THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Appeal 2012-213499
Case No. 08-CP-42-00475

John Doe, ... Appellant,

v.

City of Duncan, ... Respondent.

INITIAL BRIEF OF RESPONDENT

NELSON MULLINS RILEY & SCARBOROUGH, LLP

William H. Foster, III
Post Office Box 10084
Greenville, SC 29601
(864) 250-2300

A. Mattison Bogan
Miles E. Coleman
Post Office Box 11070
Columbia, SC 29201
(803) 799-2000

TURNER, PADGET, GRAHAM & LANEY, P.A.

Charles L. Turner
Post Office Box 1509
Greenville, SC 29602
(864) 552-4600

Attorneys for Respondent

Table of Contents

Table of Authorities

Page

Cases

Statutes

Rules

Other Authorities

Statement of the Case

Doe filed a Complaint on January 28, 2008 asserting a single claim against the City of Duncan for negligent supervision giving rise to alleged sexual abuse that occurred at the City's Fire Department. (*See* Compl. ¶¶ 2, 4-11; R. __.[1]) Doe never served the City with the Summons and Complaint. Doe's counsel acknowledged this in an email sent to the Spartanburg County Clerk of Court more than a year after filing, stating he would be submitting a voluntary dismissal. (*See* Meyers' Feb. 3, 2009 email; R. __.) Doe, however, never submitted a stipulation of dismissal or took any other action to terminate the lawsuit he had filed but never served.

On February 21, 2012—more than four years after filing the Complaint—Doe filed an Amended Complaint, in which he again asserted a single claim against the City for negligent supervision based on alleged sexual abuse that occurred at the City's Fire Department. (*See* Amend. Compl. ¶¶ 6-14; R. __.) Doe did not move to amend nor did he secure the City's written consent prior to filing the Amended Complaint. (*See* Order Granting City's Motion to Dismiss at 2; R. __.) Six days after filing the Amended Complaint, Doe served the City with the Amended Complaint but not a Summons. (*Id.*)

On March 15, 2012, the City filed a Motion to Dismiss pursuant to Rules 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(8), SCRCP, arguing that Doe's failure to serve meant that no civil action had been commenced and, alternatively, that Doe's suit had not been filed and served within the applicable statute of limitations. (*See* City's Motion to Dismiss ¶¶ 1-2; R. __.) In addition, the motion argued that Doe's Complaint

[1] On May 7, 2009, Doe filed a nearly identical Complaint in a related case arising from the same facts, *Doe v. Barry Frost*, Case No. 2009-CP-42-2662. (*See Doe v. Frost* Compl.; R. __.) Frost was the Chief of the Duncan Fire Department at the time of Doe's alleged sexual abuse. (Compl. at ¶ 5; R. __.)

should be dismissed because it was duplicative of another action pending for the same claim (*id.* ¶ 3), and that his Amended Complaint was neither properly served nor made pursuant to the requirements of Rule 15, SCRCP (*id.* ¶¶ 4-5). The City subsequently filed a memorandum in support of its motion, expanding on these arguments and arguing Doe was judicially estopped in this suit from taking a position inconsistent with his stance in a related suit. (*See* Memo in Support of City's Motion to Dismiss; R. __.)

On May 16, 2012, the Honorable Derham J. Cole held a hearing on the City's Motion to Dismiss. (*See* Tr. of May 16, 2012 hearing; R. __.) The City filed a renewed motion to dismiss on June 27, 2012, incorporating its prior motion and seeking dismissal pursuant to Rules 3, 12(b)(1), and 12(b)(2), SCRCP. (*See* City's Renewed Motion to Dismiss; R. __.)

Judge Cole issued an Order on November 1, 2012 granting the Motion to Dismiss. (*See* Order Granting City's Motion to Dismiss; R. __.) The Order concluded that Doe's failure to serve a Summons and Complaint meant that no civil action had been commenced and thus the trial court lacked jurisdiction. (*Id.* at 3; R. __.) Accordingly, the court granted the City's motion and dismissed Doe's suit pursuant to Rules 12(b)(1) and 12(b)(2), SCRCP. (*Id.*) In addition, the Order noted that "over four years passed since the filing of the action," and that Doe's failure to serve the City violated the time limitations for service imposed by Rule 3, SCRCP. (*Id.* at 2-3; R. __.) Finally, the Order noted that Doe could not file an Amended Complaint because there was no civil action to amend. (*Id.* at 3; R. __.) Doe did not file a motion pursuant to Rule 59(e), SCRCP to alter or amend the trial court's Order.

Doe appealed from the trial court's Order. On May 29, 2013, the City filed a Motion to Dismiss the Appeal, arguing that because no civil action has been commenced, this Court lacks jurisdiction and should dismiss the appeal. (*See* Motion to Dismiss Appeal.) This Court denied the motion but invited the parties to address the issue of jurisdiction in their briefs. (*See* Court of Appeals' Order of Aug. 16, 2013.)

Statement of the Facts

Doe is a 27-year-old South Carolinian. (*See* Appellant's Brief at 3 n.1; *see also* Compl. ¶ 1; R. __.) Doe's pseudonymous Complaint alleges that, while he was a minor, he was invited to participate in activities held at the Duncan Fire Department. (Compl. ¶ 4; R. __.) He further alleges that his mother was told by the Chief of the Fire Department, Barry Frost, that Doe would be well supervised during these activities. (*Id.* at ¶ 5.) Doe alleges he was subsequently sexually abused by a City employee on or around August 31, 2001. (*Id.* at ¶¶ 2, 8.[2])

In early 2003, shortly after his 17th birthday, Doe enlisted in the United States military, and he continued in military service until August of 2011. (Appellant's Brief at 3 n.1.) During that period of time, Doe was on active duty for only certain periods of time, namely from August 19, 2004 to October 8, 2004; from February 10, 2005 to May 23, 2006; and from January 29, 2007 to August 10, 2011—a combined total of 5 years, 11 months, and 14 days of active duty service. (*See* FOIA response of the National Personnel Records Center; R. __.)

[2] Doe has made inconsistent statements regarding whether the alleged abuser was an employee of the Fire Department (*see* 2008 Compl. ¶ 8; R. __) or an employee of the Police Department (*see* Amend. Compl. ¶ 10; R. __).

Standard of Review

When a trial court dismisses a suit for lack of personal jurisdiction, the appellate court will not disturb that ruling unless it is entirely unsupported by the evidence or controlled by an error of law. *Ex parte S.C. Dept. of Revenue*, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct. App. 2002) ("The court's exercise of personal jurisdiction over a party 'will not be disturbed on appeal unless wholly unsupported by the evidence or manifestly influenced or controlled by error of law.'") (quoting *Indus. Equip. Co. v. Frank G. Hough Co.*, 218 S.C. 169, 173, 61 S.E.2d 884, 885 (1950)); *Bargesser v. Coleman Co.*, 230 S.C. 562, 567, 96 S.E.2d 825, 827 (1957) (holding the exercise of personal jurisdiction over a party will not be disturbed on appeal unless unsupported by the evidence or influenced by error of law).[3]

A trial court's interpretation and application of statutes and rules—including the applicability of a statutory tolling provision, determination of the applicable statute of limitations, and the effect of state statutes and procedural rules—are questions of law, and an appellate court's review is limited to correcting errors of law. *Ranucci v. Crain*,

---

[3] Although the trial court based its dismissal on Rules 12(b)(1) and 12(b)(2), the City does not and need not rely on the 12(b)(1) aspect of the ruling. South Carolina precedent is conflicting as to whether a trial court's subject matter jurisdiction is dependent on service of the summons and complaint. Compare *Mims v. Babcock Center, Inc.*, 399 S.C. 341, 347, 732 S.E.2d 395, 398 (2012) ("[W]e note the failure of proper service does not impact the court's subject matter jurisdiction."), with *First Palmetto State Bank & Trust Co. v. Boyles*, 302 S.C. 136, 139, 394 S.E.2d 313, 315 (1990) ("We hold that subject matter jurisdiction vested in the circuit court upon commencement [*i.e.*, service] of the action," not the earlier date when the complaint was filed). This uncertainty is irrelevant here. As explained below, a number of independent grounds exist that are sufficient to affirm the trial court's order. In any event, Doe cannot challenge this aspect of the trial court's ruling because he did not raise this issue in his Statement of Issues on Appeal. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

397 S.C. 168, 171, 723 S.E.2d 242, 243 (Ct. App. 2012); *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 425, 702 S.E.2d 246, 250 (2010) ("Statutory interpretation is a question of law.") (citation omitted).[4]

Argument

This Court should dismiss this appeal or, alternatively, should affirm the trial court's order of dismissal. First, as explained below, because no Summons was ever served on the City, no civil action was ever commenced, thus the trial court lacked jurisdiction and the appellate court, in turn, lacks jurisdiction over the appeal. Second, even if this Court has jurisdiction to consider the appeal, it should affirm the trial court because Doe failed to preserve the sole issue he raises on appeal. Third, this Court should affirm the trial court's Order because the Servicemember's Civil Relief Act ("SCRA") does not remedy Doe's failure to serve the City. Fourth, under general principles of South Carolina law, the trial court correctly determined that dismissal of Doe's case was mandated by Doe's failure to serve the City prior to the expiration of the applicable statute of limitations. Finally, the Record presents an additional sustaining ground,

[4] Doe's statement of the standard of review errs in two respects. First, it errs by reciting the "abuse of discretion" standard, *see* Appellant's Brief at 1, which, as explained above, is not the correct standard to review the trial court's ruling here. Indeed, the case Doe's brief cites in support of the "abuse of discretion" standard involves the entirely different issue of a family court's discretion to award alimony. Second, Doe's brief errs by reciting the standard used to review a trial court's dismissal pursuant to Rule 12(b)(6), *see id.*, which is different from the standard used to review a dismissal pursuant to Rule 12(b)(2). Specifically, because a 12(b)(6) motion requires an evaluation of the facts and allegations in the Complaint to determine whether they present a claim upon which relief can be granted, both the trial court and the appellate court view the facts in light most favorable to plaintiff. *See Disabato v. S.C. Ass'n of Sch. Admins.*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013). In contrast, as explained above, when an appellate court reviews a 12(b)(2) dismissal, it does not apply a plaintiff-favoring view, and it will not disturb the trial court's ruling unless it is entirely unsupported by the evidence or controlled by an error of law.

namely that as a result of Doe's stance in a related proceeding, Doe is judicially estopped from claiming that the City is liable for his alleged injuries.

I. Because Doe never commenced a civil action, this Court lacks jurisdiction over the appeal and should dismiss it.

Before even considering the merits of Doe's argument on appeal, this Court must determine whether it has jurisdiction to consider the appeal. *See Holroyd v. Requa*, 361 S.C. 43, 52-53, 603 S.E.2d 417, 422 (Ct. App. 2004) (analyzing appellate jurisdiction as a "threshold matter"); *Fed. Land Bank. v. State Highway Dept.*, 172 S.C. 207, 210, 173 S.E.2d 635, 636-37 (1934) ("It appears necessary that the jurisdictional point must be decided before any of the other questions involved in the appeal be considered. As has been said, 'This question meets us at the threshold.' If the Court had no jurisdiction, the other questions presented by the appeal, interesting as they are, are rendered academic.").

The jurisdictional question arises from Doe's failure to serve a Summons on the City. The service of a Summons and Complaint is a mandatory prerequisite to commence a civil action. The Rules of Civil Procedure require service of *both* documents before a civil action is commenced:

> A civil action is commenced when the summons and complaint are filed with the clerk of court if:
>
> (1) the summons *and* complaint are served within the statute of limitations in any manner prescribed by law; or
>
> (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

Rule 3(a), SCRCP (emphasis added); *see also First Palmetto State Bank & Trust Co. v. Boyles*, 302 S.C. 136, 139, 394 S.E.2d 313, 315 (1990) ("[A] civil action is commenced by the filing and service of a summons and complaint.").

Here, it is undisputed that Doe did not comply with this mandatory procedure to commence a civil action. Doe concedes the 2008 Summons and Complaint were not served on the City. *See* Appellant's Brief at 1. He further concedes that only the purported Amended Complaint *but no Summons* was served on the City in 2012. *Id.* ("The amended *pleading* was filed and served, and an affidavit of service for the amended *complaint* was filed with the court.") (emphasis added); *see also* Order Granting City's Motion to Dismiss at 2 ("On or about February 27, 2012, the Plaintiff purported to serve the Amended Complaint on the Defendant; however, no Summons was served upon the Defendant.").

Doe's failure to serve a Summons is no small error. The service of the Summons is a critical jurisdictional issue. "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." *Brown v. Evatt*, 322 S.C. 189, 194, 470 S.E.2d 848 850 (1996) (citation omitted); *see also Fin. Fed. Credit, Inc. v. Brown*, 384 S.C. 555, 562, 683 S.E.2d 486, 490 (2009) ("A court generally obtains personal jurisdiction by service of a summons."); *Louden v. Moragne*, 327 S.C. 465, 468, 486 S.E.2d 525, 526 (Ct. App. 1997) ("Service of the summons brings the defendant within the court's jurisdiction.").

Because Doe failed to serve a Summons on the City, the trial court correctly concluded that no civil action was commenced and thus it lacked jurisdiction. When a trial court dismisses a suit for lack of jurisdiction because the Summons and Complaint were not timely served and thus no civil action was commenced, the appellate court also lacks jurisdiction and the appeal should be dismissed. *See, e.g., Morris Comm., Inc. v. S.C. Pub. Serv. Comm.*, 267 S.C. 207, 226 S.E.2d 892 (1976); *State v. Gorie*, 256 S.C.

539, 541, 183 S.E.2d 334, 335 (1971) ("Since the order appealed from was a complete nullity for lack of jurisdiction, the appeal presents no issue for consideration or decision by this Court and the appeal is, accordingly, Dismissed."); *see also Jaramillo v. Cathern & Smith*, 701 A.2d 817 (R.I. 1997) (summarily dismissing appeal of trial court's order granting a motion to dismiss for failure to properly serve defendant with the Complaint).

These cases' holdings comport with the statute granting this Court's appellate jurisdiction. The South Carolina Code states that this Court "has jurisdiction over any *case* in which an appeal is taken from an order, judgment, or decree of the circuit court." S.C. Code Ann. § 14-8-200(a) (emphasis added). Where, as here, an appeal arises from a dispute that is not a "case," *i.e.*, an actual civil action, this Court has no jurisdiction. *See, e.g., Spivey v. Carolina Crawler*, 367 S.C. 154, 624 S.E.2d 435 (Ct. App. 2005) (dismissing part of appeal that did not yet involve an "actual" controversy); *Main Corp. v. Black*, 357 S.C. 179, 592 S.E.2d 300 (2004) (affirming the Court of Appeals dismissal of an appeal because the trial court had no jurisdiction over a case sent to arbitration, thus there was no appellate jurisdiction pursuant to S.C. Code Ann. § 14-8-200(a)); *see also Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) ("If there is no actual controversy, this Court will not decide moot or academic questions.").

In short, Doe's failure to serve a Summons on the City means no civil action was ever commenced. Accordingly, the trial court correctly determined that in the absence of an actual case, it had no personal jurisdiction. Because there is no live case or civil action over which this Court can exercise jurisdiction, it should summarily dismiss the appeal.

II. Doe's sole issue on appeal is not preserved for this Court's review.

Doe's sole argument on appeal—that the SCRA excuses his failure to serve the City—raises an issue that is not preserved for appellate review. Issues not raised to *and*

ruled upon by the trial court will not be considered on appeal. *Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004).

Here, Doe argued at the hearing before the trial court that the SCRA's tolling provision applied to excuse his failure to serve. (*See* Hearing Tr. of May 16, 2012 at 10-11.) The trial court, however, did not rule on this argument, either at the hearing or in its Order dismissing Doe's suit. When an issue is not explicitly ruled on in the final order, it must be raised by an appropriate post-trial motion to be preserved for appeal. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-80 (2004) (stating that where trial court fails to rule on an issue, a party must file a Rule 59(e) motion to preserve that issue for appellate review); *Shealy v. Aiken County*, 341 S.C. 448, 459-60, 535 S.E.2d 438, 444 (2000); *Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 85, 529 S.E.2d 6, 9 (2000); *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (same); *Halbersberg v. Berry*, 302 S.C. 97, 104, 394 S.E.2d 7, 12 (Ct. App. 1990).

Doe did not file a Rule 59(e) motion asking the trial court to rule on the applicability and effect of the SCRA. Therefore, the trial court never ruled on this issue. Accordingly, Doe's sole argument on appeal is not preserved.

III. The Servicemember's Civil Relief Act does not remedy Doe's failure to serve the City after filing suit.

Even assuming this Court has jurisdiction and Doe preserved the sole issue he raises on appeal, this Court should affirm the trial court's order of dismissal. Doe argues a single issue on appeal: that his failure to commence a civil action by neglecting to serve the City is excused by the operation of the SCRA's tolling provision. Doe, however, is woefully mistaken as to the SCRA's meaning and applicability.

The SCRA is intended to "'protect those who have been obliged to drop their own affairs to take up the burdens of the nation.'" *Murdock v. Murdock*, 338 S.C. 322, 330, 526 S.E.2d 241, 246 (Ct. App. 1999) (quoting *Boone v. Lightner*, 319 U.S. 561 (1943)). Accordingly, the SCRA contains provisions protecting servicemembers from default judgments, 50 U.S.C. App. § 521,[5] prohibiting excessive interest rates, *id.* at § 527, preventing eviction by a landlord, *id.* at § 531, and protecting against foreclosure, *id.* at § 533, while the person is in *active* military duty.

The SCRA also includes a tolling provision upon which Doe bases his sole argument on appeal. Specifically, Doe argues that 50 U.S.C. App. § 526 excuses his failure to serve the City. That section, titled "Statute of limitations," tolls the time limits for determining the date on which the servicemember must file a suit:

> (a) Tolling of statutes of limitation during military service
>
> The period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns.

[5] *Murdock*, for example, dealt with the protection against entry of default judgment against a servicemember who failed to appear in a civil action. That provision—formerly found in 50 U.S.C. App. § 520 and now found in § 521—requires that before a default judgment may be entered in any action, the plaintiff must submit an affidavit stating whether or not the defendant is in military service. In *Murdock*, the plaintiff failed to file the affidavit, which warranted reversal and vacation of the default judgment against the servicemember defendant.

50 U.S.C. App. § 526.[6] The title and language of § 526(a) makes clear that it applies only to toll statutes of limitation for "bringing" a suit. Doe, however, incorrectly argues that "the action by the SCRA to suspend state law time limits necessarily includes the time provisions under SCRCP 3." Appellant's Brief at 3. Doe does not cite a single case in support of this argument, likely because courts considering this issue have held the exact opposite, namely that once a suit is filed, § 526 does *not* toll or extend any subsequent calculations of time such as the time in which to serve the defendant or the duty to prosecute a case. *See, e.g., Zitomer v. Holdsworth*, 449 F.2d 724 (3d Cir. 1971) (affirming trial court's dismissal of suit for failure to prosecute and noting that the SCRA's tolling provision "simply tolls the statute of limitations during the period of military service and has no applicability to an action duly filed and served within the applicable statute of limitations"); *Zarlinsky v. Laudenslager*, 167 A.2d 317, 320 (Penn. 1961) (noting the SCRA's tolling provision "expressly applies to the limitation of time for bringing an action, not to a limitation of time for the continuing of process in an action already brought and avails the plaintiffs nothing"); *Thornley v. Superior Court of San Francisco*, 201 P.2d 567, 568 (Cal. Ct. App. 1949) ("There is nothing in section 525 of the federal act which purports to suspend this mandatory requirement of service. Respondent argues that the word 'proceeding' in section 525 of the federal act should be construed as applying to the service of summons or any other procedural step taken in the

[6] Prior to December 19, 2003, the SCRA was known as the Soldiers' and Sailors' Civil Relief Act, and its tolling provision appeared in § 525. *Lowe v. United States*, 79 Fed. Cl. 218, 224 n.7 (Fed. Cl. 2007) ("In 2003, Congress amended the SCRA of 1940, and as part of a general revision, moved the tolling provision then in place at 50 U.S.C. app. § 525 . . . to the current 50 U.S.C. app. § 526."); *Baker v. England*, 397 F. Supp. 2d 18, 24 (D.D.C. 2005) (noting § 525 is the "immediate predecessor and substantive equivalent" of § 526).

prosecution of the action. This is not sound."); *see also Puchek v. Elledge*, 160 F. Supp. 286, 287 (N.D. Ind. 1958) (noting that the SCRA had no relation to service of process).

Commentators and legal encyclopedias agree that § 526 does not delay the period for serving a filed summons and complaint. *See* 36 A.L.R. Fed. 420 § 12 ("The tolling provision of the Soldiers' and Sailors' Civil Relief Act (50 App. U.S.C. § 525) is not applicable to, and cannot prevent the running of, time limitations governing the service of process in, or the prosecution of, actions already brought."); Am. Bar Ass'n SCRA Judges' Guide Checklist at 10, available at apps.americanbar.org/family/military/scra judgesguidecklist.pdf (noting that § 526 stays the running of statutes of limitation, but "does not, however, affect time periods within a suit, such as time periods to avoid motions to dismiss for failure to prosecute an action") (last visited September 26, 2013).

In sum, the SCRA's tolling provision applies only to toll statutes of limitation for bringing a suit. It does not apply to subsequent procedural timelines such as service of process or diligent prosecution of the case. Where, as here, a servicemember chooses to file suit during his time of military service, he cannot later rely on the SCRA to excuse his four-year delay in serving the defendant and prosecuting the action.

IV. Dismissal of Doe's case was warranted under South Carolina law.

Because the SCRA does not apply, Doe's failure to serve the City is evaluated in accordance with general principles of state law. The trial court correctly determined that, under South Carolina law, Doe's failure to serve the City mandated his case be dismissed with prejudice. In addition to the absence of a civil action and the absence of personal jurisdiction over the City, dismissal was warranted because the applicable statute of limitations had expired, as had the time to serve the City or amend the Complaint.

A. The trial court properly dismissed Doe's suit because no civil action was ever commenced and the court did not have jurisdiction over the City.

As explained in Part I, *supra*, because Doe never served a Summons on the City, no civil action was ever commenced and the trial court lacked personal jurisdiction over the City. A civil action is commenced not by the filing of a Summons and Complaint but by *service* of those documents on the defendant. *See First Palmetto State Bank & Trust Co. v. Boyles*, 302 S.C. 136, 139, 394 S.E.2d 313, 315 (1990). Because no summons was served on the defendant, Doe's action never commenced. In addition, the lack of service meant the trial court had no jurisdiction over the City. *See Fin. Fed. Credit, Inc. v. Brown*, 384 S.C. 555, 562, 683 S.E.2d 486, 490 (2009) (stating a summons is the method by which a court obtains jurisdiction); *Louden v. Moragne*, 327 S.C. 465, 468, 486 S.E.2d 525, 526 (Ct. App. 1997); *Brown v. Evatt*, 322 S.C. 189, 194, 470 S.E.2d 848 850 (1996).

In the absence of a civil action and jurisdiction, the trial court properly dismissed the suit. *See Brown*, 322 S.C. at 194, 470 S.E.2d at 850; *Estate of Corley*, 299 S.C. 525, 527, 386 S.E.2d 264, 266 (Ct. App. 1989) (affirming lower court's dismissal of case where defendant was not served with a summons).

B. The trial court properly dismissed Doe's suit because the window of time to serve the City or amend the Complaint had passed when the applicable statute of limitations expired. [7]

In addition, the trial court noted an independent basis for the dismissal, namely that Doe failed to comply with the 120-day service requirement found in Rule 3(a)(2),

[7] This aspect of the trial court's Order provides an additional, independent basis to affirm its ruling. This part of the trial court's ruling, however, is not otherwise at issue on appeal because Doe's Statement of the Issue on Appeal raises a single issue, namely that the SCRA excuses his failure to serve the City. *See* Appellant's Brief at 1. Because Doe does not take issue with any other aspect of the trial court's ruling, no other issues are properly before this court. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

SCRCP and in S.C. Code Ann. § 15-3-20(B).[8] (*See* Order granting City's Motion to Dismiss at 2; R. __.) Imposition of the 120-day requirement, dismissal with prejudice, and rejection of the purported Amended Complaint were all warranted because the statute of limitations on Doe's claim against the City had expired.

In its Motion to Dismiss, the City had argued that Doe's suit was not filed and served within the applicable statute of limitations (*see* City's Motion to Dismiss ¶ 2; R. __), and the trial court's Order noted that "over four years passed since the filing of the action" and thus Doe had failed to timely commence the action (*see* Order granting City's Motion to Dismiss at 2-3; R. __). The applicable statute of limitations is not, as Doe asserts, the time period set out in S.C. Code Ann. § 15-3-555. *See* Appellant's Brief at 3 n.1. Rather, because Doe's suit is against a City—a political subdivision of the State—and his sole cause of action alleges negligence by the Fire Chief and other Fire Department officials (*see* Compl. ¶¶ 8, 10; R. __), the suit is necessarily brought pursuant to the South Carolina Tort Claims Act ("SCTCA"). *See* S.C. Code Ann. § 15-78-70(a) (noting that the SCTCA is "the exclusive remedy for any tort committed by an employee of a governmental entity"); *id.* at § 15-78-200 (stating that the SCTCA "is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty"); *Doe v. Greenville Cnty. Sch. Dist.*, 375 S.C. 63, 651 S.E.2d 305 (2007) (noting a negligent supervision claim against

[8] Rule 3(a)(2) states if a summons and complaint are "not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing." Similarly, the statute states, "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." S.C. Code Ann. § 15-3-20(B).

school district involving sexual abuse committed by a third party was brought pursuant to the SCTCA).

The SCTCA contains its own statute of limitations, imposing a two-year time limit on any action against the State or a subdivision thereof:

> Except as provided for in Section 15-3-40,[9] *any action brought pursuant to this chapter is forever barred unless an action is commenced within two years* after the date the loss was or should have been discovered; provided, that if the claimant first filed a claim pursuant to this chapter then the action for damages based upon the same occurrence is forever barred unless the action is commenced within three years of the date the loss was or should have been discovered.

S.C. Code Ann. § 15-78-110 (emphasis added). Under the SCTCA's express and unequivocal language, this is the statute of limitations applicable to Doe's suit.[10]

Other courts confronting this question have held that a state's Tort Claims Act's statute of limitations applies, not the longer period provided in the statute of limitations for sexual abuse claims generally. *See, e.g., V.C. v. Los Angeles Unified Sch. Dist.*, 139 Cal. App. 4th 499 (Cal. Ct. App. 2006) (holding that negligent supervision suit against school district arising from sexual abuse was subject to the statute of limitations in the state Tort Claims Act, not the longer statute of limitations for general sexual abuse); *see also Kana v. United States*, No. 2:04-21947-CWH, 2006 U.S. Dist. Lexis 19849 (D.S.C.

---

[9] S.C. Code Ann. § 15-3-40 states that if a plaintiff's cause of action accrues when the plaintiff is under the age of 18 or insane, the applicable statute of limitations does not begin to run until the plaintiff reaches the age of 18 or recovers from the disability. As explained below, Doe's negligent supervision cause of action allegedly accrued while he was a minor, thus the SCTCA's two-year statute of limitations began to run on his 18th birthday and had expired long before the trial court dismissed his suit.

[10] In contrast, the statute of limitations Doe asserts should apply—S.C. Code Ann. § 15-3-555—applies to suits against the abuser himself, not against a third party. *See Doe v. Crooks*, 364 S.C. 349, 613 S.E.2d 536 (2005) (analyzing whether S.C. Code Ann. § 15-3-555 applied in suit against the alleged abuser).

March 30, 2006) (holding claim against United States arising from sexual abuse committed by a federal employee was subject to and barred by the statute of limitations in the Federal Tort Claims Act); *K.J. v. Arcadia Unified Sch. Dist.*, 172 Cal. App. 4th 1299, 1238 (Cal. Ct. App. 2009) ("Code of Civil Procedure section 340.1 sets forth a special statute of limitations for victims of childhood sexual abuse. [] However, sexual abuse victims who bring suit against a public entity are bound by the much shorter statute of limitations set forth in section 945.6."); *Drahaus v. State*, 584 N.W.2d 270, 275 (Iowa 1998) ("We point out that although the legislature has modified other statutes of limitation concerning actions brought by minors, it has not done so with respect to a minor's claim under the Tort Claims Act. For instance, Iowa Code section 614.8A extends the period for bringing an action for sexual abuse of a child, discovered after the injured person reaches the age of majority. . . . We held in *Harden*, however, that this tolling provision does not apply to claims brought under our Tort Claims Act."); *Teater v. State*, 559 N.W.2d 758 (Neb. 1997) (holding that, under the statute of limitations in state Tort Claims Act, the plaintiff's complaint alleging sexual abuse was time-barred).

Here, Doe's cause of action for negligent supervision allegedly accrued while he was a minor, thus the SCTCA's statute of limitations did not begin to run until his 18th birthday. *See* S.C. Code Ann. § 15-78-110; *id.* at § 15-3-40. Accordingly, the statute began to run in February of 2004. *See* Appellant's Brief at 3 n.1 (noting Doe was born in February of 1986). Doe had enlisted in the military prior to the time the statute of limitations began to run, and, as noted in Part III, *supra*, the SCRA's tolling provision tolls statutes of limitation during a plaintiff's "military service." The SCRA, however, tolls the running of the statute *only* during periods of *active* duty. *See Boone v. United*

States, 78 Fed. Appx. 108 (Fed. Cir. 2003) (noting the SCRA's tolling provision applies only to time in active duty); *Lazarski v. Archdiocese of Philadelphia*, 926 A.2d 459 (Penn. Super. Ct. 2007) (noting that a plaintiff servicemember's non-active duty time in the military did not toll the state statute of limitations on his sexual abuse claim because "the SCRA expressly points to 'active duty' as the touchstone activating its tolling provisions. . . . There are gaps in Appellant's active duty status. . . . As a result, because Appellant has undisputed periods of inactive duty, the tolling provision of the SCRA would not apply to those dates.").

Doe was a member of the Army, the Army Reserve, or the Army National Guard from February 2003 until August 10, 2011. (*See* FOIA response from the National Personnel Records Center; R. __.) During that time, however, he was on active duty for only a total of 5 years, 11 months, and 14 days. (*Id.* (stating Doe was on active duty only from August 19, 2004 to October 8, 2004; from February 10, 2005 to May 23, 2006; and from January 29, 2007 to August 10, 2011).) Accordingly, by the time the City moved to dismiss Doe's suit, the SCTCA's two-year statute of limitations on his claim had expired,[11] and by the time the trial court dismissed the case, the statute of limitations was

[11] As noted above, the statute began to run on Doe's 18th birthday, which occurred on an unknown day in February of 2004. Assuming it began to run on February 29th, 5 months and 21 days had expired by the time Doe reached active duty status on August 19, 2004. The clock began to run again during Doe's first hiatus from active duty—from October 8, 2004 to February 10, 2005—which allowed another 4 months and 2 days to expire. The clock resumed its ticking during Doe's second period of inactive duty—from May 23, 2006 to January 29, 2007—during which another 8 months and 6 days expired. The clock began to run again when Doe left military service on August 10, 2011. Accordingly, by the time the City filed its Motion to Dismiss on March 15, 2012, an additional 7 months and 5 days had expired, meaning *a cumulative total of 25 months and 4 day of non-tolled time had passed* since Doe's cause of action accrued. Doe concedes the summons and complaint were not served within this time period.

long gone.[12] The SCTCA's two-year statute of limitations on Doe's cause of action expired on February 11, 2012, *see generally* note 11, *supra*, at which point the window of time closed to serve the documents. *See* Rule 3(a)(2) ("[I]f not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.). Because neither document had been served on the City by that date, Doe had failed to commence a civil action and dismissal with prejudice was warranted. *See* S.C. Code Ann. § 15-3-20(B) ("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."); *Brown v. Evatt*, 322 S.C. 189, 194, 470 S.E.2d 848 850 (1996) (affirming dismissal with prejudice where plaintiff failed to serve the summons and complaint); *Estate of Corley*, 299 S.C. 525, 527, 386 S.E.2d 264, 266 (Ct. App. 1989) (affirming lower court's dismissal of case where defendant was not served with a summons); *see also Louden v. Moragne*, 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997) (affirming trial court's grant of summary judgment where plaintiff failed to serve the summons within the statute of limitations, which subsequently expired).

Additionally, because Doe had not commenced a civil action, it was impossible for him to "amend" his Complaint, and because the statute of limitations had expired it was impossible for his purported Amended Complaint to initiate a new suit. *See Spence v. Spence*, 368 S.C. 106, 128, 628 S.E.2d 869, 881 (2006) ("Dismissal of a complaint does not bar a subsequent action brought *before the expiration of the statute of limitations*.") (citations omitted) (emphasis added); *Don Shevey & Spires, Inc. v. Am. Motors Realty*

[12] By the time the trial court filed its Order on November 1, 2012, a total of 32 months and 21 days of non-tolled time had passed since his cause of action accrued, far in excess of the SCTCA's two-year statute of limitations.

Corp., 279 S.C. 58, 301 S.E.2d 757 (1983) (affirming trial court's dismissal where plaintiff, who had not filed and served the summons and complaint prior to expiration of the statute of limitations, sought to amend).

V. Doe is judicially estopped from bringing this action due to his inconsistent position taken in a related suit.

The record presents an additional sustaining ground, namely that dismissal of Doe's suit was warranted because he is judicially estopped from asserting a claim here that is diametrically opposed to the position he has taken in a related suit arising from the same facts.[13] "Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). Its purpose "is to ensure the integrity of the judicial process." *Id.* As explained in greater detail below, Doe cannot assert in one suit that the Fire Chief is individually liable for statements he made in his *individual* capacity, and then assert in the other suit that the City is also liable because the Fire Chief made those statements in his *official* capacity.

On May 7, 2009, Doe filed a complaint in a related case arising from the same facts giving rise to this suit. (*See Doe v. Frost* Compl.; R. __.) Frost was the Chief of the Duncan Fire Department at the time of Doe's alleged sexual abuse. (Compl. at ¶ 5; R. __.) Doe's complaint against Frost arises from the same set of facts and is nearly identical to the Complaint giving rise to this appeal. In that suit, one contested issue was whether Frost was individually liable for his alleged acts, which in turn depended on whether

[13] This issue was argued to, but not relied upon by, the trial court. (*See* City's Motion to Dismiss at 4-6; R. __.)

those acts occurred within or without the scope of his employment as Fire Chief. Doe asserted that Frost acted in his *individual* capacity "when he was not working." (*See Doe v. Frost* Compl. ¶ 7; R. __.) In response, Frost argued he could not be individually liable and that Doe was required by the SCTCA to sue the agency or political subdivision liable for the alleged acts and omissions, *i.e.*, the City of Duncan. (*See* Frost's Answer ¶ 40; R. __; *see also* Frost's Motion for Summary Judgment ¶ 1; R. __ (arguing Doe's sole remedy for Frost's alleged negligence was a suit against the city pursuant to the SCTCA).) At a motion hearing in that case, Doe argued that he did not need to name the City as a defendant because Frost was individually liable because his alleged assurance of supervision and subsequent negligence did not arise out of his employment as Fire Chief. (*See* Tr. of May 16, 2012 hearing at 5; R. __ (summarizing arguments made in 2011 hearing regarding motion to dismiss in *Doe v. Frost*).)

Having made that argument in a related case, Doe cannot now argue the opposite in this case, *i.e.*, that Frost's alleged assurance and subsequent negligence were, in fact, acts taken in his official capacity, and thus the city is liable. The SCTCA is clear. A city is not liable for the acts of its employee that are outside the scope of his employment. *See* S.C. Code Ann. §§ 15-3-60(17) and 15-3-70(b). Accordingly, having taken the position that Frost was individually liable for his acts, Doe is judicially estopped from now asserting that the city is vicariously liable for those same acts.

Judicial estoppel includes five elements: (1) two inconsistent positions taken by the same party; (2) the positions are taken in the same or related proceedings involving the same parties or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position in the prior related suit and must

have received some benefit therefrom; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. *Cothran*, 357 S.C. at 215-16, 592 S.E.2d at 632.

Applying these elements here, Doe is estopped from asserting the City is liable. Doe has taken two totally inconsistent positions in two related proceedings involving the same parties or their privies. Doe benefited from his prior inconsistent argument by avoiding a ruling dismissing his case against Frost.[14] Doe persisted in maintaining his contradictory arguments even after they were brought to his attention (*see* Tr. of May 16, 2012 hearing at 11-13; R. __), which indicates an intentional effort to mislead the court.

In light of his inconsistent argument in a prior, related suit—an argument from which he profited—Doe is estopped from now arguing that the City is liable for Frost's acts. Accordingly, the trial court correctly dismissed Doe's suit.

Conclusion

For the foregoing reasons, Respondents respectfully request that this Court affirm the Order of the trial court.

[*SIGNATURE PAGE ATTACHED*]

[14] The parties in *Doe v. Frost* recently consented to a dismissal of that suit pending resolution of this appeal, with leave to re-file within one year. (*See* Consent Order of Dismissal, filed September 9, 2013; R. __.)

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

William H. Foster III
SC Bar No. 66221
E-Mail: bill.foster@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

A. Mattison Bogan
SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
Miles E. Coleman
SC Bar No. 78264
E-Mail: miles.coleman@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

TURNER, PADGET, GRAHAM & LANEY, P.A.

Charles L. Turner
SC Bar No. 64996
E-Mail: cturner@turnerpadget.com
200 East Broad Street, Suite 250
Post Office Box 1509
Greenville, SC 29602
(864) 552-4600

Attorneys for Respondent

Greenville, South Carolina
October 7, 2013