No. COA21-530 DISTRICT 19D

NORTH CAROLINA COURT OF APPEALS

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| ANTHONY JOHNSON AS THE ADMINISTRATRIX OF THE ESTATE OF VIRGINIA M. JOHNSON, DECEASED, ANTHONY JOHNSON, INDIVIDUALLY,  Plaintiffs,  CHARLES JOHNSON, THOMARINE JACKSON, CYNTHIA MCPHAUL, TERRY JUANITA JOHNSON,  Nominal Plaintiffs or Defendants   v.    DERWIN JOHNSON, VERONICA JOHNSON, AND HARLEY E. JOHNSON INDIVIDUALLY AND IN  HIS CAPACITY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HARLEY T. JOHNSON. | )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  ) | From Hoke County  No. 20 CVS 179 |

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**PLAINTIFFS-APPELLANTS’ BRIEF**

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**PLAINTIFFS-APPELLANTS’ BRIEF**

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## ISSUES PRESENTED

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## STATEMENT OF THE CASE

Plaintiff commenced this action by the filing of a complaint, notice of lis pendens and issuance of summons on 9 March 2020. (R 2-95). The Clerk of Court issued an additional summons for Defendants Derwin and Veronica Johnson on 17 April 2020. (R 96). Defendant Harley E. Johnson filed an amended Answer, Motion to Dismiss, Motion for Attorney’s fees, and Counterclaim on 21 August 2020. (R 103). Defendants Derwin and Veronica Johnson filed an Answer, Counterclaim and Crossclaim on or about 29 May 2020. (R 110). Plaintiffs Answered Defendants Derwin and Veronica Johnson’s Counterclaim on or about 29 July 2020. (R 123). A Judgment dismissing the case with prejudice for lack of subject matter jurisdiction was entered on 14 December 2020. (R 136). Plaintiff Noticed its appeal on 21 January 2021 after receiving service of a partial order on 22 December 2020. (R 139). A transcript of the 26 October 2020 hearing was ordered on 2 February 2021 and delivered 4 May 2021. (R 145, App 12-15). The Proposed Record on Appeal was served on 3 June 2021. (R 152). Defendants Derwin and Veronica Johnson’s (“Objecting Appellees”) objections were served on 25 June 2021. Defendants Appellees Derwin and Veronica Johnson timely moved for judicial settlement and the Hoke County Superior Court set the date of the judicial settlement to 10 September 2021. (R 151). Defendant Appellee Harley Johnson did not object to the proposed record on appeal nor to the other Appellees’ objections. The Appellant and Objecting Appellees came to an agreement as to which documents would be included in the printed record and which documents would be included in the 11(c) supplement on 7 September 2021 and the record was deemed Settled on that date. (Id.)

## STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

From the Order finding that the Court did not have subject matter jurisdiction heard at the October 26, 2020 Superior Court Civil Session and entered on December 14, 2020 by the Superior Court of Hoke County, the Honorable Michael A. Stone, Judge Presiding. The parties appealing are the plaintiffs Anthony Johnson individually and as the Administratrix of the Estate of Virginia M. Johnson and Charles Johnson. Judge Stone’s order and judgment is a final judgment, and appeal therefore lies to the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(b).

## STATEMENT OF THE FACTS

{{ facts }}

## ARGUMENT

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“Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute.” [Harris v. Pembaur, 84 N.C.App. 666, 667, 353 S.E.2d 673, 675 (1987)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987035834&pubNum=0000711&originatingDoc=Ib5c6a0a0745e11e68bf9cabfb8a03530&refType=RP&fi=co_pp_sp_711_675&originationContext=document&transitionType=DocumentItem&ppcid=1220a3126dde4204af1be3852a4774b9&contextData=(sc.Keycite)#co_pp_sp_711_675). “Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal.” McKoy v. McKoy, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). “‘Under a de novo review, the court considers the matter anew and freely substitutes its own judgment’ for that of the lower tribunal.” State v. Williams, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting In re Greens of Pine Glen, Ltd. P’ship, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)); see also Craig v. New Hanover Cnty. Bd. of Educ., 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (“Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” (quotation marks omitted)).

While the Court appears to have made its ruling of lack of subject matter jurisdiction based on Plaintiffs’ failure to “perfect service,” perfecting service is not determinative of subject matter jurisdiction and is inappropriate to consider in a Motion under Rule 12(b)(1). Here, the Clerk of Court issued one summons upon filing on 9 March 2020 to Defendants Harley Johnson and Cynthia McPhaul. (R 2). Recognizing its error, the Clerk of Court issued an additional summons on 17 April 2020 to Derwin Johnson and Veronica Johnson (R 96).

Failure of the Clerk of Court to issue a summons to all Defendants in an action does not implicate the subject matter jurisdiction of the Superior Court.

. . . “ ‘[T]he issuance and service of process is the means by which the court obtains jurisdiction, and thus where no summons is issued, the court acquires jurisdiction over neither the parties nor the subject matter of the action.’ ” . . . Understood in context, this language was used to emphasize that a summons had in fact been issued in In re J.T. (I), as had been the case in In re Poole. Id.; In re Poole, 151 N.C.App. at 475, 568 S.E.2d at 202. Read literally and in isolation, however, this language could be interpreted to mean the failure to issue a summons defeats subject matter jurisdiction. We disavow such an interpretation. The summons relates to subject matter jurisdiction, albeit only insofar as it apprises the necessary parties that the trial court's subject matter jurisdiction has been invoked and that the court intends to exercise jurisdiction over the case. Thus, although the summons itself does not establish subject matter jurisdiction, it can be used as some proof of invocation of the trial court's subject matter jurisdiction. This invocation is accomplished when a proper controversy has been brought before the court. See Peoples, 94 N.C. at 172.

In re K.J.L., 363 N.C. 343, 347–48, 677 S.E.2d 835, 838 (2009) (emphasis added). In KLJ, the Court explained that “the summons is not the vehicle by which a court obtains subject matter jurisdiction over a case, and failure to follow the preferred procedures with respect to the summons does not deprive the court of subject matter jurisdiction.” Id. at 346, 667 S.E.2d at 837.

Defendants can waive any defect, non-existence, or service of process and the Superior Court retains subject matter jurisdiction.

Because the summons affects jurisdiction over the person rather than the subject matter, this Court has held that a general appearance by a civil defendant “waive[s] any defect in *or nonexistence of* a summons.” *Dellinger v. Bollinger,* 242 N.C. 696, 698, 89 S.E.2d 592, 593 (1955) (emphasis added) (citations omitted); *see also Hatch v. Alamance Ry. Co.,* 183 N.C. 617, 628, 112 S.E. 529, 534 (1922) (Clark, C.J., dissenting) (“[A]ppearance in an action dispenses with the necessity of process. Indeed, there are numerous cases that although there has been no summons at all issued, a general appearance, by filing an answer or otherwise, makes service of summons at all unnecessary.” (citations omitted)).

In re K.J.L., 363 N.C. 343, 347, 677 S.E.2d 835, 837–38 (2009) (emphasis added).[[1]](#footnote-1)

While there was no affidavit of service filed in this case yet, Appellant’s failure to file an affidavit of service is irrelevant to Appellee’s motion to dismiss for lack of subject matter jurisdiction or Appellee’s motion to dismiss under Rule 12 (b)(6), (which motion was not argued nor considered by the Court).

### THE TRIAL COURT ERRED WHEN IT DISMISSED PLAINTIFF’S CLAIMS FOR FAILURE TO STATE A CLAIM UNDER RULE 12(B)(6) WITHOUT HEARING THAT MOTION AND AFTER IT CLAIMED IT HAD NO SUBJECT MATTER JURISDICTION.

“The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion, the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.” Stanback v. Stanback, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). “This Court must conduct a de novo review of the pleadings to determine their legal sufficiency and to determine whether the trial court’s ruling on the motion to dismiss was correct.” Leary v. N.C. Forest Prods., Inc., 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, aff’d per curiam, 357 N.C. 567, 597 S.E.2d 673 (2003).

#### The parties were not heard on Defendant Harley Johnson’s motion to dismiss for failure to state a claim under Rule 12(b)(6). The Court’s refusal to hear Appellants on that motion, and failure to consider Appellants’ Complaint in its determination is error.

As an initial matter, the Court cannot dismiss a lawsuit for a lack of subject matter jurisdiction and simultaneously rule on the merits under Rule 12(b)(6). Holton v. Holton, 258 N.C. App. 408, 415–16, 813 S.E.2d 649, 655 (2018) (“a dismissal under Rule 12(b)(1) must be made without prejudice, since a trial court without jurisdiction would lack authority to adjudicate the matter.”) (citation omitted). The Court expressly recognized this limitation when it stated:

16 MS. PHAIR: Thank you. Your Honor, I hate to --

17 to be -- but I know my client's going to ask. I did have a

18 pending attorney's-fee issue with regard to this case, and I

19 don't know if your -- Your Honor wants ---

20 THE COURT: Well, Ms. Phair, this Court does not

21 have subject-matter jurisdiction ---

22 MS. PHAIR: Okay.

23 THE COURT: --- to enter any order ---

24 MS. PHAIR: Okay.

25 MR. PINERO: Your Honor ---

1 THE COURT: --- to make any adjudication

(App 10-11, Transcript 17-18)

Moreover, there is no mention of the motion to dismiss for failure to state a claim by any party or the Court in the transcript. The matter was not argued nor contemplated by the Court. Notwithstanding the lack of any direction to mention Rule 12(b)(6), the Court signed an order drafted by counsel for the Defendant Harley Johnson, over Appellants’ objection, dismissing the case under Rule 12(b)(6). (See R\_Supp 170-74 submitted to the Court by email.) Notwithstanding the Court’s error, Appellants’ Complaint states a claim and the Court’s dismissal is further in error.

#### Appellants’ Complaint states a claim and cannot be dismissed under Rule 12(b)(6).

Appellants’ Complaint states claims for Quiet Title, Breach of Fiduciary Duty, Constructive Fraud, Fraud, Punitive Damages, and for an accounting.

##### Appellants state a claim for Quiet Title.

In order to state a claim to quiet title a plaintiff must allege that it (1) “have some estate or interest in [the property]; and [2] that the defendant must assert some claim to such land adverse to the plaintiff's title, estate or interest.” Wells Fargo Bank, N.A. v. Hundley, 233 N.C. App. 240, 758 S.E.2d 707 (2014) (citation omitted). Here, the Complaint alleges that :

* 1. **Plaintiff Appellants are the heirs at law of the estate of Virginia Johnson and Harley Johnson. (R 7-8 pp 10.),**
  2. **Virginia Johnson had a right of survivorship over the properties at issue. (R 11-12 pp 46, 48),**
  3. **The deeds purporting to vest title in Defendant Appellants are not sufficient to sever title and that they were not valid conveyances. (R 12 pp 47, 49, 50),**
  4. **The properties referenced in the DJ Deed and the HEJ Deed belonged to Virginia Johnson in fee simple at her death and passed by intestacy at her death. (R 12 pp 50), and**
  5. **Defendants have excluded the heirs of Virginia Johnson including Plaintiff Anthony Johnson from the properties described in the DJ Deed and the HEJ Deed. (R 9 pp 19).**

##### Appellants state a claim for Breach of Fiduciary Duty.

A claim for breach of fiduciary duty requires the existence of a fiduciary duty. Governors Club, Inc. v. Governors Club Ltd. P'ship, 152 N.C. App. 240, 247, 567 S.E.2d 781, 786 (2002), aff'd, 357 N.C. 46, 577 S.E.2d 620, 2003 WL 1572130 (2003) Here, the Complaint alleges that :

* 1. **Virginia Johnson and Harley T. Johnson suffered from advanced dementia as early as January of 2009 and did not have the capacity thereafter to transfer property, sign a will, or appoint a power of attorney. (R 8 pp 12),**
  2. **At all relevant times, Defendants Derwin Johnson and Harley E. Johnson had access to Virginia Johnson and Harley T. Johnson as caretakers., (R 8 pp 13),**
  3. Derwin Johnson drafted [a power of Attorney], which appointed Derwin Johnson as power of attorney over Virginia Johnson's affairs. (R 9 pp 21),
  4. Derwin Johnson drafted [a power of Attorney], which appointed Derwin Johnson as power of attorney over Harley T. Johnson's affairs. (R 9 pp 24),
  5. As Power of Attorney for Virginia Johnson, Defendant Derwin Johnson owed fiduciary duties to Virginia Johnson. (R 12 pp 54),
  6. As Power of Attorney for Harley T. Johnson, Defendant Derwin Johnson owed fiduciary duties to Harley T. Johnson. (R 12 pp 55),
  7. As purported Trustee for Harley T. Johnson, Defendant Harley E. Johnson owed fiduciary duties to Harley T. Johnson. (R 12 pp 56),
  8. As Personal Representative to Harley T. Johnson's Estate, Defendant Harley E. Johnson owed fiduciary duties to the heirs of Harley T. Johnson including Plaintiffs. (R 12 pp 57),
  9. Defendant Derwin Johnson breached his duties by:
     1. engaging in self dealing;
     2. transferring Virginia Johnson's personal property to himself;
     3. drafting and causing the VJ Trust to be executed and filed with the Hoke County Register of Deeds;
     4. drafting, signing, and filing a fraudulent will that he signed as power of attorney;
     5. drafting, signing, and filing a fraudulent trust that he signed as power of attorney;
     6. causing the DJ Deed to be executed and filed with the Hoke County Register of Deeds;
     7. and by otherwise abusing his position of trust and confidence as described above to the detriment of Plaintiffs. (R 13 pp 58)
  10. Defendant Harley E. Johnson breached his duties by:
      1. engaging in self dealing;
      2. transferring Harley T. Johnson's personal property to himself;
      3. causing the Harley T Trust to be executed and filed with the Hoke County Register of Deeds;
      4. d. causing the HEJ Deed to be executed and filed with the Hoke County Register of Deeds;
      5. forging Harley T. Johnson's signature on the Harley T Trust;
      6. and by otherwise abusing his position of trust and confidence as described above to the detriment of Plaintiffs. (R 13 pp 59)

##### Appellants state a claim for Constructive Fraud.

“To survive a motion to dismiss, a cause of action for constructive fraud must allege (1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that plaintiff was, as a result, injured.”  White v. Consol. Plan., Inc., 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004) (citation omitted). The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself. Id As discussed above, the Complaint alleges that both Defendants Harley and Derwin Johnson engaged in self dealing.

##### Appellants state a claim for Fraud.

The essential elements of actionable fraud are: “(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.” Ragsdale v. Kennedy, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974). “It is sufficient if, upon a liberal construction of the whole pleading, the charge of fraud might be supported by proof of the alleged constitutive facts.” Becker v. Graber Builders, Inc., 149 N.C. App. 787, 793, 561 S.E.2d 905, 910, 2002 WL 552763 (2002). Here, the Complaint alleges that

* 1. Defendants Derwin Johnson and Veronica Johnson agreed to defraud Plaintiff . . .and take her personal property by drafting, and executing or notarizing a fraudulent Will, the Harley T Trust, and the VJ Trust.” (R 15 pp 72)
  2. **Defendant Veronica Johnson made misrepresentations in her notary statement concerning the presence of the signatory to the above referenced documents. (R 16 pp 73)**
  3. **Defendant Harley E. Johnson forged Harley T. Johnson's name on the Harley T. Trust. (R 16 pp 74)**
  4. **Defendants knowingly made those misrepresentations with the intent to induce Virginia Johnson, Harley T. Johnson, and their heirs to accept a state of affairs where Derwin Johnson received substantially all of Virginia Johnson and Harley T. Johnson's property. (R 16 pp 75)**
  5. **Plaintiffs reasonably relied on Defendants' misrepresentations. (R 16 pp 76)**
  6. **All Defendants conspired to damage Plaintiffs by causing powers of attorney documents and deeds to be executed in order to keep property out of the hands of Plaintiffs and the other heirs of Harley T. and Virginia Johnson. (R 16 pp 77)**
  7. **Plaintiffs have been damaged by Defendants' actions in an amount exceeding $25,000. (R 16 pp 78),**

##### Appellants state a claim for Punitive Damages.

“The aggravated conduct which supports an award for punitive damages when an identifiable tort is alleged may be established by allegations of behavior extrinsic to the tort itself, as in slander cases. Or it may be established by allegations sufficient to allege a tort where that tort, By its very nature, encompasses any of the elements of aggravation. Such a tort is fraud, since fraud is, itself, one of the elements of aggravation which will permit punitive damages to be awarded.” Newton v. Standard Fire Ins. Co., 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976). Here, the Complaint alleges fraud and further alleges willfill, wanton, and malicious acts. (R 16 pp80).

##### Appellants state a claim for an Accounting.

“The first cause of action is by tenants in common against other tenants in common for an accounting. The claim is based on concerted action by the defendants. Hence, it was proper to sue the defendants individually to seek an accounting.” Davis v. Davis, 246 N.C. 307, 309, 98 S.E.2d 318, 321 (1957)

Here, the Complaint alleges that the heirs and cotenants are entitled to an accounting.

## Conclusion

The trial Court’s decision to dismiss this action for lack of subject matter jurisdiction based on the failure of perfection of service was in error and Appellant stated a claim for all of it’s causes of action. Therefore, the Court of Appeals should vacate the Order dismissing Plaintiffs’ claims and remand the case to allow the Clerk of Court to correct its issues such that this case can proceed on the merits.

Respectfully submitted, this 21st day of October 2021.

OAK CITY LAW LLP

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## CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing pursuant to North Carolina Rule of Appellate Procedure 26 by US mail with sufficient postage addressed to the following persons at the following addresses:

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This the 21st day of October, 2021.

/s/ Samuel Pinero II

Samuel Pinero II

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Plaintiff certifies that the foregoing brief, which was prepared using a 14-point proportionally spaced font with serifs, is less than 8,750 words (excluding covers, captions, indexes, tables of authorities, counsel’s signature block, certificates of service, this certificate of compliance, and appendixes) as reported by the word-processing software.

/s/ Samuel Pinero II

Samuel Pinero II

No. COA21-530 DISTRICT 19D

NORTH CAROLINA COURT OF APPEALS

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PLAINTIFFS-APPELLANTS’ BRIEF

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## APPENDIX

[APPENDIX APP **Error! Bookmark not defined.**](#_Toc373686)

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1. While the court did not make a ruling or hear any motion concerning personal jurisdiction, Defendants all made counterclaims subjecting them to the jurisdiction of the Court.

   She also filed a counterclaim against plaintiff along with her answer. Once defendant submitted herself to the jurisdiction of the court, then the defense of lack of jurisdiction over the person was no longer available to her. A defendant submits to the jurisdiction of the court by formally entering a voluntary appearance, by seeking some affirmative relief at the hands of the court, or by utilizing the facilities of the court in some manner inconsistent with the defense that the court has no jurisdiction over her. Simms v. Stores, Inc., 285 N.C. at 156, 203 S.E.2d at 776.

   Harris v. Pembaur, 84 N.C. App. 666, 670, 353 S.E.2d 673, 676 (1987). [↑](#footnote-ref-1)