

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

No. COA22-611

Filed 07 March 2023

Mecklenburg County, No. 21 CVD 2750

TAMARA NICOLE SCOTT and MICHAEL SCOTT, Plaintiffs,

v.

MEHMET ALI VURAL, BOBBY EUGENE NICHOLS, and KENAN GUNDOGDU,  
Defendants.

Appeal by Plaintiffs from order entered 30 December 2021 by Judge Paulina N. Havelka in Mecklenburg County District Court. Heard in the Court of Appeals 8 February 2023.

*The Cochran Firm Charlotte, by Faith R. Fox, for Plaintiffs-Appellants.*

*Hedrick Gardner Kincheloe & Garofalo L.L.P., by M. Duane Jones, Brooks P. Miller, and Linda Stephens, for Defendant-Appellee.*

GRIFFIN, Judge.

Plaintiffs Tamara Nicole Scott and Michael Scott appeal from an order granting Defendant Mehmet Ali Vural's motion to dismiss. Plaintiffs argue the trial court erred by granting Defendant's motion to dismiss because their complaint and summons were properly served upon Defendant. Plaintiffs also contend Defendant

failed to present sufficient evidence to rebut the presumption of proper service. We affirm the trial court's order.

### **I. Factual and Procedural Background**

On 24 February 2018, Plaintiffs and Defendant were involved in an automobile accident. On 26 February 2021, Plaintiffs filed a personal injury suit against Defendant and four co-defendants. Civil summonses were issued to each defendant. On 7 April 2021, Plaintiffs filed an amended complaint and issued an Alias and Pluries Summons to Defendant. The original summons, the Alias and Pluries summons, and complaints were mailed to Defendant at 7045 Ridge Lane Road, Charlotte, N.C. 28262.

On 14 May 2021, Plaintiffs filed an affidavit of service by certified mail, copies of a certified mail return receipt, and USPS tracking history dated 23 April 2021 confirming delivery at 7045 Ridge Lane Road, Charlotte, N.C. 28262. The signature box on the return receipt shows "C-19," as record of contactless delivery per USPS Covid Protocol. The USPS tracking history shows "delivered to an individual at the address."

On 8 October 2021, Defendant filed a motion to dismiss pursuant to Rules 12(b)4, (b)(5), and (b)(6) of the North Carolina Rules of Civil Procedure for "failure to provide adequate process, failure to provide adequate service of process, and/or failure to state a claim upon which relief may be granted." The basis for the motion was that Defendant (1) did not receive the summons and complaint; (2) did not sign

the certified mail receipt; and (3) no longer owns or resides at the Ridge Lane Road address. Evidence included a sworn affidavit stating the foregoing, as well as a warranty deed transferring ownership of the Ridge Lane Road property from Defendant to a buyer that was notarized on 18 May 2018.

On 30 November 2021, the trial court held a hearing on the motion and ruled in Defendant's favor. The trial court's order granting Defendant's motion to dismiss included the following findings of fact:

9. Defendant [] no longer owns or resides at . . . 7045 Ridge Lane Road [.]

. . .

11. Defendant [] did not receive the Summons and Complaint.

12. Defendant [] did not sign the certified mail receipt.

. . .

15 Plaintiffs failed to properly serve Defendant [] as a party[.]

Plaintiffs timely appeal from the trial court's dismissal order.

## **II. Analysis**

Plaintiffs appeal from an interlocutory order. Interlocutory orders are generally not appealable because the case is not disposed of but requires "further action by the trial court . . . to settle . . . the entire controversy." *Cagle v. Teachy*, 111 N.C. App. 244, 247, 431 S.E.2d 801, 803 (1993) (citation omitted). However,

interlocutory orders are immediately appealable “if a substantial right of one of the parties would be prejudiced should the appeal not be heard prior to final judgment.” *Id.* at 245–46, 431 S.E.2d at 802. Here, dismissal of Defendant affects Plaintiffs’ substantial right “to have determined in a single proceeding plaintiffs’ claims of defendants’ joint and concurrent negligence.” *Harris v. Daimler Chrysler Corp.*, 180 N.C. App. 551, 554, 638 S.E.2d 260, 264 (2006) (citation and internal quotation marks omitted).

Plaintiffs argue that the trial court erred in granting Defendant’s motion to dismiss because service of the summons and complaint was proper, and Defendant failed to present sufficient evidence to rebut the presumption of valid service. We address each argument.

#### **A. Sufficiency of Service of Process**

We review the grant of a motion to dismiss *de novo*. *Davis v. Urquiza*, 233 N.C. App. 462, 463–64, 757 S.E.2d 327, 329 (2014) (citation and internal quotation marks omitted). “When applying *de novo* review, we consider the case anew and may freely substitute our own ruling for the lower court’s decision.” *Bynum v. Wilson Cnty.*, 367 N.C. 355, 358, 758 S.E.2d 643, 645 (2014) (citation and internal quotation marks omitted).

A defendant may assert the defense of insufficiency of service of process by filing a responsive pleading or by motion. *See* N.C. R. Civ. P. 12(b)(5) “Where there is no valid service of process, the court lacks jurisdiction over a defendant, and a

motion to dismiss . . . should be granted.” *Davis*, 233 N.C. App. at 463–64, 757 S.E.2d at 329. “[W]here a statute provides for service of summons . . . by designated methods, the specified requirements must be complied with or there is no valid service.” *Lowman & Co. v. Ballard*, 168 N.C. 16, 18, 84 S.E. 21, 22 (1915) (citation omitted). “[S]tatutes concerning service of process must be strictly complied with, and [] even actual notice, if it does not comply with statutory requirements, does not give the court jurisdiction over a party.” *Davis*, 233 N.C. App. at 465, 757 S.E.2d at 330.

Here, Plaintiffs argue Defendant was properly served pursuant to Rule 4 of the North Carolina Rules of Civil Procedure, which requires “[t]he complaint and summons [to] be delivered to some proper person for service” and may be done by “mailing a copy of the summons and [] complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.” N.C. R. Civ. P. 4.

When a Defendant is served by “leaving the summons and complaint with a person other than the named defendant,” that person “must be . . . of suitable age and discretion, who lives with [the] defendant [at] . . . their usual place of abode.” *Guthrie v. Ray*, 293 N.C. 67, 70, 235 S.E.2d 146, 148 (1977) (citation and internal quotations omitted). When “delivery is made elsewhere the service is invalid.” *Id.*

Here, Plaintiffs sent the summons and complaint to Defendant at 7045 Ridge Lane Road, Charlotte, N.C. 28262. The documents were left with an unknown

individual according to USPS tracking history and the certified mail return receipt was signed “C-19.” Defendant presented evidence he has not lived at the Ridge Lane property since 2018. Additionally, there is no evidence in the record showing the summons and complaint were left with a “substitute person” who resides with Defendant or that he signed the return receipt. Plaintiffs sent the summons and complaint to Defendant at an address that is no longer his “dwelling house or usual place of abode[.]” Plaintiffs therefore failed to comply with statutory requirements for valid service of process upon Defendant.

#### **B. Rebutting Presumption of Valid Service of Process**

Next, Plaintiffs contend that the trial court erred in granting Defendant’s motion to dismiss because Defendant did not provide sufficient evidence to rebut the presumption of valid service of process.

“Although a return of service showing service on its face constitutes prima facie evidence of service, such showing can be rebutted[.]” *Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996) (citation omitted). “[A] defendant who seeks to rebut the presumption of [] service generally must present evidence that service of process failed to accomplish its goal of providing [the] defendant with notice of the suit.” *Davis*, 233 N.C. App. at 465, 757 S.E.2d at 330.

Plaintiffs argue that Defendant provided no documentation other than his affidavit that he did not receive the summons. Plaintiffs point to *Guthrie v. Ray* to support their contentions. However, in *Guthrie*, the summons and complaint were

served by the sheriff and left with the defendant's mother at the defendant's home and the only evidence provided was a single sworn affidavit by the defendant. *Guthrie*, 293 N.C. at 70, 235 S.E.2d at 148. Here, the summons and complaint were mailed to Defendant at a home that he had sold and vacated three years earlier and were left by a USPS worker with an unknown individual. Additionally, Defendant provided the certified mail return receipt signed "C-19" by the mail carrier in place of recipient's signature per USPS Covid-19 protocol; a tracking history report noting delivery to an "individual;" Defendant's sworn affidavit; and a copy of a general warranty deed showing transfer of ownership of the home from Defendant to the buyers signed, dated, and notarized on 23 May 2018. We conclude Defendant presented sufficient evidence to rebut the presumption of valid service and such evidence supports the trial court's conclusions of law that "Plaintiff's service of process failed to provide . . . notice of the lawsuit" and Defendant "was not properly served with the Summons and Complaint within the limitations period."

### **III. Conclusion**

Based on the foregoing reasons, we hold that the trial court properly granted Defendant's motion to dismiss. We therefore affirm the trial court's order.

AFFIRMED.

Judges WOOD and FLOOD concur.

Report per Rule 30(e).