

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

STATE OF SOUTH CAROLINA )  
COUNTY OF SPARTANBURG )

IN THE COMMON PLEAS COURT

John Doe, )  
Plaintiff, )  
-vs- )  
City of Duncan Fire, )  
Department, )  
Defendant. )

TRANSCRIPT OF RECORD  
2008-CP-42-475

May 16, 2012  
Spartanburg, South Carolina

B E F O R E :

HONORABLE J. DERHAM COLE, JUDGE

A P P E A R A N C E S :

J. DAVID FLOWERS, ESQUIRE  
GREGG E. MEYERS, ESQUIRE  
Attorneys for the Plaintiff

CHARLES FRANKLIN TURNER, JR., ESQUIRE  
Attorney for the Defendant

Linda D. Moffitt  
Circuit Court Reporter

INDEX

1

2 Motion -- page 3.

3 No sworn testimony; no exhibits entered into evidence.

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 THE COURT: All right. Doe vs. Duncan Fire  
2 Department -- City of Duncan.

3 MR. TURNER: Yes, sir, Your Honor. May it please the  
4 Court.

5 THE COURT: This is defendant's motion to dismiss.

6 MR. TURNER: Yes, sir, it is.

7 Your Honor, I represent the -- it's actually the Town  
8 of Duncan, but semantics aside I represent the Town of  
9 Duncan and Berry Frost, the fire chief in this case.

10 And if Your Honor will give me a little -- a little  
11 bit of leeway here, I need to take you through some  
12 procedural background of this case, because there's  
13 actually two pending cases that has added some confusion to  
14 it. And if nothing else today, maybe we can straighten out  
15 the confusion.

16 But this case arises out of alleged sexual abuse of a  
17 minor at the Duncan Fire Department that occurred back 11  
18 years ago or so now. The plaintiff was a minor. He was  
19 alleged to have been sexually assaulted by a then Duncan,  
20 Town of Duncan, police officer who has since been  
21 prosecuted and is serving time in Columbia.

22 The original complaint in this case was filed in  
23 January of 2008. I am not aware that a summons was filed  
24 with that complaint. There may have been one filed. I  
25 don't know. And it doesn't matter all of that much for the

1 purposes of the motion.

2 But in January of 2008 it was filed. It was given a  
3 case number of 0475. It was filed Doe vs. the City of  
4 Duncan Fire Department.

5 In that complaint there was a specific allegation made  
6 against the fire chief, Barry Frost, who allegedly told the  
7 plaintiff's mother that he would take care of her son, and  
8 that based upon this representation he assumed the duty,  
9 and he didn't fulfill that duty. And there's basically a  
10 negligence supervision claim made against him as a result  
11 not supervising the plaintiff as a minor.

12 What is important is that that particular action was  
13 never served on anyone with the Town of Duncan. Subsequent  
14 to the filing of 0475, that original case, the plaintiff  
15 filed a separate action against Barry Frost individually on  
16 May the 7th of 2009.

17 And in that case, which was assigned a separate of  
18 course case number, 2662, the same allegations were made  
19 that Barry Frost was individually liable because of the  
20 assurances he had made to the plaintiff's mother.

21 He -- the allegations even go so far as to say that  
22 those assurances were given in a social setting when he was  
23 not working -- and that's paragraph seven in that  
24 particular complaint -- and as a result he negligently  
25 supervised the plaintiff, the same allegations, the same,

1 very same, essentially the same, pleadings that are made in  
2 this case.

3         Subsequent to that action which was, in fact, served  
4 on Barry Frost we answered on his behalf. In one of our  
5 defenses we asserted in our answer and through a motion  
6 that was heard before Your Honor now approximately a year  
7 or a year and a half ago -- was that Barry Frost was an  
8 improper defendant because he was the fire chief the Town  
9 of Duncan and the Tort Claims Act prevented his individual  
10 liability as fire chief.

11         That motion was denied partly because the plaintiff  
12 asserted in that case that -- that he was acting  
13 individually, and individually he can be held -- held  
14 liable, and the case was against him individually for his  
15 own -- his own negligence that arose outside the course and  
16 scope of -- of his employment.

17         That case was stayed. The plaintiff was in the  
18 National Guard or Army Reserves or something and was put on  
19 active duty. He's now off active duty and that case is  
20 proceeding.

21         We have filed the motion in this case, Your Honor, and  
22 specifically want to address the issues that have come up  
23 in this case.

24         There are now two actions that are filed, two separate  
25 actions, against two defendants that allege essentially the

1 same thing.

2 The first action was never served. That's 0475. The  
3 second action was served and pending. But in February --  
4 I'm sorry. Let me go back. In February of 2009  
5 plaintiff's counsel -- and this is Exhibit A to our  
6 memorandum -- plaintiff's counsel sent an email to the  
7 clerk's office saying he was going to voluntarily dismiss  
8 this action, 0475.

9 I'm not aware that any dismissal order was ever  
10 entered, any type of consent order. Because it was never  
11 served we never made an appearance in this case on behalf  
12 of the Town of Duncan.

13 What complicates the matter is on February -- in  
14 February of this year, February 21st of 2012, an amended  
15 complaint was filed by the plaintiff in 0475, this case.  
16 It was filed with the clerk's office. No summons was filed  
17 with it. No motion to amend was filed seeking the Court's  
18 permission to amend the allegations of the complaint.

19 And the amended complaint was served on the Town of  
20 Duncan through Brian Cothran who is acting as the town's  
21 administrator on February the 27th of 2012. Again, no  
22 summons was served with the amended complaint on Chief  
23 Cothran.

24 We had filed a motion to dismiss, Your Honor, in this  
25 case and submitted a memorandum of law. The basis of the

1 motion is essentially four things -- the plaintiff has  
2 failed to properly commence this action under South  
3 Carolina law; there's no jurisdiction over the Town of  
4 Duncan because no summons was ever served on it; the  
5 plaintiff has attempted to improperly amend his complaint  
6 under Rule 15 and should be estopped to allowed to amend it  
7 based on his representations to the -- to the clerk that  
8 the action was going to be dismissed; and that the  
9 plaintiff should be judicially estopped from making the  
10 allegations in this case due to inconsistent positions  
11 presented in this case versus the subsequent case, 2662.

12 Your Honor, South Carolina law is clear that an action  
13 is commenced through the filling of a summons and complaint  
14 with the clerk of court if actual service is accomplished  
15 within 120 days after filing. And that's section  
16 15-3-20(b).

17 Our Supreme Court has affirmed that principle in that  
18 a civil action is commenced by filing and service of the  
19 summons and complaint. That's Brown vs. Evatt.

20 In this case the plaintiff did not properly commence  
21 this action. We don't have a record of a summons being  
22 issued in the first action that was filed in January of  
23 2008. But even if it was, it wasn't served ever at all.

24 The 120-day time limit long went out the window.  
25 We're now four years after the fact. And the failure to

1 find -- we believe the failure to file -- the failure to  
2 file and timely serve the summons and complaint in this  
3 action is, in fact, failed.

4 Also, Your Honor, the amended complaint in this case  
5 did not include a summons. We don't believe that even if  
6 the Court believes that the case should move forward -- it  
7 was not, the amended action was not, properly served  
8 because it did not have a summons on it.

9 A summons under South Carolina is a means by giving  
10 the Court jurisdiction, and unless waived the Court  
11 otherwise did not obtain personal jurisdiction over  
12 defendant. And on top of that the plaintiff never sought  
13 leave of the Court to amend the complaint to address the  
14 additional allegations.

15 what's more troublesome or is as troublesome, Your  
16 Honor, is the issue that has now come up. The plaintiff is  
17 making and has made specific allegations against Barry  
18 Frost, again, responding to our motion in the Barry Frost  
19 case, the subsequent case, saying we believe that Barry  
20 Frost is liable separate and apart from his employment with  
21 the City of Duncan, the Town of Duncan, because he made  
22 these assurances to the plaintiff's mother in a social  
23 setting specifically alleging in the complaint that he was  
24 not at work when these assurances were made and that he's  
25 individually liable separate and apart from his employment

1 with the Town of Duncan.

2 Now the plaintiff in this case, again, the first case  
3 that's now attempting to be revived, is attempting to  
4 allege that the Town of Duncan is liable by virtue of Barry  
5 Frost's failure to supervise, failure to live up to the  
6 duty that he assumed based on -- based on the assurances he  
7 made to the mother that the Town of Duncan is now  
8 vicariously liable through respondeat superior as Barry  
9 Frost is fire chief based on the failure of him living up  
10 to those assurances.

11 And, Your Honor, our position is they can't have it  
12 both ways. They can plead alternatively. I understand  
13 that, and there's no issue with that. But they're taking  
14 the position that Barry Frost is liable, period,  
15 individually because he was not -- he was not at work, and  
16 made a specific argument to the Court against our motion to  
17 dismiss on that basis. And now they're proceeding on a  
18 theory of respondeat superior vicarious liability against  
19 the town for those same allegations.

20 And I don't think they can have it both ways. I mean,  
21 either Barry Frost was in the course and scope of his  
22 employment or he's not. And they're taking inconsistent  
23 positions in this case.

24 We don't think the case has been properly initiated,  
25 commenced. There's no summons been served on the -- on the

1 Town of Duncan ever in this case either through the  
2 original pleading or the amended pleading. And we don't --  
3 we don't think that's proper. We don't think there's  
4 jurisdiction. And on that basis, Your Honor, we would ask  
5 for this particular action to be dismissed.

6 The subsequent action, the 2009 action, has been --  
7 has been served. We're proceeding with that. We're  
8 defending that. But this case against the Town of Duncan  
9 we think is -- is improperly brought, no jurisdiction.  
10 It's not been commenced.

11 THE COURT: Mr. Meyers.

12 MR. MEYERS: Thank you, Your Honor.

13 There has been an amended complaint filed and the --  
14 all of the difficulties in this case arise from the  
15 plaintiff having been entered in the military service prior  
16 to age 18.

17 He was in active combat in Afghanistan for a number of  
18 years. And he has come out relatively a few months ago.  
19 And so under the federal statute that applies to service  
20 members he had had time to initiate this case.

21 The initial case wasn't served. We agree with that.  
22 But his time to perfect that service extends under the  
23 federal statute. The amended complaint recites his  
24 military service as I understand it's required to do. And  
25 the case is initiated, we contend, properly based on the

1 amended pleading.

2       So it's not clear to me why we're arguing about the  
3 initial complaint since the federal law protects a service  
4 member the entire time he's in military service and for a  
5 period of time after he leaves military service. The case  
6 has been amended within that period of time.

7       So we think under the service issue there's not really  
8 an issue, that the initial complaint -- we agree it wasn't  
9 served under state law, but we also agree that's irrelevant  
10 because the plaintiff was in the military service, had no  
11 obligation to pursue, had no obligation to perfect. It's  
12 protected by federal statute, which of course overrides any  
13 state law to the contrary. So we think that issue is  
14 governed by the federal law and it's in the statute.

15       The motion I got had to do with a prior pending  
16 action. I didn't get a motion about service. I didn't get  
17 any of that stuff. But that's okay because that's the  
18 essence of the rationale for the amended complaint. And we  
19 think the federal law covers that.

20       The case against Mr. Frost is based on the  
21 solicitation he made of the mother to have her son  
22 participate in this program at the fire station.

23       The case against the town is about the molestation  
24 that occurred at the fire station. So we think it's not  
25 either-or. We think they both have liability, Mr. Frost

1 for his individual actions that he took outside the  
2 workplace and the town for the lack of supervision that  
3 applied when the police officer molested the boys at the  
4 fire station, one of which was the plaintiff.

5 So I'm a little confused about the complaint. We're  
6 not saying it's one or the other. We're saying it's both,  
7 as we can do it in one action. But Mr. Frost has no  
8 individual liability if he's acting solely on behalf of the  
9 town, but he was acting in a social setting.

10 So it seemed to us that it was fair to bring a claim  
11 against Mr. Frost individually and also bring it against  
12 the town. That's the rationale for it. And I really don't  
13 see what the issue is.

14 MR. TURNER: Your Honor, the issue is a summons -- a  
15 summons has never been served on the Town of Duncan in four  
16 years in this case. That's the issue.

17 In order to get personal jurisdiction over the Town of  
18 Duncan a summons has to be served on them. I don't know  
19 how much clearer the rules can be and I don't know how much  
20 clearer the Supreme Court decisions can be.

21 There's a statute right on point. This is not a  
22 statute-of-limitations argument. I'm not making an  
23 argument that the plaintiff was out of time, although I may  
24 at some point do that. I'm not waiving that at this point.  
25 But it's not an issue of whether the plaintiff was in

1 service or not.

2 The plaintiff -- what's interesting about this case is  
3 the plaintiff chose while he was in service to initiate  
4 this action. And -- and there's no federal law that  
5 affects South Carolina saying how an action should be  
6 commenced regardless of whether it's in time or out of time  
7 or the statute of limitations is tolled.

8 If he makes a choice to initiate the action, which he  
9 did, it's got to be commenced properly under South Carolina  
10 law, and it's not a -- a summons has never been served on  
11 the Town of Duncan ever.

12 The -- to say that they both could have liability, I  
13 agree they both could have liability. Both the town and  
14 Barry Frost can have liability. But if they're taking the  
15 position that the town's liability through Barry Frost's  
16 actions -- the town is liable by virtue of Barry Frost's  
17 actions and on the same breath Barry Frost is acting  
18 individually and that's the basis of his liability, they  
19 can't make those allegations. That is inconsistent.

20 They can't say Barry Frost is outside the course and  
21 scope of his employment in a social setting and that's the  
22 basis of his liability and in the same breath say and, oh,  
23 by the way, the town's liable for that too because Barry  
24 Frost is the fire chief. That is an inconsistent position.

25 Either he's in the course and scope of his employment

1 in the social setting, or in a social setting, and he's  
2 not. And to me that's where the rub -- that's where the  
3 rub lies, that they're trying to have their cake and eat it  
4 too.

5 They're trying to say, well, he made it in a social  
6 setting, he's individually liable on that basis, but, oh,  
7 by the way, the town is liable too because he's the fire  
8 chief and was acting in that capacity.

9 Either he -- and this goes to the Tort Claims Act,  
10 Your Honor. As we referenced in our memo, the Tort Claims  
11 Act says in 15-78-70 and 200 that a -- that a person acting  
12 in the course and scope of their employment or governmental  
13 entity is not liable. And under 15-78-60 -- and I think  
14 it's sub-paren 16 or 17 -- a governmental agency is not  
15 liable if an employee is acting outside of the course and  
16 scope at the time that the act was committed or was done  
17 with actual malice, intent to harm, which is not this case  
18 with Barry Frost.

19 And, Your Honor, that's our difficulties with it.  
20 It's a commencement issue. It's not a  
21 statute-of-limitations issue at this point under this  
22 motion. It's whether the case was properly commenced, and  
23 it was not. No summons was ever -- was ever served.

24 THE COURT: Mr. Meyers, I don't recall you addressing  
25 the summons issue. I understand about the allegations.

1 what about the summons?

2 MR. MEYERS: I think it's correct that in the initial  
3 filing it was not served and -- so the summons was not  
4 served. But the amended complaint, summons and complaint,  
5 were served, so.

6 THE COURT: Well, I can look at the file. That's what  
7 Mr. Turner's is saying, it's not. He says that wasn't  
8 served with the summons either.

9 MR. MEYERS: Yeah. That's news to me, Your Honor,  
10 because the -- everything was sent out by my.

11 THE COURT: Well, I don't have the 2662 file. I've  
12 just have just the 475 file.

13 MR. TURNER: It is the 475 file, Your Honor, that's at  
14 issue.

15 THE COURT: Oh.

16 MR. MEYERS: And it's the amended complaint as I  
17 understood Mr. Turner to recite that there was a motion to  
18 amend, there was a summons and there was the amended  
19 complaint. So all of those things should have been what  
20 was served, and as I understood it was served.

21 MR. TURNER: We've checked with the clerk's office and  
22 they do not a summons with the amended complaint. And Mr.  
23 Meyers admits that he never served the original summons and  
24 complaint on the town.

25 MR. MEYERS: Well, as I understood it, we had a

1 summons and -- with the amended complaint. All of that was  
2 sent to the town. So that's -- that's my best information  
3 without being able to check. And that's where I'm at a  
4 disadvantage because I didn't have any indication that  
5 issue was a part of this motion. But I can certainly check  
6 that very easily. I can pull the affidavit of service or  
7 the mailing of what was sent.

8 MR. TURNER: Your Honor, just for the record.

9 THE COURT: Well, I've got a -- I've got a summons  
10 filed here with the court on January the 28th of 2008.  
11 There is a summons attached to a complaint.

12 MR. TURNER: And that was the original pleading.

13 THE COURT: That's January the 28th.

14 MR. TURNER: And that was never served.

15 MR. MEYERS: Of this year.

16 MR. TURNER: Of 2008.

17 THE COURT: 2008.

18 MR. TURNER: That was never served on the Town of  
19 Duncan.

20 THE COURT: All right. I've got an affidavit of  
21 service for the amended complaint. You say the amended  
22 complaint does not have a summons, so.

23 MR. TURNER: That's right. Your Honor, I did raise  
24 this issue in my motion.

25 THE COURT: Okay.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

MR. TURNER: It's ground No. 1.

THE COURT: All right. Anything -- I will read the memo. Anything else? I've got the file.

MR. MEYERS: I don't think so, Your Honor.

MR. TURNER: Nothing, Your Honor.

THE COURT: Okay. I'll issue an order.

END OF REQUESTED TRANSCRIPT OF RECORD

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Common Pleas Court for Spartanburg County, South Carolina, on the 16th day of May 2012.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

August 20, 2012



Linda D. Moffitt  
Circuit Court Reporter

**RECEIVED**

MAY 30 2013

**SC Court of Appeals**