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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-712

No. COA20-672

Filed 21 December 2021

Edgecombe County, No. 20-CVS-53

CHERRY JONES & JEFFERY JONES, Plaintiffs,

v.

TRINITY HIGHWAY PRODUCTS, LLC; MOYE FENCE COMPANY, INC.; and
JOHN DOE, Defendants.

Appeal by plaintiffs from orders entered on or about 19 February 2020 by
Judge Jeffery B. Foster in Superior Court, Edgecombe County. Heard in the Court
of Appeals 25 May 2021.

Richard E. Batts, PLLC, by Richard E. Batts, Esq., for plaintiff-appellants.

*Poyner Spruill LLP, by J. Nicholas Ellis, by defendant-appellee Trinity
Highway Products, LLC.*

*Yates, McLamb & Weyher, L.L.P., by Michael C. Gruman and Christopher J.
Skinner, for defendant-appellee Moye Fence Company, Inc.*

STROUD, Chief Judge.

¶ 1

Plaintiffs appeal orders dismissing their action. Due to invalid service of
process of the first summonses and complaint, the statute of limitations was not tolled

by the filing of the first action which plaintiffs voluntarily dismissed. The trial court properly dismissed plaintiffs' case based upon expiration of the statute of limitations.

I. Background

¶ 2 Because the issues in this case stem from the process of service in a prior filed case, we begin with that case. We will provide only the procedural background of the prior case as is necessary for an understanding of our analysis in the present case.

A. Procedural Background of 2018 Action

¶ 3 On 8 October 2018, plaintiff Cherry Jones and her husband, plaintiff Jeffrey Jones, issued summonses and filed a complaint ("2018 Action") against Trinity Highway Products, LLC, ("defendant Trinity") Moye Fence Company, Inc., ("defendant Moye"), John Doe ("defendant Doe"), and USAA Insurance Agency, Inc. of Texas ("USAA") regarding an automobile accident and the injuries and damages stemming from it. In the 2018 Action, plaintiff Ms. Jones alleged a claim of negligence based upon her injuries in the accident against defendant Trinity, defendant Moye, and defendant Doe, and plaintiff Mr. Jones alleged a claim for his loss of services, consortium, and companionship of Ms. Jones. The 2018 Action also had a claim for "un-insurance underinsurance claims against" defendant USAA. (Capitalization altered.)

¶ 4 On or about 12 November 2018, Richard E. Batts, plaintiffs' attorney, filed an "AFFIDAVIT OF SERVICE BY THE UNITED STATES POSTAL SERVICE WITH

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SIGNATURE CONFIRMATION[.]” Mr. Batts averred that “[t]he Plaintiff’s Summons & Complaint were deposited with the United States Postal Service on 9th October 2018, with Tracking Confirmation Number” to defendant Moye. Mr. Batts also included a “CERTIFICATE OF SERVICE BY PRIORITY MAIL with TRACKING & SIGNATURE CONFIRMATION” noting the process of service as “depositing a copy via Priority Mail with Tracking and Signature Confirmation Number” along with attachments including the USPS tracking label and proof of delivery. The USPS tracking label notes it is “PRIORITY MAIL 2-DAY with Signature Confirmation” and the USPS proof of delivery also notes it was “Priority Mail” with “Signature Confirmation[.]” A similar affidavit, certificate of service, and attachments were filed regarding defendant Trinity.

¶ 5

On or about 14 December 2018, defendant Trinity filed a motion to dismiss for “insufficiency of process pursuant to Rule 12(b)(4) and 12(b)(5) of the North Carolina Rules of Civil Procedure.” By its own motion to dismiss, defendant Moye alleged the same. On 18 January 2019, citing Rule 41(a)(1) of the North Carolina Rules of Civil Procedure, plaintiffs filed a voluntary dismissal, without prejudice, of their action against all defendants except defendant Doe. On 19 February 2019, plaintiffs dismissed their action, without prejudice, against defendant Doe.

B. Current Action

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¶ 6 On or about 17 January 2020, plaintiffs filed a complaint against defendant Trinity, defendant Moye, and defendant Doe, based on the same facts and circumstances as the 2018 Action. Plaintiffs alleged that on or about 6 October 2015, Ms. Jones “was struck by a vehicle[;]” the driver of the other vehicle left the scene and is the unknown John Doe defendant. When Ms. Jones was hit, she “collided with fencing and a guardrail[;]” sustaining serious injuries, including a broken back and neck, and head injuries requiring brain surgery and removal of a portion of her skull.

¶ 7 Plaintiffs alleged that defendant Trinity made the guardrail and fencing she collided with, and defendant Moye installed them. Plaintiffs made claims for negligence and loss of services, consortium, and companionship against all three defendants. Plaintiffs requested damages in excess of \$25,000, costs, and a jury trial.

¶ 8 On 31 January 2020, defendant Trinity filed a motion to dismiss. Defendant Trinity alleged that plaintiffs had

filed a virtually identical action previously in this Court, as case file 18-CVS-859, on October 8, 2018, but failed to ever properly serve Trinity. Due to Plaintiffs’ failure to serve Trinity in the prior action, Plaintiffs’ claims were discontinued by operation of law under Rule 4(e) on January 8, 2019. Trinity moved to dismiss that prior action because it was barred by the statute of limitations and for other reasons. Although their claims had already been discontinued under Rule 4(e), Plaintiffs filed a purported Voluntary Dismissal Without Prejudice on January 18, 2019, on the eve of the hearing of Trinity’s motion to dismiss. Plaintiff’s re-filing of this action on January 17, 2020, does not alter the fact that the statute of limitations

has expired, and the Complaint should therefore be dismissed.

On 5 February 2020, defendant Moye also filed a motion to dismiss on a similar basis as defendant Trinity.

¶ 9 Thereafter, defendant Moye filed a motion to shorten the time for hearing its motion to dismiss. On or about 19 February 2020, the trial court allowed defendant Moye's motion to shorten the time to hearing and motion to dismiss because

Plaintiffs failed to properly perfect service of the Summons and Complaint in the Prior Action against Moye Fence Co. in compliance with Rule 4 of the North Carolina Rules of Civil Procedure, and as such, the statute of limitations on Plaintiffs' claims was not tolled by the filing of the Prior Action. Therefore, the statute of limitations has expired on Plaintiffs' claims and the Court finds that Moye Fence Co.'s Motion to Dismiss should be granted on this basis.

The trial court also filed an order dismissing plaintiffs' claim on the same basis as to defendant Trinity. Both orders were entered with prejudice. Plaintiffs appeal the orders dismissing their action.

II. Motion to Shorten Time to Hearing

¶ 10 Plaintiffs first contend the trial court erred in allowing defendant Moye's motions to shorten the time under North Carolina Rule of Civil Procedure 6(d).

A. North Carolina Rule of Civil Procedure 6(d)

¶ 11 Rule 6(d) of the North Carolina Rules of Civil Procedure provides in pertinent part, "A written motion, other than one which may be heard ex parte, and notice of

the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court.” N.C. Gen. Stat. § 1A-1, Rule 6(d) (2019).

B. Standard of Review

¶ 12 Plaintiffs argue for a *de novo* standard of review, though plaintiffs’ “Standards of Review” section focuses on the portion of their appeal dealing with the substance of the motion to dismiss. (Capitalization altered.) Plaintiffs do not cite to any case using a *de novo* standard of review for an issue under Rule 6(d). Defendant Moye argues for an abuse of discretion standard citing *J.D. Dawson Co. v. Robertson Marketing, Inc.*, 93 N.C. App. 62, 65, 376 S.E.2d 254, 256 (1989). But in *J.D. Dawson Co.*, this Court was speaking of a motion for sanctions when it noted the abuse of discretion standard. *See id.* (“Defendant next contends the trial court abused its discretion in ordering a shortened notice period and ordering relief in the form of striking defendant’s pleadings on plaintiff’s motion to compel and motion for sanctions. *As we have previously found no abuse of discretion as to the sanctions imposed by the trial court, we will only address defendant’s shortened notice period argument.*” (emphasis added) (quotation marks omitted)).

¶ 13 When addressing the issue of shortened notice to hearing, our prior cases do not state a specific standard of review and instead focus heavily on prejudice to the non-moving party. *See, e.g., J.D. Dawson Co.*, 93 N.C. App. at 65-66, 376 S.E.2d at

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256-57 (“It is defendant’s contention that it was extremely prejudiced in its ability to adequately prepare for the hearing because it received actual notice of the 4 March 1988 hearing on 2 March 1988, and the hearing location was changed at the last minute.”)

¶ 14 Plaintiffs here did object to shortening the time for hearing but did not present any specific argument to the trial court as to how they would be prejudiced by proceeding with the hearing beyond stating they needed more time to prepare. Like the defendant in *Brandon v. Brandon*, 10 N.C. App. 457, 461, 179 S.E.2d 177, 180 (1971), plaintiffs have not identified any additional evidence that would have been available to them at a later hearing and do not show how they would have benefited from a later hearing. *See id;* *see also Story v. Story*, 27 N.C. App. 349, 351–52, 219 S.E.2d 245, 247 (1975) (“Defendant first contends that the trial court was without authority to dismiss the appeal in that defendant did not receive the five-day statutory notice provided for in Rule 6(a) for hearings on motions. The record shows that defendant received notice on 16 April 1975 and attended the hearing on 22 April 1975. As provided by Rule 6(a) in not counting Saturdays and Sundays, *it is true that defendant had less than five days notice; but defendant has brought forth no argument that he was in any way prejudiced by lack of proper notice[.]*” (emphasis added)). The trial court allowed defendant Moye’s motion to shorten because the issues being raised, “involve the exact same matters and issues that the first notice was filed

timely[;]” “the exact same matters and issues” being, deficient process of service in the 2018 Action.

¶ 15 In *Brandon*, while this Court substantively addressed the issue of child custody, it also explained that North Carolina Rule 6 of Civil Procedure, regarding notice of hearing, “is not an absolute right” and again focuses on prejudice:

[a]lthough the statutes indicate that ordinarily a parent is entitled to at least five days notice (an intervening Saturday or Sunday excluded) of a hearing involving the custody of a child, G.S. § 50-13.5(e)(1) and (2), G.S. § 1A-1, Rule 6, this is not an absolute right and is subject to the rule relating to waiver of notice above mentioned. It is also subject to the rule that a new trial will not be granted for mere technical error which could not have affected the result, but only for error which is prejudicial amounting to the denial of a substantial right. Defendant has failed to show how she was prejudiced by the court’s failure to postpone the hearing, therefore, the assignment of error is overruled.

10 N.C. App. at 461, 179 S.E.2d at 180 (citation omitted). Accordingly, we focus our analysis on whether plaintiffs have demonstrated prejudice amounting to denial of a substantial right. *See id.*

C. Prejudice to Plaintiffs

¶ 16 Even “[a]ssuming *arguendo*,” as in *J.D. Dawson Co.*, 93 N.C. App. at 66, 376 S.E.2d at 257, “that notice was improperly given,” here, as in *Story* and *J.D. Dawson Co.*, plaintiffs did not argue before the trial court as to how proceeding to hearing prejudiced them, and they have failed to demonstrate prejudice on appeal. *See J.D.*

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Dawson Co., 93 N.C. App. at 66, 376 S.E.2d at 257; *Story*, 27 N.C. App. at 351–52, 219 S.E.2d at 247. Plaintiffs’ argument is approximately two-and-a-half pages long and over two pages of this argument consists of the procedural background of this issue and the timeline explaining their right to five days notice, “excluding the intermediate Saturday and Sunday[.]” under Rule 6(d). As to prejudice or any actual argument, plaintiffs only contend “[t]he violation of N.C. Gen. Statute, § 1A[-1], Rule 6, deprived Plaintiffs of valuable rights to which they were entitled; a failure to provide such valuable rights deprived Plaintiffs of Equal Protection of the Laws under both the North Carolina and United States Constitutions.” The mention of “valuable rights” is not specific enough to indicate to this Court how plaintiffs were prejudiced. Further, Rule 6 is not a right to which plaintiffs are unequivocally “entitled” to; as noted in *Brandon*, 10 N.C. App. at 461, 179 S.E.2d at 180, “Rule 6, . . . is not an absolute right and . . . is also subject to the rule that a new trial will not be granted for mere technical error which could not have affected the result, but only for error which is prejudicial amounting to the denial of a substantial right.”

¶ 17 In plaintiffs’ reply brief they contend prejudice “was made patently clearly during the hearing of statements that more time was needed to properly prepare Plaintiff’s defense[.]” But again, such bare assertions without more, are not enough: Here, the issue was whether the 2018 Action had been properly served on the defendants. Plaintiffs were aware of this issue even before their voluntary dismissal

of the 2018 Action, and the documents purporting to show service of the 2018 Action were presented to the trial court. “Defendant, like the defendant in *Brandon*, has suggested no additional testimony that would have been available to it at a later hearing and does not show how it would have benefited from a later hearing.” *See J.D. Dawson Co.*, 93 N.C. App. at 66, 376 S.E.2d at 256-57. Particularly here, where plaintiffs have already filed a substantially similar complaint in 2018 and the same legal issue is argued --process of service – as had previously been raised, plaintiffs were well aware for over a year that this was an issue. Plaintiff has enumerated no specific prejudice that would be addressed by more time. This argument is overruled.

III. Dismissal of Plaintiff’s Action

¶ 18 Plaintiffs’ only other argument on appeal is that the trial court erred in granting defendant Trinity’s and defendant Moye’s motions to dismiss.

A. Rule 12(b)(6) Hearing

¶ 19 Plaintiffs first note that because the trial court considered documents regarding service from the 2018 Action, the orders on appeal are summary judgment orders because the trial court considered documents beyond the complaint in this action. In its orders dismissing plaintiffs’ complaint, the trial court did not note a particular rule and ultimately dismisses plaintiffs’ complaint on the basis of the statute of limitations. But plaintiffs’ complaint in this action specifically referred to the pleadings in the 2018 Action: “This matter was originally filed on 08 October

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2018 and later dismissed without prejudice on 18 January 2019.” In fact, if plaintiffs had not included the 2018 Action in the allegations of the complaint, they would have had no basis for alleging their claims were filed within the extended time allowed by Rule 41. Accordingly, the 2018 pleadings and summonses may be considered by the trial court without converting the hearing to summary judgment. *See generally Bank of Am., N.A. v. Rice*, 244 N.C. App. 358, 372-73, 780 S.E.2d 873, 883-84 (2015). In *Bank of Am., N.A. v. Rice*, this Court discussed *Robertson v. Boyd*, 88 N.C. App. 437, 363 S.E.2d 672 (1988), wherein the defendant contended certain documents “were extraneous to the pleadings and, accordingly, should not have been considered in connection with [plaintiff] BOA’s Rule 12 motions”:

The fatal flaw with Rice’s argument regarding the Incentive Plans is that—as Judge Boner’s Order noted—Rice specifically referenced both plans in his counterclaims[.]

.....

We rejected an analogous argument in *Robertson*. In that case, the plaintiffs purchased a home from the defendants. In conjunction with the sale, the defendants provided the plaintiffs with a termite inspection report stating that the residence was free of any termite damage. After closing, however, the plaintiffs discovered that the house had, in fact, suffered termite damage. The plaintiffs therefore brought suit against the defendants for fraudulent misrepresentation and concealment and referenced the termite report in their complaint. *Robertson*, 88 N.C. App. at 439, 363 S.E.2d at 674.

The defendants filed a motion to dismiss as well as a motion for judgment on the pleadings. The trial court granted the defendants’ motion to dismiss, and on appeal

the plaintiffs argued that the trial court had impermissibly considered the termite report without converting the defendants' motion into a motion for summary judgment. *Id.* at 440–41, 363 S.E.2d at 674–75. In holding that the trial court did not err, we stated the following:

Defendants in this case apparently utilized Rule 12(c) because they wanted the trial court to consider the termite report and the contract of sale in determining the sufficiency of plaintiffs' complaint. These documents were not submitted by plaintiff, but copies of both documents were attached to the answer and motion to dismiss of defendants Boyd and copies of the termite report were attached to the motions to dismiss of defendants Booth Realty and Go–Forth. Because these documents were the subjects of some of plaintiffs' claims and plaintiffs specifically referred to the documents in their complaint, they could properly be considered by the trial court in ruling on a motion under Rule 12(b)(6).

¶ 20

Id. at 440-41, 363 S.E. at 675.

Here, similarly, the Incentive Plans considered by the trial court were expressly referenced in Rice's own counterclaims. Consequently, the trial court's review of excerpts from these documents did not require the conversion of BOA's Rule 12 motions into motions for summary judgment.

Bank of Am., 244 N.C. App. at 372-73, 780 S.E.2d at 883-84. Accordingly, here, the hearing on the motions to dismiss was not converted to a summary judgment hearing.

B. Standard of Review

The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can

be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Legal conclusions, however, are not entitled to a presumption of validity. Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

We conduct a *de novo* review of the pleadings to determine their legal sufficiency.

Wells Fargo Bank, N.A. v. Corneal, 238 N.C. App. 192, 195, 767 S.E.2d 374, 377 (2014)

(citation omitted).

C. Background Regarding Process of Service in 2018 Action

¶ 21 Here, there are no conflicts in the facts regarding service. The documents establish that on 8 October 2018 plaintiffs issued summonses and filed a complaint against defendants. On 15 October 2018, both defendants Trinity and Moye were served “by depositing a copy via Priority Mail with Tracking and Signature Confirmation” When serving a corporation, Rule 4 of the North Carolina Rules of Civil Procedure provides the methods for service of process and persons to be served on behalf of the corporation. *See generally* N.C. Gen. Stat. § 1A-1, Rule 4 (2017). The methods for service are personal delivery; registered or certified mail, return receipt

requested; or delivery by a “designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2).” N.C. Gen. Stat. § 1A-1, Rule 4(j)(6).

(6) Domestic or Foreign Corporation.--Upon a domestic or foreign corporation by one of the following:

- a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office.
- b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.
- c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director or agent to be served as specified in paragraphs a and b.
- d. By depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the officer, director, or agent to be served as specified in paragraphs a. and b., delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, “delivery receipt” includes an electronic or facsimile receipt.

N.C. Gen. Stat. § 1A-1, Rule 4(j)(6).

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compliance with the requirements of the statute. Although defective service of process may sufficiently give the defending party actual notice of the proceedings, such actual notice does not give the court jurisdiction over the party.” *Fulton v. Mickle*, 134 N.C. App. 620, 623–24, 518 S.E.2d 518, 521 (1999) (citations and quotation marks omitted). “Absent valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed.” *Glover v. Farmer*, 127 N.C. App. 488, 490, 490 S.E.2d 576, 577 (1997).

¶ 23

While plaintiffs contend use of USPS with signature confirmation suffices under North Carolina General Statute § 1A-1, Rule 4(j)(6), their argument is defeated by other portions of Rule 4. Rule 4(j)(1)(e) (2017), regarding service of process for “natural person[s],” indicates that USPS with signature confirmation is a valid form of service: “By mailing a copy of the summons and of the complaint by signature confirmation as provided by the United States Postal Service, addressed to the party to be served, and delivering to the addressee.” The provision allowing for USPS service for signature confirmation is specifically *not* listed in the section for service upon a corporation. *See generally* N.C. Gen. Stat. § 1A-1, Rule 4(j). By providing for USPS with signature confirmation as to natural persons and not providing for such service as to corporations, the General Assembly has plainly omitted service by USPS with signature confirmation as a method to serve corporations. “The requirements of this section [of Rule 4] must be construed strictly and the prescribed procedure must

be followed strictly. Unless the requirements are met, there is no valid service.” *Greenup v. Register*, 104 N.C. App. 618, 620, 410 S.E.2d 398, 400 (1991) (citation omitted).

D. Statute of Limitations

¶ 24 Plaintiffs filed their 2018 Action almost three years to the day after the accident upon which it was based, as the accident occurred on 6 October 2015 and plaintiffs filed their 2018 Action on 8 October 2018.

Plaintiff’s original complaint brought a cause of action for negligence, which has a three-year statute of limitations. See *Latham v. Cherry*, 111 N.C. App. 871, 873, 433 S.E.2d 478, 480 (1993) (“The statute of limitations for personal injury due to negligence is three years.” (citing N.C. Gen. Stat. § 1–52(16)), *cert. denied*, 335 N.C. 556, 441 S.E.2d 116 (1994)).

Williams v. Owens, 211 N.C. App. 393, 394, 712 S.E.2d 359, 360 (2011).¹ If the negligence claim fails, so too does plaintiffs’ claim for loss of services, consortium, and companionship. *Newman v. Stepp*, 267 N.C. App. 232, 239, 833 S.E.2d 353, 358 (2019) (“This Court emphasized that a loss of consortium claim is derivative in nature and that, where the loss of consortium claim is covered under the wrongful death statute, the plaintiff could not independently bring a separate claim for loss of consortium.

¹ North Carolina General Statute § 1-52 has since been amended though the statute of limitations for negligence causing personal injury claims remains three years. *See generally* N.C. Gen. Stat. § 1-52 (2021).

Thus, it is incorrect to say that a claim of loss of consortium is only properly asserted under a wrongful death statute. As *Nicholson* recognized, an action for loss of consortium based on the negligent act of a third party may be joined in any suit by a spouse to recover for personal injuries. *See Nicholson*, 300 N.C. at 304, 266 S.E.2d at 823.”), *aff’d*, 376 N.C. 300, 852 S.E.2d 104 (2020), *reh’g denied*, 376 N.C. 673, 852 S.E.2d 629 (2021)

¶ 25 To toll the three-year statute of limitations and receive another year as provided for in North Carolina Rule of Civil Procedure 41, plaintiffs must have properly served the 2018 Action:

The summons constitutes the means of obtaining jurisdiction over the defendant. The summons, not the complaint, constitutes the exercise of the power of the State to bring the defendant before the court. As such, defects in the summons receive careful scrutiny and can prove fatal to the action.

A party may correct a failed or defective original service by endorsement of the original summons or by application for alias and pluries summons within ninety days of original issue or last endorsement. If neither method is used to extend time for service, the action is discontinued and treated as if it had never been filed.

If a plaintiff obtains proper service on a defendant within the time for filing a complaint, a voluntary dismissal of the first action tolls the statute of limitations for one year. However, *the voluntary dismissal of an action based on defective service does not toll the statute of limitations*. A new summons issued after the discontinuation of the original action begins a new action.

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Latham v. Cherry, 111 N.C. App. 871, 873–74, 433 S.E.2d 478, 480 (1993) (emphasis added) (citations and ellipses omitted); *see generally* N.C. Gen. Stat. § 1A-1, Rule 41 (2017). Because plaintiffs had defective process of service of the 2018 Action, the statute was not tolled and plaintiffs’ claims expired in 2018, three years after the 2015 accident upon which the claims are based. Accordingly, the trial court properly allowed defendant Trinity’s and Moye’s motions to dismiss.

IV. Conclusion

¶ 26 Because plaintiffs failed to properly serve defendants in 2018, the statute of limitations was not tolled, and thus we affirm the trial court’s orders allowing defendant Trinity and Moye’s motions to dismiss.

AFFIRMED.

Judges HAMPSON and GRIFFIN concur.

Report per Rule 30(e).