

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF SPARTANBURG )  
 )  
 John Doe, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 City of Duncan, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 C.A. NO.: 2008-CP-42-475

**MEMORANDUM IN SUPPORT OF  
 DEFENDANT’S MOTION TO DISMISS**

**TO: PLAINTIFF AND HIS ATTORNEY OF RECORD, GREGG MEYERS,  
 ESQUIRE:**

Defendant City of Duncan Fire Department respectfully submits this memorandum in support of its Motion to Dismiss.

**Facts**

A Complaint, but no Summons, was filed in this matter on January 28, 2008. Over four years later, on February 21, 2012, an Amended Complaint, but still no summons, was filed. The Plaintiff did not file a motion to amend the original Complaint. Thereafter, on or around February 27, 2012, the Plaintiff purported to serve the Amended Complaint (again, with no Summons) on the Defendant. On March 15, 2012, this Motion was filed.

**Argument**

**1. Plaintiff failed to commence this action**

The Plaintiff has failed to commence this action for a number of reasons. First, S.C. Code Ann. § 15-3-20(b) provides that a civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing. (emphasis added). Moreover, the South Carolina Supreme Court has stated that “in South Carolina a civil action is commenced by the filing and service of a

summons and complaint.” *Brown v. Evatt*, 322 S.C. 189, 470 S.E.2d 848 (1996) (citations omitted)(emphasis added). In this case, the Plaintiff did not file a summons with his original Complaint, nor did he file one with his Amended Complaint. Since the Plaintiff failed to file and serve a summons, this matter should be dismissed.

Next, as set forth above, S.C. Code Ann. § 15-3-20(b) provides that a civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing. (emphasis added). In this case, the Plaintiff does not even purport to serve the Defendant (with the Amended Complaint) until over four years after this action was filed. Thus, even assuming *arguendo* that the Plaintiff *did* file and/or serve a summons in this case, the delay in service is well in excess of the 120 day time limit set forth in S.C. Code Ann. § 15-3-20(b). Therefore, this matter should be dismissed.

Finally, by failing to file a summons and to timely file and serve the Defendant with a summons and complaint, this court has neither subject matter jurisdiction over the action, nor personal jurisdiction over the Defendant. Subject matter jurisdiction vests in the circuit court upon commencement of the action, that is, when the summons and complaint was served, not when filed. *First Palmetto State Bank vs. Boyles*, 302 S.C. 136, 394 S.E.2d 313 (1990). Moreover, a summons is not mere notice, but a means for giving jurisdiction to the court, and unless it is waived, the court cannot otherwise obtain personal jurisdiction. *Brown v. Evatt*, 322 S.C. 189, 470 S.E.2d 848 (1996). Again, in this case, the Plaintiff has failed to file and serve a summons within the time period allowed by S.C. Code Ann. § 15-3-20(b) and, as such, this action has not been commenced. Therefore, this Court lacks both personal jurisdiction over the Defendant and subject matter jurisdiction over this action. Thus, this matter should also be

dismissed pursuant to Rules 12(b)(1) and 12(b)(2) of the South Carolina Rules of Civil Procedure.

2. **Plaintiff's Amended Complaint should be dismissed as Plaintiff failed to attach a summons and, as such, failed to perfect service and service of process in accordance with Rule 12(b)(4)(5) of the South Carolina Rules of Civil Procedure**

As discussed above, the Plaintiff has failed to perfect service of process in this case. Rules 12(b)(4) and (5) of the South Carolina Rules of Civil Procedure allow a party to raise the issues of insufficiency of process and insufficiency of service of process, respectively, by way of a Motion to Dismiss. As set forth above, in South Carolina a civil action is commenced by the filing and service of a summons and complaint. *Brown v. Evatt*, 322 S.C. 189, 470 S.E.2d 848 (1996) (citations omitted). A summons is not a mere notice, but a means for giving jurisdiction to the court, and unless it is waived, the court cannot otherwise obtain personal jurisdiction. *Id.* In this case, the Plaintiff has failed to serve the Defendant with a Summons. Moreover, the only pleading with which this Defendant has been served is the Amended Complaint that was purportedly served on February 27, 2012. Since no summons has ever been filed or served, this matter should be dismissed pursuant to Rules 12(b)(4) and (5) of the South Carolina Rules of Civil Procedure.

3. **Plaintiff failed to move to amend his Complaint pursuant to Rule 15 of the South Carolina Rules of Civil Procedure. Rule 15 of the South Carolina Rules of Civil Procedure requires such motion and therefore said Amended Complaint should be dismissed**

The Plaintiff did not seek leave from the Court to amend his Complaint. Rule 15 of the South Carolina Rules of Civil Procedure states:

a party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to

which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fifteen days after service of the named amended pleading, whichever period may be the longer, unless the court otherwise orders.

In the present case, the Plaintiff simply filed the Amended Complaint without seeking leave from the Court. Under normal circumstances, this case would have been placed on the trial roster well before the Amended Complaint was filed. As such, the Plaintiff would have needed leave from the Court to file the Amended Complaint pursuant to Rule 15.

In this case, however, as set forth in an email from counsel for the Plaintiff to the Spartanburg County Clerk of Court (a copy of which is attached hereto as "Exhibit A" and incorporated by reference herein), the Plaintiff intended to voluntarily dismiss the case in February of 2009. Presumably, the case was never placed on the trial roster because the Plaintiff's counsel indicated that he was going to dismiss it. Accordingly, the Plaintiff is estopped from asserting that he can file the Amended Complaint in this matter without leave of this Court. Therefore, the Amended Complaint is invalid and should be dismissed.

4. **This action should be dismissed pursuant to Rule 12(b)(6) on the grounds that the Plaintiff is judicially estopped from bringing this action**

The Plaintiff has filed an almost identical complaint in *John Doe vs. Barry Frost*, Case No.: 2009-CP-42-2662. Barry Frost served as the Chief of the Duncan Fire Department at the time of the actions complained of by the Plaintiff in that case, as well as this case. In that case, the Defendant moved to dismiss that action on the grounds that the Plaintiff failed to name the agency or political subdivision liable for the act (i.e., allegedly, the City of Duncan) in accordance with the Tort Claims Act. S.C. Code Ann. § 15-78-70(c) provides that a person,

when bringing an action against a governmental entity under the provisions of [the Tort Claims Act], shall name as a party defendant only the agency or political subdivision for which the employee was acting. At the hearing on that Motion to Dismiss, the Plaintiff argued that he did not need to name the City of Duncan because Mr. Frost was individually liable because his liability did not arise out of his employment as fire chief for the Town of Duncan.

In order for a government employee to be individually liable for a tort, pursuant to S.C. Code Ann. § 15-78-70(b), the employee's conduct must not have been within the scope of his official duties, or it must have constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. Conversely, S.C. Code Ann. § 15-78-60(17) provides that a governmental entity is not liable for loss resulting from employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. Thus, by arguing that the City of Duncan did not have to be named in the case against Mr. Frost, the Plaintiff has effectively taken the position that the City of Duncan is not liable in this matter. Therefore, the Plaintiff is now judicially estopped from asserting that the City is liable and bringing this action.

The following elements are necessary for the application of the doctrine of judicial estoppel: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. *Cothran vs. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004). Applying these

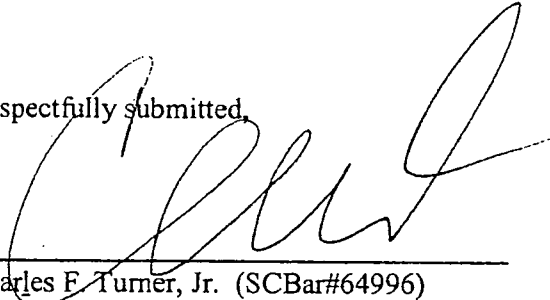
elements to the present case, the Plaintiff is judicially estopped from asserting that the Defendant City of Duncan is liable in this matter.

In *Doe vs. Frost*, the Plaintiff took the position that Mr. Frost was individually liable (i.e., that his conduct fell outside his scope of employment); whereas, in this matter, the Plaintiff now attempts to connect the alleged actions of Mr. Frost to the City of Duncan (i.e., that his conduct was within his scope of employment). These inconsistencies were taken by the same party (the Plaintiff), in the same proceedings involving the same facts. Moreover, the Plaintiff benefited from this position in the *Doe vs. Barry Frost* case by using that position to contest a motion to dismiss. These positions are totally inconsistent and, upon information and belief, were taken as part of an intentional effort to mislead this Court. Therefore, the Plaintiff is estopped from asserting that the City of Duncan is liable in this matter. As such, the Plaintiff has failed to state a claim upon which relief can be granted, and this matter should be dismissed with prejudice.

#### Conclusion

Based on the arguments and authorities presented above, the Court should grant the Defendant's Motion to Dismiss.

Respectfully submitted,



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May 16, 2012  
Greenville, South Carolina

