

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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DEC 04 2014

SC 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.

RESPONDENT'S RETURN TO PETITION FOR REHEARING

Pursuant to Rule 240(d), SCACR, Respondent City of Duncan files this Return to Appellant's Petition for Rehearing. Rehearing is not warranted because, as this Court correctly held in its per curiam ruling, Doe's sole argument on appeal 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 federal Servicemember's Civil Relief Act's ("SCRA") tolling provision applied to excuse his failure to ever serve the summons and complaint. (*See* R. 43-44.) The trial court, however, did not rule on this argument, either at the hearing or in its Order dismissing Doe's suit. Indeed, the Order did not even mention the SCRA. (*See* R. 1-3.)

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). Doe, however, did not file a Rule 59(e) motion asking the trial court to rule on the applicability and effect of the SCRA. Accordingly, when Doe raised the SCRA as his only issue on appeal, this Court ruled the issue was not preserved.

Doe now argues in his Petition for Rehearing that the trial court's order "necessarily rejected" and "implicitly rejected" Doe's argument regarding the SCRA. *See* Pet. for Rehearing at 2-3. This is incorrect. An issue is not ruled on where the "trial court's order is silent on the issue." *Foster v. Foster*, 393 S.C. 95, 99, 711 S.E.2d 878, 880 (2011). Furthermore, the trial court did *not* "implicitly" or "necessarily" reject Doe's argument. Rather, it's ruling dismissing Doe's case was based on a ground completely unrelated to tolling and the SCRA. The Order of dismissal notes there is an absolute and mandatory duty to serve a summons and a complaint on a defendant, and that Doe *never* served the summons and complaint filed in 2008 and that, even after filing a purported "amended complaint" in 2012, he *never* served the summons.¹ (*See* R. 1-2.) Accordingly, the trial court concluded that Doe "failed to commence this action" and thus dismissed the suit. (R. 2.) This ruling and its reasoning were entirely independent from the question

¹ 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.

of whether the SCRA tolled any statute of limitations. In short, the trial court's ruling did *not* implicitly and necessarily reject Doe's argument regarding the SCRA.

In sum, the trial court did not rule on Doe's SCRA argument (either expressly or implicitly) and Doe failed to raise the issue in a Rule 59(e) motion. Accordingly, that issue—the sole issue he chose to raise on appeal—is not preserved for appellate review. This Court should thus deny his Petition for Rehearing.

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December 4, 2014

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PROOF OF SERVICE

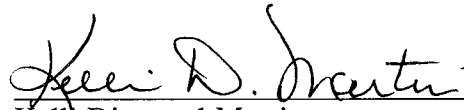
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Respondent's Return to Petition for Rehearing

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Dec. 4th, 2014.

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December 4, 2014

Jenny Abbott Kitchings
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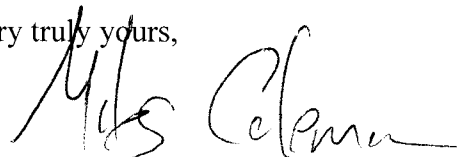
SC Court of Appeals

RE: John Doe v. City of Duncan
Appellate Case No. 2012-213499
Case No. 2008-CP-42-0475
Our File No. 15407.01504

Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Respondent's Return to the Petition for Rehearing in regard to the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier. Also enclosed is a proof of service of this filing on opposing counsel. With warm regards, I remain

Very truly yours,



Miles E. Coleman

Enclosures