IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-926

No. COA22-319

Filed 29 December 2022

Mecklenburg County, No. 20 CVS 14021

KATARZYNA LECHOWICZ, Executor of the Estate of IZABELA LECHOWICZ, Deceased, DEBORAH SUTTON, Executor of the Estate of ERICK SWAFFER, Deceased, Plaintiffs,

v.

GOODRICH CORPORATION d/b/a COLLINS AEROSPACE SYSTEMS, Defendant.

Appeal by Plaintiffs from order entered 21 December 2021 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 September 2022.

The Law Office of Daryl G. Davidson, Sr., PC by Daryl G. Davidson, Sr., and Wisner Law Firm, PC, by Floyd A. Wisner, admitted pro hac vice, for Plaintiffs-Appellants.

Smith Anderson Blount Dorsett Mitchell & Jernigan, LLP, by Kirk G. Warner and Amelia L. Serrat, for Defendant-Appellee.

CARPENTER, Judge.

¶ 1 Katarzyna Lechowicz and Deborah Sutton ("Plaintiffs") appeal from an order granting a motion to dismiss filed by Goodrich Corporation d/b/a Collins Aerospace Systems ("Defendant") and dismissing Plaintiffs' wrongful death and survival

products liability claims with prejudice. On appeal, Plaintiffs argue the trial court erred by granting Defendant's motion to dismiss per Rules 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6) of the North Carolina Rules of Civil Procedure. After careful review, we conclude Plaintiffs' claims are barred by the statute of limitations, and the trial court did not err in granting Defendant's motion to dismiss.

I. Factual and Procedural Background

¶ 2 On 27 October 2018, a helicopter spun out of control and crashed shortly after takeoff in Leicester City, United Kingdom, killing Plaintiffs' decedents, Izabela Lechowicz, and the pilot, Eric Swaffer. Plaintiffs, who are Decedents' respective executrixes, commenced the instant wrongful death and survival products liability action on 26 October 2020 by filing a Complaint ("Complaint") in Mecklenburg County Superior Court, naming the defendant as "Collins Aerospace Systems, Inc., a corporation, formerly known as Rockwell Collins, Inc." ("Collins").

¶ 3 In the Complaint, Plaintiffs maintained that various component parts of the tail rotor, allegedly "designed, manufactured, assembled and sold" by Collins, with a principal place of business in Charlotte, North Carolina, were defective and unreasonably dangerous, proximately resulting in the crash. Also on 26 October 2020, contemporaneously with the Complaint, Plaintiffs applied for and had issued a Summons ("first Summons") against Collins at a Charlotte address.

¶ 4 On 14 December 2020, Plaintiffs applied for and had issued an A&P Summons ("first A&P Summons") against Collins at the same Charlotte address but failed to serve it upon Defendant. The first A&P Summons was active for ninety days and expired on 15 March 2021. Collins moved for an extension of time to respond to the Complaint on 6 January 2021, which was granted by the Assistant Clerk of Court on 12 January 2021. On 12 February 2021, Collins filed a Special Appearance and Motion to Dismiss. On 22 March 2021—thirty-eight days after service of the Motion to Dismiss and seven days after the first A&P Summons expired—Plaintiffs filed two affidavits of service claiming to have served the Complaint, but not the first Summons or the first A&P Summons, on Collins' alleged registered agent, CT Corporation System, on 11 December 2020 at a Charlotte address and on 15 December 2020 at a Raleigh address.

¶ 5 On 19 July 2021, Plaintiffs filed an Amended Complaint ("Amended Complaint") and Summons ("second Summons") naming the defendant as "Goodrich Corp. d/b/a Collins Aerospace Systems[.]" The second Summons was directed to Goodrich, yet addressed to "Kirk G. Warner, Attorney for Defendant" at his firm's Raleigh P.O. Box. While not marked as an A&P Summons, it noted the date of the first Summons as 26 October 2020. On 9 August 2021, Plaintiffs served the Amended Complaint and second Summons via certified mail at CT Corporation System's Raleigh address. On 10 September 2021, Goodrich filed a Special Appearance and

Motion to Dismiss. On 15 October 2021, Plaintiffs issued another A&P Summons ("second A&P Summons") addressed to Mr. Warner in Raleigh; however, handwritten next to the typed address was the Raleigh address of CT Corporation System, which may have been added after issuance by the Clerk of Court. On 20 October 2021, Plaintiffs served CT Corporation System with the second A&P Summons and Amended Complaint in Raleigh via sheriff. Goodrich filed a Special Appearance and Restated Motion to Dismiss on 10 September 2021.

¶ 6 Goodrich's Restated Motion to Dismiss came before the Honorable Lisa C. Bell in Mecklenburg County Superior Court on 6 December 2021. By Order entered 21 December 2021, Judge Bell dismissed the Amended Complaint with prejudice on four grounds, all of which were timely appealed.

II. Jurisdiction

¶ 7 Judge Bell's dismissal order entered 21 December 2021 is a final judgment and jurisdiction therefore lies with this Court per N.C. Gen. Stat. § 7A-27(b) (2021).

III. Issues

¶ 8 The issues on appeal are whether the trial court erred in granting Defendant's motion to dismiss: (1) per N.C. R. Civ. P. 12(b)(4) after concluding the second Summons, naming Goodrich Corp., was defective on its face; (2) per N.C. R. Civ. P. 12(b)(2) & (5) after concluding Plaintiffs failed to properly serve Goodrich Corp. and its predecessor Defendant, Collins Aerospace Systems, Inc., a corporation formerly

known as Rockwell Collins, Inc.; (3) per N.C. R. Civ. P. 12(b)(6) after concluding the Amended Complaint was filed after the statute of limitations had expired and did not relate back to the Complaint; and (4) per N.C. R. Civ. P. 12(b)(6) after concluding the first A&P Summons issued on 14 December 2020 expired without proper service on the defendant named in the Complaint, thereby discontinuing the action.

IV. Analysis

¶ 9 Appellate courts review an order granting a motion to dismiss *de novo*. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

A. Defect(s) in Process and Service – Second Summons

¶ 10 Citing *Hazelwood v. Bailey*, 339 N.C. 578, 584, 453 S.E.2d 522, 525 (1995), Plaintiffs first argue that any defect in the second Summons rendered it voidable and capable of correction by amendment, rather than void and thus depriving the trial court of jurisdiction. Defendant asserts that since the second Summons was directed to Mr. Warner, who had yet to appear or be retained as attorney of record for Goodrich, Plaintiffs failed to serve anyone authorized by Rule 4(j)(6) to accept service, which "violates the clear requirements of Rule 4" making it "defective on its face." *See Lane v. Winn-Dixie Charlotte, Inc.*, 169 N.C. App. 180, 187, 609 S.E.2d 456, 460 (2005).

¶ 11 "The purpose of a summons is to give notice to a person to appear at a certain place and time to answer a complaint against him." *Latham v. Cherry,* 111 N.C. App.

871, 874, 433 S.E.2d 478, 481 (1993), *cert. denied,* 335 N.C. 556, 441 S.E.2d 116 (1994). "In order for a summons to serve as proper notification, it must be issued and served in the manner prescribed by statute." *Id.* at 874, 433 S.E.2d at 481. When a defendant challenges service, a plaintiff has the burden of proving that the person who accepted service was "authorized by law to accept service of process on [the defendant's] behalf." *Hamilton v. Johnson*, 228 N.C. App. 372, 378, 747 S.E.2d 158, 163 (2013). "[A] person relying on the service of a notice by mail must show strict compliance with the requirements of the statute." *Fulton v. Mickle*, 134 N.C. App. 620, 623, 518 S.E.2d 518, 521 (1999). Service of process may be effected upon a domestic or foreign corporation in four ways according to Rule 4(j)(6).

> 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, R. 4(j)(6) (2021).

¶ 12 Here, Mr. Warner was not counsel of record for Goodrich and had not entered an appearance for Goodrich at the time of attempted service. Additionally, he was not an officer, director, or agent of the corporation such that service would be permissible under Rule 4(j)(6). Furthermore, he otherwise lacked authority to accept service on behalf of Goodrich. *See Beck v. Beck*, 64 N.C. App. 89, 93, 306 S.E.2d 580, 583 (1983) ("An attorney who generally handles the legal affairs for an individual is not an agent of that person for the service of process *unless* he makes an appearance in the [lawsuit] for him.") (emphasis in original).

¶ 13 Rule 4(i) provides, "[a]t any time . . . in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued." N.C. Gen. Stat. § 1A-1, R. 4. Material prejudice results under Rule 4(i) where a plaintiff is permitted to amend a summons after the statute of limitations runs, requiring a defendant "to defend a lawsuit which otherwise would have expired." *Stinchcomb v. Presbyterian Med. Care Corp.*, 211 N.C. App. 556, 564, 710 S.E.2d 320, 326 (2011).

¶ 14 Finally, the "voidable" rule from *Hazelwood* does not benefit Defendant in this case. 339 N.C. at 585, 453 S.E.2d at 526 (holding that a party's misidentification of the appropriate county on a properly served summons rendered it voidable, not void). In discussing whether the summons misstating the appropriate county was voidable or void, the court stated,

> [W]hen the name of the defendant is sufficiently stated in the caption of the summons and in the complaint, such that it is clear that the corporation, rather than the officer or agent receiving service, is the entity being sued, the summons, *when properly served upon an officer, director or agent specified in N.C. R. Civ. P. 4(j)(6)*, is adequate to bring the corporate defendant within the trial court's jurisdiction.

Id. at 583–84, 453 S.E.2d at 525 (emphasis added).

¶ 15 Here, the second Summons naming Goodrich violated Rule 4(j) because Mr. Warner was not an appropriate officer, director, or agent to receive service of process. *See* N.C. Gen. Stat. § 1A-1, R. 4(j)(6). Additionally, the handwritten Raleigh address of CT Corporation System on the second A&P Summons dated 15 October 2021, a process defect which may have been added after issuance by the Clerk of Court, is insufficient to cure the facial defect in the second Summons. Accordingly, the trial court properly determined the second Summons was "defective on its face." *See Winn-Dixie Charlotte, Inc.*, 169 N.C. App. at 187, 609 S.E.2d at 460.

B. Service Upon Goodrich and Predecessor Defendant

¶ 16 Next, Plaintiffs argue that the trial court improperly determined that they failed to serve Goodrich and its predecessor defendant, Collins, because Plaintiffs served Goodrich with the Amended Complaint and second A&P Summons (1) on 9 August 2021 by certified mail c/o its registered agent, CT Corporation System, and (2) on 20 October 2021 personally via its agent, CT Corporation System. Defendant asserts that the defects in the second Summons defeat the presumption of service by certified mail. Plaintiffs respond that its facts regarding service on Goodrich by certified mail and sheriff are unchallenged, and in any event, service of the Amended Complaint is governed by Rule 5 rather than Rule 4, because the amendment corrects a misnomer rather than adding a new party.

¶ 17 Our courts "exercise personal jurisdiction over a defendant by service of process in accordance with the provisions of Rule 4(j) or Rule 4(j1) of the Rules of Civil Procedure." N.C. Gen. Stat. § 1-75.6 (2021). "Generally, without valid service, the court cannot exercise jurisdiction over a person." *Ryals v. Hall-Lane Moving and Storage Co., Inc.*, 122 N.C. App. 242, 247, 468 S.E.2d 600, 604 (1996) (citation omitted). Two potential points of failure in the service of process may preclude a court from assuming jurisdiction: (1) defects in the summons, *i.e.*, insufficient process; and (2) defects in the manner of service, *i.e.,* insufficient service of said process. *See, e.g., Storey v. Hailey*, 114 N.C. App. 173, 177–180, 441 S.E.2d 602, 605–06 (1994) (analyzing sufficiency of process by looking to the summons itself and insufficiency of

service of process by looking to the manner in which the summons was served, before holding personal jurisdiction should have been exercised by the trial court).

¶ 18 Here, the process was deficient as to Goodrich, and service of process was deficient with respect to both Goodrich and Collins. Mr. Warner was not an agent authorized by Rule 4(j) to accept service on behalf of Goodrich or Collins, and Collins was a nonentity without a registered agent or officer to properly serve. Plaintiffs served the Amended Complaint and second A&P Summons upon Goodrich's registered agent, CT Corporation System, by certified mail in August 2021 and personally by sheriff in October 2021. While the language of the trial court's 21 December 2021 Order is not explicit whether its conclusion regarding service was based solely on the defect in the second Summons, or in conjunction with that fact and additional service defect(s), this distinction is of no consequence in reaching our conclusion.[1]

¶ 19 Finally, Plaintiffs' argument that Rule 5—allowing service of pleadings subsequent to the original complaint upon counsel of record—applied to their Amended Complaint instead of Rule 4, is without merit, because Rule 4 governs the

[1] We note Plaintiffs violated Local Rule 15.1 of the 26th Judicial District Superior Court Division Civil Rules, requiring proof of service and any required affidavits be filed within 15 days of perfected service. Here, Plaintiffs filed affidavits on 22 March 2021, evidencing service of the Complaint—but not the first Summons or the first A&P Summons—upon CT Corporation System, 101 days and 97 days after the two service attempts on 11 December 2020 and 15 December 2020.

initiation of cases, and Rule 5 governs subsequent pleadings in a properly initiated case. *See Van Engen v. Que Sci., Inc.*, 151 N.C. App. 683, 688, 567 S.E.2d 179, 183 (2002); *see also* N.C. Gen. Stat. § 1A-1, R. 4, 5. Based on the forgoing, the trial court did not err in concluding Plaintiffs failed to properly serve Goodrich Corp. and Collins.

C. Statute of Limitations and Relation Back

¶ 20 Plaintiffs next argue that the Amended Complaint merely corrected a misnomer and thus relates back to the Complaint filed on the date the statute of limitations expired. Defendant counters that the Amended Complaint substituted a new party, effectively dismissing Collins from the lawsuit and allowing the statute of limitations to expire. Plaintiffs respond that Defendant's conduct equitably estops it from asserting a statute of limitations defense.

¶ 21 The statute of limitations for wrongful death actions in North Carolina is two years. N.C. Gen. Stat. § 1-53(4) (2021). "A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." N.C. Gen. Stat. § 1A-1, R. 15(c) (2021). "When the amendment seeks to add a party-defendant or substitute a party-defendant to the suit, the required notice cannot occur." *Crossman v. Moore*, 341 N.C. 185, 187, 459 S.E.2d 715,

717 (1995). Therefore, Rule 15(c) does not provide "authority for the relation back of a claim against a new party." *Id.* at 187, 459 S.E.2d at 717. Notice to the proper party within the statute of limitations is key to relation back of an amended complaint to the original complaint. *Reece v. Smith*, 188 N.C. App. 605, 609, 655 S.E.2d 911, 914 (2008) ("Here, no one was served within the statute of limitations so it is evident that the proper individual was not put on notice of the lawsuit[.]").

¶ 22 Our Courts have encountered a variety of improper attempts to add or substitute a new party defendant. One such example is substituting a corporation for an individual. *See Bob Killian Tire, Inc. v. Day Enterprises Inc.,* 131 N.C. App. 330, 333, 506 S.E.2d 752, 754 (1998) (holding that the plaintiff's amendment sought to substitute an individual for a corporate defendant and "thereby nam[ed] a new party-defendant rather than correct[ed] a misnomer."). A second example is adding a new party by amending the complaint to add defendants in their official capacity rather than individual capacity, or vice versa. *See Treadway v. Diez*, 209 N.C. App. 152, 156–57, 703 S.E.2d 832, 835–36 (Jackson, J. dissenting), *dissent adopted as opinion of the court*, 365 N.C. 289 (2011) (concluding amendment of defendant from "Buncombe County Sheriff's Department" to "Van Duncan, Sheriff of Buncombe County" was an ineffective attempt to substitute a new party, not a misnomer); *Rogerson v. Fitzpatrick,* 121 N.C. App. 728, 732, 468 S.E.2d 447, 450 (1996) ("Because *Crossman* prohibits the addition of new defendants under Rule 15(c),

plaintiff's claims against the City and the officers in their official capacities may not take on the filing date of his original complaint...."); *White v. Crisp,* 138 N.C. App. 516, 521 530 S.E.2d 87, 90 (2000) (holding that amending the complaint to include defendant in his individual capacity had the effect of adding a new party and relation back was not proper under *Crossman*). A third example is substituting one distinct corporation for a separate corporation. *See Franklin v. Winn Dixie Raleigh, Inc.,* 117 N.C. App. 28, 450 S.E.2d 24 (1994), *aff'd per curiam,* 342 N.C. 404, 464 S.E.2d 46 (1995) (holding that amendment substituting "Winn Dixie Raleigh, Inc." for "Winn Dixie Stores, Inc." was adding a new party and not correcting a misnomer when both were separate corporations). A fourth example is adding a third-party defendant not named in the original complaint. *See Wicker v. Holland,* 128 N.C. App. 524, 495 S.E.2d 398 (1998) (holding that amending complaint to include third-party defendant after expiration of statute of limitations is adding a new party and therefore prohibited under *Crossman*).

¶ 23 Nevertheless, "[a]n amendment to correct a misnomer in the description of a party defendant may be granted after the expiration of the statute of limitations if (1) there is evidence that the intended defendant has in fact been properly served, and (2) the intended defendant would not be prejudiced by the amendment." *Liss v. Seamark Foods*, 147 N.C. App. 281, 286, 555 S.E.2d 365, 369 (2001); *see also Tyson v. L'Eggs Prod., Inc.*, 84 N.C. App. 1, 6, 351 S.E.2d 834, 837 (1987) (reversing the trial

court's grant of corporate defendant's motion to dismiss per statute of limitations where plaintiff filed unbroken chain of A&P summonses after initially suing a nonentity subsidiary of a larger corporation which had not registered a certificate of assumed name, reasoning that it constituted "one legal entity which uses two names."). A misnomer is a "[m]istake in name; giving incorrect name to person in accusation, indictment, pleading, deed or other instrument." *Liss,* 147 N.C. App. at 285, 555 S.E.2d at 368 (quoting Black's Law Dictionary 1000 (6th ed. 1990)).

¶ 24 Plaintiffs' two strongest sources of precedent are *Liss* and *Tyson*, yet each is distinguishable. In *Liss*, the Court noted the same attorneys represented both "defendants" throughout, which reduced the risk of prejudice. *See id*. at 286, 555 S.E.2d at 369. Whereas here, Plaintiff improperly served Defendant's counsel and the purported agent of a nonentity, despite no registered agent listed on the Secretary of State website, in *Liss* the plaintiff effected good service on the president, an appropriate officer of the appropriate corporation, despite naming the defendant in the complaint and summons as Seamark Foods, rather than Seamark Enterprises. *See id*. at 286, 555 S.E.2d at 369. Accordingly, despite defendants sharing the same counsel in this case and in *Liss*, we conclude *Liss* is inapposite due to the service issue. *See id*. at 286, 555 S.E.2d at 369.

¶ 25 In *Tyson*, the Court noted the significance of the defendant's failure to register an assumed trade name in accordance with a now repealed statute. *Tyson*, 84 N.C.

App. at 6, 351 S.E.2d at 837. Nevertheless, *Tyson* is similarly distinguishable because the plaintiff in *Tyson* eventually effected service upon an officer of the appropriate corporation, with an unbroken chain of A&P summonses until service occurred. Here, service upon Goodrich's agent did not occur until after the chain of A&P summonses lapsed, and the statute of limitations had expired. *See id.* at 6, 351 S.E.2d at 837.

¶ 26 Next, Defendant's conduct in this case is not a basis to toll the statute of limitations by invoking the doctrine of equitable estoppel, based on the record before us. *See Pierce v. Johnson*, 154 N.C. App. 34, 571 S.E.2d 661 (2002) (invoking equitable estoppel to overcome statute of limitations where counsel failed to inform adversary his client had died). Plaintiffs direct us to several service bulletins with Collins Aerospace named on the header, and a Final Rule of the Federal Aviation Administration noting Collins as a point of contact, as evidence Collins held itself out as an operating entity. While the service bulletins do plainly contain Collins' name, they do not represent or otherwise indicate it was a legal entity capable of suit.

¶ 27 Plaintiffs further argue Defendant's counsel obfuscated the entity's identity and intentions, including representing via email that "our firm is representing the defendant Collins" and ran out the clock before asserting that Collins could not be sued. Plaintiffs raise correspondence in January 2021 with a paralegal named Wanda Knight. Ms. Knight identified herself as a "paralegal for Collins" before indicating in an affidavit filed 12 July 2021, that Collins was not a legal entity subject

to suit and that she was a "paralegal for Goodrich Corp. d/b/a Collins." It logically follows that legal staff would identify themselves in relation to the named party in an action. As this correspondence occurred months after the initiation of the case and multiple service attempts, we conclude it is both too remote and insubstantial to invoke the doctrine of equitable estoppel. Our conclusion is bolstered by the fact that Defendant limited all appearances to special appearances, and all filings with the court scrupulously identified "named Defendant [Collins]" as the party, without waiving any objections.

¶ 28 Moreover, Plaintiffs argue that they unwittingly consented to an extension to their detriment, but this argument fails because Defendant's extension was sought by formal motion making no mention of consent, and the motion was granted by the Clerk of Court as a matter of course.

¶ 29 Finally, Plaintiffs raise a phone call with Defendant's New York counsel wherein counsel allegedly stated he had no objection to service. Defendant denies, however, any affirmative representation, and there is no proof of any such representation in the record.

¶ 30 There is insufficient evidence of misconduct by defense counsel evident in the record before us. It is not a defendant's responsibility to conduct due diligence or file paperwork for an adversary, especially when such information, or lack thereof, is publicly available on the Secretary of State website. After receiving service of the 12

February 2021 motion to dismiss, Plaintiffs still had a month to issue a timely, subsequent A&P summons, which they failed to accomplish. Plaintiffs incorrectly seek to shift blame to Defendant for their own errors and noncompliance with the Rules.

¶ 31 Plaintiffs' attempted amendment to "Goodrich Corp. d/b/a Collins Aerospace Systems" does not relate back to the Complaint filed against named Defendant, "Collins Aerospace Systems, Inc., a corporation, formerly known as Rockwell Collins, Inc." As evidenced by the record, Collins is a nonentity without a registered agent to serve, and Goodrich Corp. is a new party to this action. Furthermore, we lack evidence that the nonentity predecessor Defendant, Collins, was served in compliance with Rule 4, and Goodrich would be materially prejudiced by defending against an otherwise time-barred action. *See Liss*, 147 N.C. App. at 286, 555 S.E.2d at 369; *see also Stinchcomb*, 211 N.C. App. at 564, 710 S.E.2d at 326.

4. Discontinuance After Expiration of the First A&P Summons

¶ 32 Lastly, Plaintiffs argue that service of the first A&P Summons was not necessary as service of the Complaint and first Summons had already been effected on 11 and 15 December 2020. Additionally, Plaintiffs reiterate their equitable estoppel argument, which was previously addressed. *Supra,* Section IV(3). Defendant responds that service was improper, and Plaintiffs allowed the chain of A&P summonses to lapse, thus commencing the case anew after the statute of

limitations expired. Moreover, Defendant correctly notes that even if we accepted Plaintiffs' argument regarding relation back under Rule 15, which we do not, Plaintiffs' case nevertheless fails due to discontinuance of the A&P summonses.

¶ 33 "The function of an alias and pluries summons is to keep a lawsuit alive and maintain the original date of the commencement of the action when the original summons has not been properly served upon the original defendant named therein." *Tyson*, 84 N.C. App. at 5, 351 S.E.2d at 837 (citation omitted). Pursuant to Rule 4(e), "[w]hen there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action is discontinued as to any defendant not theretofore served with summons within the time allowed." N.C. Gen. Stat. § 1A-1, R. 4(e); *see also Dozier v. Crandall*, 105 N.C. App. 74, 78, 411 S.E.2d 635, 638 (1992) ("[W]hen plaintiff failed to have this action continued through endorsement or issuance of alias or pluries summons within 90 days, this action was discontinued.").

¶ 34 "If a party fails to use either method to extend time for service, the suit is discontinued, and treated as if it had never been filed. If a new summons is issued after the original suit is discontinued, it begins a new action." *Johnson v. City of Raleigh*, 98 N.C. App. 147, 148–49, 389 S.E.2d 849, 851 (1990); *see also Chateau Merisier, Inc. v. GEKA, S.A.*, 142 N.C. App. 684, 686, 544 S.E.2d 815, 817 (2001) (holding that where a summons was not served within the allocated time and no

endorsement nor A&P summons was sought within ninety days, plaintiff's action was deemed to have begun on the date on which a new summons was issued); *Integon Gen. Ins. Co. v. Martin*, 127 N.C. App. 440, 490 S.E.2d 242, 244 (1997) ("The issuance of an alias or pluries summons without [indicating its relation to the original summons] has the double effect of initiating a new action and discontinuing the original one."); *Wayne Cty. ex rel. Williams v. Whitley*, 72 N.C. App. 155, 159, 323 S.E.2d 458, 462 (1984) ("[S]omething must be done by the plaintiff to keep his cause of action alive within the ninety-day period until some type of service can be had over the defendant. If the ninety-day period passes without any action on the part of the plaintiff and the cause of action is discontinued, then no endorsement, issuance of an alias or pluries summons, or service of process by publication can revive the action.").

¶ 35 Here, we have previously determined that Collins was not properly served with the first Summons or the first A&P Summons, thus necessitating an unbroken chain of A&P summonses to avoid discontinuance under Rule 4(e). Plaintiffs filed the Complaint and first Summons on 26 October 2020 and had the first A&P Summons issued against Collins on 14 December 2020. The first A&P Summons expired on 15 March 2021 without being served upon Defendant. *See Dozier*, 105 N.C. App. at 78, 411 S.E.2d at 638; *see also* N.C. Gen. Stat. § 1A-1, R. 4(d).

¶ 36 On 19 July 2021, Plaintiffs purported to file the Amended Complaint and second Summons, and on 15 October 2021, purported to file the second A&P

Summons. As the first A&P Summons expired on 15 March 2021 without proper service upon Collins, the Amended Complaint and second Summons filed 19 July 2021 "shall be deemed to have commenced on the date of such issuance." N.C. Gen. Stat. § 1A-1, R. 4(e). Accordingly, Plaintiffs' Amended Complaint constituted a new action, clearly time-barred by the two-year statute of limitations, which the trial court properly determined.

V. Conclusion

¶ 37 Based on the forgoing, we hold the trial court properly granted Defendant's motion to dismiss on multiple bases. We therefore affirm the order dismissing Plaintiffs' claims with prejudice.

AFFIRMED.

Judge DIETZ concurs.

Judge COLLINS concurs in the result.

Report per Rule 30(e).