 12(b)(6) of the North Carolina Rules of Civil Procedure . . . when some fact disclosed in the complaint necessarily defeats the plaintiff’s claim.’ ” *Hooper v. Liberty Mut. Ins. Co.*, 84 N.C. App. 549, 551, 353 S.E.2d 248, 250 (1987) (quoting *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985)). A motion to dismiss under Rule 12(b)(6) is an appropriate method of determining whether the statutes of limitation bar plaintiff’s claims if the bar is disclosed in the complaint. *Horton v. Carolina Medicorp*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996).

JOHNSON V. JOHNSON

2022-NCCOA-809

*Opinion of the Court*

*Carlisle v. Keith*, 169 N.C. App. 674, 681, 614 S.E.2d 542, 547 (2005).

¶ 22 We review the trial court’s ruling on a motion to dismiss under Rule 12(b)(6) *de novo*:

On review of a motion to dismiss, we determine

whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. In ruling upon such a motion, the complaint is to be liberally construed, and the trial court should not dismiss the complaint unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief.

*Meyer v. Walls*, 347 N.C. 97, 111-12, 489 S.E.2d 880, 888 (1997) (brackets in original) (citations and internal quotation marks omitted).

“A statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim.” *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996). “Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period [rests] on the plaintiff. A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired.” *Id.* (citations omitted).

*Shepard v. Ocwen Federal Bank, FSB*, 361 N.C. 137, 139, 638 S.E.2d 197, 199 (2006).

¶ 23 Although the statute of limitations is an affirmative defense which can be waived, here all Defendants, including Derwin and Veronica, raised expiration of the

JOHNSON V. JOHNSON

2022-NCCOA-809

*Opinion of the Court*

statutes of limitations applicable to the various claims in their answers and motion to dismiss. “When a defendant asserts the statute of limitations as an affirmative defense, the burden rests on the plaintiff to prove that his claims were timely filed.” *White v. Consolidated Planning, Inc.*, 166 N.C. App. 283, 305, 603 S.E.2d 147, 162 (2004) (citing *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 547, 589 S.E.2d 391, 396-97 (2003), *disc. review denied*, 358 N.C. 241, 594 S.E.2d 194 (2004)).

¶ 24 As noted above, Defendants’ answers and motions raised several potential grounds for dismissal, and all Defendants pled expiration of the statutes of limitations for the various claims. The most obvious reason for dismissal of the complaint, based upon the allegations of the complaint taken as true, is expiration of the applicable statutes of limitations. The most recent of the events or acts alleged by Plaintiff Anthony occurred on 4 March 2015—the date Derwin “presented to the Court a document purporting to be the Last Will and Testament of Virginia M. Johnson”; the earliest event or act alleged occurred on 24 September 2009—the date Derwin “caused a document entitled Durable Power of Attorney for Financial Management [for Virginia Johnson] to be filed with the Hoke County Register of Deeds.” Setting aside the various arguments regarding the lack of subject matter jurisdiction of the trial court to address claims arising from the estates of the parties’ deceased parents, all Plaintiff Anthony’s allegations address claims which accrued no less than five years before the complaint was filed, but the applicable statutes of

limitations are three years. *See* N.C. Gen. Stat. § 1-52 (2019) (effective 20 July 2017 to 25 July 2019).

¶ 25 Even if we generously assume Plaintiff Anthony previously filed a complaint for the same claims as in the complaint in this case and it was filed within the statute of limitations, the prior complaint was dismissed more than one year prior to the filing of this complaint. The trial court’s order found that Plaintiff Anthony’s prior claims were voluntarily dismissed 7 March 2019 and refiled 9 March 2020.

Under Rule 41(a)(1), a plaintiff may voluntarily dismiss an action without order of the court “at any time before the plaintiff rests his case.” Further, “[i]f an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal. . . .” N.C. R. Civ. P. 41(a)(1). “ ‘[I]n order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year “extension” by way of a Rule 41(a)(1) voluntary dismissal without prejudice, the complaint must conform in all respects to the rules of pleading.’ ” *Robinson v. Entwistle*, 132 N.C. App. 519, 522, 512 S.E.2d 438, 441 (quoting *Estrada v. Burnham*, 316 N.C. 318, 323, 341 S.E.2d 538, 542 (1986), *superseded by statute on other grounds as stated in Turner v. Duke Univ.*, 325 N.C. 152, 163, 381 S.E.2d 706, 712 (1989)), *disc. review denied*, 350 N.C. 595, 537 S.E.2d 482 (1999). Consequently, Rule 41(a)(1) is only available in an action where the original complaint complied with the “rules which govern its form and content prior to the expiration of the statute of limitations.” *Robinson*, 132 N.C. App. at 523, 512 S.E.2d at 441.

*Ford v. McCain*, 192 N.C. App. 667, 671, 666 S.E.2d 153, 156 (2008).

¶ 26 Since Plaintiff Anthony’s original complaint is not in our record on appeal, we have no way of knowing if that first complaint was timely or if it conformed “in all respects to the rules of pleading.” We could stop our analysis right there since Appellants have the duty to include all information necessary to address the issues on appeal in the record. N.C. R. App. P. 9(a) (limiting review to the record on appeal); *Estate of Redden ex rel. Morley v. Redden*, 194 N.C. App. 806, 810, 670 S.E.2d 586, 589 (2009) (“It is appellant’s duty to ensure that the record is complete.”). But even if we generously assume the prior complaint was proper, the “one-year extension” of time to file under Rule 41(a)(1) had expired. *See* N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2020). Plaintiff Anthony filed the second complaint on 9 March 2020, more than a year after the prior claims were voluntarily dismissed on 7 March 2019. Because the statutes of limitations had expired based upon the dates alleged in the Plaintiff Anthony’s complaint and more than a year elapsed between Plaintiff Anthony’s voluntary dismissal of the first case and the refiled claims, we affirm the trial court’s dismissal of the complaint under Rule 12(b)(6).

#### IV. Conclusion

¶ 27 For the reasons stated above, we affirm the trial court’s order dismissing Plaintiff Anthony’s complaint. We also dismiss the cross-appeal of Defendants Derwin and Veronica.

AFFIRMED IN PART; DISMISSED IN PART.

JOHNSON V. JOHNSON

2022-NCCOA-809

*Opinion of the Court*

Judges ARROWOOD and WOOD concur.

Report per Rule 30(e).