Beyond jurisdiction: service of process, statutes of limitations, and the uninsured motorist carrier exception

Service of process—service of the documents initiating a civil lawsuit—is a frequent issue of concern for judicial officials and practitioners. Typically, we are concerned about service of process because it is one of the necessary elements of personal jurisdiction. A defect in the manner of service or in the process itself (*i.e.*, the initiating documents) can prevent the court from exercising jurisdiction over the person purportedly served. Questions about service of process and personal jurisdiction are extensive and complex and have been the subject of many blog posts, but this post will explore a different aspect of service of process—its interaction with statutes of limitations.

When thinking about statutes of limitations—or the time limits on when a lawsuit can be brought—we usually focus on the moment a lawsuit is commenced, not the moment of service. Service of process, however, is also an integral component of the commencement of a lawsuit, with important implications for analyzing statutes of limitations.

Statutes of Limitations

Generally, the initiation of a civil lawsuit is the relevant event, or tolling date, for calculating whether the time to bring a lawsuit has expired. N.C.G.S. § 1-15 states that a civil lawsuit "can only be *commenced* within the periods prescribed" for the claim at issue—that is, within the statute of limitations (emphasis added). N.C. Rule of Civil Procedure 3(a) provides that "[a] civil action is commenced by filing a complaint with the court" or "by the issuance of a summons." *Accord Roshelli v. Sperry*, 63 N.C. App. 509, 511 (1983).

So, the commencement of an action tolls the statute of limitations. But it's not that simple. The commencement of a civil action is not irreversible, meaning that a lawsuit that at first appears timely may later become barred. Because the continued validity of the commencement of an action depends on the subsequent perfection of service of process, the date on which an action is initiated can change. If an action is discontinued, subsequent acts reviving or reinitiating the action create a new commencement date for purposes of the statute of limitations.

Standard Framework: Service of Process & Statutes of Limitations

Even though they occur later in time, the issuance and service of process are integral parts of the commencement of a lawsuit. An action is commenced pursuant to Rule 3, but perfection of service of process pursuant to Rule 4 is also necessary. A defect can convert what would otherwise be a timely-filed lawsuit into one barred by the statute of limitations, retroactively invalidating the action's commencement date.

How can this happen?

First, North Carolina Rule of Civil Procedure 4(a) requires that a summons be issued within five days of the filing of a complaint. *See Selph v. Post*, 144 N.C. App. 606, 607 (2001). If a valid summons does not issue in that time, the original action is discontinued. *Roshelli*, 63 N.C. App. at 511. If this occurs, then the date of commencement will be deemed to be the date of issuance of the new, valid summons. *Id.*

Similarly, Rule 4(e) provides that if a summons is not served within 90 days of its issuance, the action is discontinued unless there has been an endorsement or alias & pluries summons issued to extend its life. Once an action has been discontinued, then the date of issuance of a subsequent summons reviving the lawsuit becomes the new date of commencement for the lawsuit. N.C. R. Civ. P. 4(e). If that new date falls outside the statute of limitations, then what was formerly a timely-filed lawsuit is now barred. *See, e.g.*, *Russ v. Hedgecock*, 161 N.C. App. 334, 337 (2003).

Whether the action is discontinued under Rule 4(a) or Rule 4(e), the effect is the same: the relevant tolling date is now the new date of commencement of the action, not the previous date of commencement of the discontinued action. Commencement of the action, however, remains the relevant event for purposes of calculating the statute of limitations. The inquiry simply becomes whether the original date of commencement was maintained by the subsequent perfection of service of process or if a discontinuance has created a new date of commencement. If an action is discontinued, then the date of commencement for the lawsuit will be the date of issuance of the new summons reinitiating the action. This new date of commencement is used to determine whether the action falls within the statute of limitations.

This framework—where the date of commencement may change but commencement remains the relevant event for calculating the statute of limitations—is the rule in almost all civil matters. Service of process need not occur within the time period of the statute of limitations so long as commencement of the lawsuit does. *See, e.g., Selph*, 144 N.C. App. at 608. Though failure to perfect service of process can retroactively affect the date of commencement, this does not change the fact that commencement—not service of process—remains the relevant event for purposes of the statute of limitations.

There is, however, an exception to this standard framework.

The Uninsured Motorist Carrier Rule: Service of Process as Tolling Date?

The exception applies to uninsured motorist coverage carriers ("UM carriers")[1] brought into a lawsuit as an unnamed defendant. For these defendants, the relevant event for tolling the statute of limitations is currently service of process, not commencement of the lawsuit.

As the Court of Appeals recently reiterated in *Dean v. Rousseau*, this rule for UM carriers is

"inconsistent with other applications of the statute of limitation which hold that cases are timely when filed within the statute of limitation, with service of process permitted within the time frames set forth in Rule 4 of the North Carolina Rules of Civil Procedure, even when service is accomplished after the statute of limitation has expired." 2022-NCCOA-376, ¶ 11 (quoting in full *Powell v. Kent*, 257 N.C. App. 488, 492 *disc. rev. denied*, 371 N.C. 338 (2018)).

North Carolina law allows a UM carrier to be brought into a civil action when it is "served with copy of summons, complaint or other process in the action against the uninsured motorist," at which point in time it becomes an unnamed defendant in the action. N.C.G.S. § 20-279.21. As the Court of Appeals observes in *Dean*, N.C.G.S. § 20-279.21 "does not specify a time limitation for service of the uninsured motorist carrier." 2022-NCCOA-376, ¶ 8. However, the court notes it is bound by a prior line of cases "standing for the proposition that service of the complaint and summons on an unnamed defendant uninsured motorist carrier must occur before the expiration of the applicable statute of limitations," that is, service of process is necessary to toll the statute of limitations in this context. *Id.* at ¶ 5 (citing as the line of cases *Thomas v. Washington*, 136 N.C. App. 750 (2000); *Davis v. Urquiza*, 233 N.C. App. 462 (2014); *Powell v. Kent*, 257 N.C. App. 488 (2018)).

Where does this proposition come from? The answer is not entirely clear, but a review of the cases provides some insight.

In both the *Thomas* and *Davis* cases, service was first achieved on the named defendants (that is, the uninsured motorists themselves). After this happened, multiple alias and pluries summonses were issued before eventually being served on the UM carriers. In both cases, alias and pluries summons were served on the UM carriers well outside of the statute of limitations.

Thomas v. Washington

In *Thomas*, the Court of Appeals opinion noted that "[t]he date an action is commenced becomes crucial when a statute of limitations is pled in bar of the action" and that "Rule 3 . . . provides that a civil action is commenced when a complaint is filed with the court." *Thomas*, 136 N.C. App. at 754 (2000). The *Thomas* court then found that alias and pluries summonses were not valid when issued after the original summons had already been served on all named defendants. 136 N.C. App. at 755 (2000) (finding "the provisions relating to issuance of alias or pluries summonses did not apply, as both individual defendants were served personally with the original summons" and "provisions for . . . issuance of an alias or pluries summons *apply only when the original summons was not served*") (cleaned up). That is to say, until a UM carrier is served, they are not yet a defendant in the lawsuit, and thus Rule 4(d), which allows the issuance of an alias and pluries summons "[w]hen any defendant in a civil action is not served within the time allowed for service," does not allow this extension for a UM carrier not yet brought into the lawsuit as a defendant.

The *Thomas* court's limit on the use of alias and pluries summonses does not on its face mandate a shift in the statute of limitations tolling event from commencement to service of process. To the

contrary, it aligns with the standard framework laid out above: it was not the date of service of process that created a statute of limitations problem, but rather, the defect in the process. Because service was never perfected, the action was discontinued as to that defendant (the UM carrier)—which did, of course, create a statute of limitations issue.

Davis v. Urquiza

The *Davis* court likewise found alias and pluries summonses invalid as they were issued after service had been achieved on the named defendant. 233 N.C. App. at 467 ("As we held in *Thomas,* plaintiffs' alias and pluries summonses issued after [named] defendant was served have no legal effect."). The failure to perfect service of process[2] alone would have barred the action as to the UM carrier defendant.[3] But the *Davis* opinion also introduced a new requirement—that the date of service of process must fall within the statute of limitations. Specifically, the *Davis* court found that "the carrier must be served by the traditional means of service, within the limitations period" and "service . . . outside of the limitations period mandated dismissal." 233 N.C. App. at 467. The introduction of a requirement that service of process be made within the statute of limitations is perplexing.[4] The *Davis* court found the plaintiff never achieved effective service of process as to the UM carrier, making any focus on the date of service of process extraneous. *Id.* at 466-67.

Powell v. Kent

When the Court of Appeals confronted a different set of facts in *Powell*, it reinforced the focus on the date of service of process in the UM context. In *Powell*, the action was commenced within the statute of limitations and the original summons was served on the UM carrier—no alias and pluries summons needed—but the summons was served outside the statute of limitations. Under the reasoning in *Thomas* and *Davis*, the summons served on the uninsured motorist carrier was not itself defective. The *Powell* court, however, found itself bound by the following language in *Davis*: "[T]he carrier must be served by the traditional means of service, *within the limitations period*." *Powell*, 257 N.C. App. at 492 (quoting in full *Davis*, 233 N.C. App. at 467) (emphasis added). The *Powell* court articulated its understanding of the *Davis* rule as one requiring "that service of process also be accomplished before the date the statute of limitation expires" despite its belief that this rule would "appear to be inconsistent with other applications of the statute of limitation which hold that cases are timely when filed within the statute of limitation, with service of process permitted within the time frames set forth in Rule 4 . . . even when service is accomplished after the statute of limitation has expired." 257 N.C. App. at 492.

As a result of this chain of events, the calculation of statutes of limitations for actions against uninsured motorist carriers is currently an anomaly. In *Dean*, the Court of Appeals again observed that "the rule . . . seems inapposite and inconsistent with this State's Rules of Civil Procedure and how the statute of limitations is evaluated in other civil matters," and asked for "clarification and further guidance" on the issue. 2022-NCCOA-376, ¶ 13. The North Carolina Supreme Court

previously denied a petition for discretionary review in *Powell*, but the petition for discretionary review currently pending in *Dean* provides yet another opportunity for clarification of this issue.

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[1] A UM carrier provides insurance coverage to a driver in the event of an accident where the at-fault driver has no insurance.

[2] Before seeking alias and pluries summonses, the plaintiff in *Davis* also attempted service of the original summons and complaint (within the statute of limitations) on a claims adjuster for the UM carrier, which service of process the court also found to be defective. 233 N.C. App. at 466.

[3] Indeed, the trial court in *Davis* dismissed the claims against the UM carrier "for insufficiency of process or insufficiency of service of process." 233 N.C. App. at 468.

[4] This confusion may originate with the *Davis* court's misapprehension of *Lawrence v. Sullivan*, 192 N.C. App. 608 (2008), which it cites for the proposition that the "defendant was entitled to a dismissal due to insufficient process or service of process within the applicable limitations period." 233 N.C. App. at 466. *Lawrence*, which does not involve a UM carrier defendant, applies the standard framework in the context of voluntary dismissals—where a voluntary dismissal is taken after defective service, the failure to perfect service means the original commencement date is no longer considered to have tolled the statute of limitations and the voluntary dismissal does not then toll the statute of limitations for an additional year. 192 N.C. App. at 621-23. Indeed, in *Lawrence* it is clear the plaintiff would have timely commenced her action when she filed her complaint within the statute of limitations and served it outside the statute of limitations, but for the fact that the service was defective. *Id.* at 622.