

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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-310

No. COA21-345

Filed 3 May 2022

Forsyth County, No. 17CVS4176

TODD HUTCHINS and ANGELA RENTENBACH HUTCHINS, Plaintiffs,

v.

CVS PHARMACY, INC., and its assigns and successors-in-interest, CVS of N. CAROLINA, INC., and its assigns and successors-in-interest, NORTH CAROLINA CVS PHARMACY, L.L.C., and its assigns and successors-in-interest, CVS 4252 NC L.L.C., and its assigns and successors-in-interest, CVS 7331 NC L.L.C., and its assigns and successors-in-interest, SVC BOONE NC LLC /f/k/a CVS BOONE NC, L.L.C., and its assigns and successors-in-interest, KAYLIE ANN HENNE, and her assigns and successors-in-interest, and ALLYSON KAY DUKE, and its assigns and successors-in-interest, Defendants.

Appeal by plaintiffs from order and judgment entered 25 February 2021 by Judge Richard S. Gottlieb in Forsyth County Superior Court. Heard in the Court of Appeals 25 January 2022.

Todd Darren Hutchins and Angela Rentenbach Hutchins, pro se, for plaintiffs-appellants.

Ellis & Winters LLP, by Leslie C. Packer and Steven A. Scoggan, for defendants-appellees.

GORE, Judge.

with additional claims for loss of consortium and spousal services. Defendants CVS Pharmacy Inc. et al. moved for dismissal pursuant to Rule 12(b)(6) on grounds that, *inter alia*, relevant statutes of limitation and repose barred plaintiffs' claims. The trial court granted defendants' motion to dismiss. The trial court also dismissed this action with prejudice for plaintiffs' failure to prosecute. We conclude that plaintiffs' claims are time-barred. Therefore, we affirm the trial court's order and judgment dismissing this action with prejudice.

I. Background

¶ 2

Plaintiff Todd Hutchins opened this case on 6 July 2017 by filing a Motion to Extend Statute of Limitations in Medical Malpractice Action. The trial court adopted the facts in his motion and granted a 120-day extension of the statute of limitations to 3 November 2017 having determined good and sufficient cause.

A. Original Complaint

¶ 3

On 3 November 2017, Mr. Hutchins filed a complaint. He alleged that on 7 July 2014, a pharmacist "unilaterally wrote a prescription" for a different type of medication than what Mr. Hutchins's physician prescribed. Defendant CVS refilled this allegedly non-bioequivalent prescription on 19 August 2014 and 27 September 2014. The trial court issued summonses on 3 November 2017. However, Mr. Hutchins did not serve those summonses or the complaint on any of the defendants.

¶ 4

On 12 January 2018, Judge L. Todd Burke entered an order closing the

proceeding because Mr. Hutchins “did not file a complaint or cause any summons to be issued” by 3 November 2017. After Judge Burke closed the proceeding, Mr. Hutchins obtained an alias and pluries summons (“A&P” summons) on 31 January 2018. He did not serve defendants with this A&P summons, the original summons, or the original complaint.

B. Motion to Set Aside the Trial Court’s 12 January 2018 Order

¶ 5 Mr. Hutchins took no further action in the trial court until 7 August 2018, when he filed a motion to set aside Judge Burke’s 12 January 2018 Order closing the proceeding. Judge Burke found a factual error in the 12 January 2018 Order, noting that a summons and complaint had in fact been filed on 3 November 2018.¹ Judge Burke then struck his 12 January 2018 Order and allowed Mr. Hutchins “to move forward with the case relating the case back to where it stood as of [12 January 2018].” Mr. Hutchins then obtained five additional A&P summonses but did not serve any of the defendants for well over a year after Judge Burke’s 10 August 2018 Order.

C. First Amended Complaint and Mrs. Hutchins Joined as Plaintiff

¶ 6 On 16 October 2019, Larry Parrish, a Tennessee attorney, filed a motion to appear *pro hac vice* on Mr. Hutchins’s behalf. The first amended complaint was filed

¹ The date 3 November 2018 is incorrect but reflects the precise language used in the 10 August 2018 Order Granting Motion to Set Aside/Amend Dismissal. The correct date is 3 November 2017.

shortly thereafter on 5 November 2019. The first amended complaint added Mr. Hutchins’s wife, Angela Hutchins, as a plaintiff in the case. On 5 November 2019, the trial court issued a summons identifying Mr. and Mrs. Hutchins as plaintiffs. While this summons was not designated A&P, it listed the dates of the prior A&P summonses.

¶ 7 The first amended complaint reasserted allegations that a pharmacist wrongfully substituted one type of medication for that prescribed by Mr. Hutchins’s physician. It also added claims brought by Mrs. Hutchins for loss of consortium and spousal services.

¶ 8 Defendants moved to dismiss after they were served with the summonses and first amended complaint. In an order filed 25 February 2021, Judge Richard S. Gottlieb concluded that both Mr. and Mrs. Hutchins’s claims were barred by the statutes of limitations in N.C. Gen. Stat. §§ 1-15(c) and 1-52. Judge Gottlieb granted defendants’ motion to dismiss and dismissed plaintiffs’ claims with prejudice, noting that the trial court, “in its discretion, has considered other options and concludes that no result other than dismissal of this action with prejudice would suffice to address the failure to prosecute.”

¶ 9 On 24 March 2021, plaintiffs timely filed notice of appeal to this Court from the Order entered 25 February 2021 granting defendants’ Motion to Dismiss.

II. Motion to Dismiss

¶ 10 The dispositive issue in this case is whether the trial court erred in granting defendants’ motion to dismiss on grounds that plaintiffs’ claims are time-barred. We conclude that plaintiffs’ claims are barred by statutes of limitation and repose.

A. Standard of Review

¶ 11 “We review a dismissal under Rule 12(b)(6) de novo, viewing the allegations as true and in the light most favorable to the non-moving party.” *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5, 802 S.E.2d 888, 891 (2017) (*purgandum*). Dismissal pursuant to Rule 12(b)(6) is appropriate when one of three conditions is satisfied: “(1) when on its face the complaint reveals no law supports plaintiff’s claim; (2) when on its face the complaint reveals the absence of fact sufficient to make a good claim; and (3) when some fact disclosed in the complaint necessarily defeats plaintiff’s claim.” *Johnson v. Bollinger*, 86 N.C. App. 1, 4, 356 S.E.2d 378, 380 (1987) (citation omitted). “A statute of limitations can be the basis for dismissal on a Rule 12(b)(6) motion if the face of the complaint discloses that plaintiff’s claim is so barred.” *Reunion Land Co. v. Vill. of Marvin*, 129 N.C. App. 249, 250, 497 S.E.2d 446, 447 (1998) (citation and quotation marks omitted). “Whether a statute of repose has run is a question of law.” *Glens of Ironduff Prop. Owners Ass’n v. Daly*, 224 N.C. App. 217, 220, 735 S.E.2d 445, 447 (2012) (citation and quotation marks omitted).

B. Rule 4

¶ 12 Under Rule 4(c), service of the summons and of the complaint must be made

within 60 days after the date of the issuance of summons. N.C. R. Civ. P. 4(c). The trial court issued summonses on 3 November 2017, and Mr. Hutchins had until 2 January 2018 to serve defendants. Mr. Hutchins did not do so.

¶ 13 If defendants are not served within 60 days, the action may be continued by plaintiff through one of two methods of extension: 1) obtaining an endorsement upon the original summons for an extension of time; or 2) issuance of an A&P summons within 90 days of when the last endorsement or summons was issued. N.C. R. Civ. P. 4(d). Judge Burke closed the proceeding in the 12 January 2018 Order, and Mr. Hutchins had timely obtained his first A&P summons on 31 January 2018. He did not serve that summons on defendants.

¶ 14 Under Rule 4(d)(2), Mr. Hutchins had 90 days—until 1 May 2018—to obtain and serve another A&P summons on defendants. He did not do so.

¶ 15 Pursuant to Rule 4(e):

When there is neither endorsement by the clerk nor issuance of [A&P] 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. Thereafter, [A&P] summons may issue, or an extension be endorsed by the clerk, but, as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement.

N.C. R. Civ. P. 4(e).

¶ 16 In other words, when Mr. Hutchins failed to obtain another A&P summons

within 90 days from the date of the previous issuance, this action was discontinued as to any defendant not served within the statutorily mandated time. Mr. Hutchins was permitted to revive this action by obtaining another endorsement or A&P summons. However, “[a] discontinuance breaks the chain of summonses and a summons endorsed more than 90 days after the issuance of the original summons does not relate back to the original date of filing of the complaint.” *In re Adoption of Searle*, 74 N.C. App. 61, 65, 327 S.E.2d 315, 318 (1985) (citation omitted).

¶ 17 In his 10 August 2018 Order, Judge Burke stuck his dismissal Order dated 12 January 2018 and extended the time “for Plaintiff to obtain a summons relating back to where the summons stood as valid and alive on [12 January 2018], having now 10 days from the date of this Order to obtain a summons extending the original [3 November 2017] summons” Regardless, this Order purports to alter or ignore our Rules of Civil Procedure and is not effective to override the requirements of Rule 4.

¶ 18 In *Russ v. Hedgecock*, this Court held that trial courts are without jurisdiction “to prevent a discontinuance of an action under N.C.R. Civ. P. 4(e) where there is neither an endorsement of the original summons nor issuance of an [A&P] summons within ninety days after issuance of the last preceding summons.” 161 N.C. App. 334, 336, 588 S.E.2d 69, 70 (2003) (citation omitted). Such an order is “void *ab initio*[.] . . . a nullity[.] and may be attacked either directly or collaterally, or may simply be

ignored.” *Id.* at 337, 588 S.E.2d at 71 (citations and quotation marks omitted). Here, as in *Russ*, the trial court cannot disregard our Rules of Civil Procedure by purporting to prevent discontinuance or extend the 90-day window for timely issuance of an A&P summons. Thus, when Mr. Hutchins obtained a second A&P summons on 17 August 2018, he commenced an entirely new action. *See* N.C. R. Civ. P. 4(e).

C. Statute of Limitations

¶ 19 “Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff’s cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all.” *Shearin v. Lloyd*, 246 N.C. 363, 370, 98 S.E.2d 508, 514 (1957).

¶ 20 Mr. Hutchins’s medical malpractice claims are subject to a three-year statute of limitations. N.C. Gen. Stat. §§ 1-15(c), 1-52(5). Section 1-15(c) provides that a professional malpractice claim accrues “at the time of the occurrence of the last act of the defendant giving rise to the cause of action” § 1-15(c). The last act of negligence that plaintiffs could allege occurred on 27 September 2014, when the prescription was last refilled.

¶ 21 Section 1-15(c) also provides a narrow discovery rule for latent injuries. However, “the one-year-from-discovery provision of G.S. § 1-15(c) does not apply in this case because plaintiffs discovered the injury less than ‘two or more years after the occurrence of the last act of the defendant giving rise to the cause of action’”

Teague v. Randolph Surgical Assocs., P.A., 129 N.C. App. 766, 771, 501 S.E.2d 382, 386 (1998) (quoting § 1-15(c)). Here, plaintiffs’ amended complaint confirms that they knew on 13 November 2014, less than two months after the last prescription refill, that Mr. Hutchins was allegedly provided with a “non-bioequivalent medication.”

¶ 22 Plaintiffs argue that Mr. Hutchins’s claims did not accrue until 2018 or late 2019, when he was first diagnosed with a mold infection and connected that diagnosis to the medication that he was provided in 2014. However, this argument fails because plaintiffs already filed suit for damages arising from the prescription in 2017. “The date on which the statute of limitations begins to run is not altered by the fact that damages continue to accrue.” *Carl Rose & Sons Ready Mix Concrete, Inc. v. Thorp Sales Corp.*, 36 N.C. App. 778, 780, 245 S.E.2d 234, 235 (1978). Mr. Hutchins’s claims are time-barred because this action was commenced on 17 August 2018, almost a year after the statute expired.

¶ 23 The three-year statute of limitations period in section 1-52(5) applies to Mrs. Hutchins’s spousal loss-of-consortium claims. § 1-52(5). “Under North Carolina law, a spouse’s claim for loss of consortium must be joined with the other spouse’s claim for personal injury[,] . . . [and] is not barred by the statute of limitations so long as the original negligence claim of the injured spouse is not so barred.” *Sloan v. Miller Bldg. Corp.*, 128 N.C. App. 37, 40, 493 S.E.2d 460, 462 (1997) (citations omitted). The statute of limitations on Mr. Hutchins’s claims expired when he commenced this

action on 17 August 2018, thus barring Mrs. Hutchins’s claims.

¶ 24 Section 1-15(c) also establishes a four-year statute of repose. § 1-15(c) (“[I]n no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action . . .”). Consequently, Mrs. Hutchins had to bring her claims by 27 September 2018, and she was not added as a plaintiff in this action until the first amended complaint was filed on 5 November 2019. Assuming *arguendo*, Mrs. Hutchins’s claims “relate back” under N.C. R. Civ. P. 15(c) to either the time Mr. Hutchins first initiated this proceeding on 6 July 2017 or, as we’ve established, the commencement date on 17 August 2018, Rule 15(c) does not allow for relation back of new parties’ claims. *See Estate of Fennell v. Stephenson*, 354 N.C. 327, 334-35, 554 S.E.2d 629, 633-34 (2001) (citation omitted) (“[W]hile Rule 15 of the North Carolina Rules of Civil Procedure permits the relation-back doctrine to extend periods for pursuing claims, it does not apply to parties.”). Thus, Mrs. Hutchins’s claims are barred by the relevant statutes of limitations and repose.

D. Additional Issues on Appeal

¶ 25 Plaintiffs present several additional issues in their brief: 1) whether Judge Burke’s 12 January 2018 Order violated plaintiffs’ state and federal constitutional rights to due process; 2) whether plaintiffs did not have to obtain A&P summonses during the time Judge Burke’s 12 January 2018 Order “effectively” dismissed the case until 10 August 2018; and 3) whether the “legal effect” of Judge Burke’s 10 August

2018 Order was the same as if Mr. Hutchins had refiled his claims within a year of taking a Rule 41(a) dismissal. Plaintiffs raised none of these arguments before the trial court.² These arguments are therefore waived on appeal. *See* N.C.R. App. P. 10(a)(1).

¶ 26 Given our resolution of this matter, it is unnecessary to address whether the trial court abused its discretion by concluding that plaintiffs' claims should be dismissed for failure to prosecute.

III. Conclusion

¶ 27 For the foregoing reasons, we affirm the trial court's order and judgment dismissing this action with prejudice.

AFFIRMED.

Judge COLLINS concurs.

Judge JACKSON concurs in the result only.

Report per Rule 30(e).

² Transcripts from the trial proceedings were not included in the record on appeal. The parties consented to a narration of relevant trial proceedings pursuant to N.C.R. App. P. 9(c)(1).