

**The State of South Carolina
In The Supreme Court**

Appeal from Spartanburg County Court of Common Pleas
J. Derham Cole, Circuit Judge, Case No. 2008-CP-42-0475

Appeal 2012-213499 (S.C. App. Filed November 12, 2014)

John Doe,

Appellant-Petitioner,

v.

City of Duncan,

Respondent

Petition for Writ of *Certiorari* to the Court of Appeals

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SC Court of Appeals

Certification by Counsel

Counsel certifies pursuant to SCACR 242(d) that a Petition for Rehearing was made and finally ruled on by the Court of Appeals, on December 17, 2014.

Questions Presented For Review

1. Did the Court of Appeals err in requiring a Rule 59(e) motion for an argument necessarily denied by the trial court?
2. Did the Court of Appeals err in affirming the trial court's dismissal of this action after refusing to apply the time provisions of the Servicemembers Civil Relief Act, 50 App. U.S.C.A. § 501 et seq.?

Grounds for the Petition

On December 17, 2014, the Court of Appeals denied rehearing its order of November 12, 2014, which affirmed the trial court dismissing this action. The rationale of the Court of Appeals panel was that no Rule 59(e) motion had been filed in the trial court when the trial court refused to apply to the case the time provisions of the Servicemember's Civil Relief Act, 50 App. U.S.C.A § 501 et seq.

The federal statute that protects military members during their active service, in this instance the Plaintiff's combat service in Afghanistan, was the sole basis argued in opposition to the motion to dismiss. Transcript at pp. 10 – 11, R. App. pp. 43 - 44. The argument was necessarily denied when the trial court granted the motion. *Spence v. Wingate*, 674 S.E.2d 169, 170 (S.C. 2009).

On three independent grounds the petition should be granted.

- (1) The issues in the case are novel, in the sense that it appears unprecedented that the trial court refused to apply controlling federal law.

(2) The decision of the Court of Appeals to require a Rule 59(e) motion when the only ground argued below was necessarily denied by the trial court conflicts with this court's decision in *Spence v. Wingate*, 674 S.E.2d 169, 170 (S.C. 2009). and

(3) The decisions of the trial court and Court of Appeals conflict with not only a decision of the United States Supreme Court, *Boone v. Lightner*, 319 U.S. 561, 575, 63 S.Ct. 1223, 1231 (1943), that require the Servicemember's Civil Relief Act is to be "liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation," but also directly conflicts with the Supremacy Clause, Article VI of the United States Constitution, by which federal statutes are "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Statement of The Case

This action related to the Plaintiff's childhood sexual abuse was referred to counsel and filed in 2008 (R. App. pp. 9 - 11, 2008 Complaint). When counsel was informed that the Plaintiff had been deployed to Afghanistan (R. App. 43, Transcript at p. 10), that 2008 action was not served. (R. App. 1, Order 1). After 2012, when the Plaintiff's period of military service ended (R. App. 12, Amended Complaint), counsel prepared and filed an amended summons and complaint that recounted the Plaintiff's military service and the applicable provision of the Servicemember's Civil Relief Act as to timing of the filing. (R. App. 12, Amended Complaint ¶¶ 2 - 4). The amended pleading was filed and served, and an affidavit of service for the amended complaint was filed with the court. (R. App. pp. 15 and 25, Affidavits of service).

The Defendant moved to dismiss contending (a) that the action was not properly served in 2008, (b) that a motion was necessary before the 2008 complaint could be served, and (c) that the case should be dismissed in its entirety. (R. App. pp. 16 to 17). The Plaintiff's sole argument in opposition to the motion was that he was covered by the time provisions of the Servicemembers Civil Relief Act. Hearing Transcript at 10 – 11, R. App. 43 - 44.

By order of November 1, 2012, the trial court dismissed the action finding that the 2008 complaint had not been served within 120 days of filing (R. App. 2, Order at 2). The trial court also ruled the Plaintiff was “estopped” from filing an Amended Complaint (R. App. p. 3, Order at 3), “because, at the time Plaintiff sought to file and serve his purported Amended Complaint there was no action to amend.” (R. App. p. 3, Order at 3). Applying time limits from state law and procedure, the trial court dismissed the action, with prejudice, which also prevented the servicemember, whose time to file had not expired under the federal statute, from simply re-filing the complaint in 2012. R. App. p. 3, Order at 3.

Argument in Support of the Petition

The Court of Appeals erred in affirming the trial court dismissal under state law time limits (a) without applying the Servicemembers Civil Relief Act and (b) by requiring a Rule 59(e) motion when the only argument made to the trial court was necessarily denied.

The Servicemember's Civil Relief Act (SCRA) “is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.” *Boone v. Lightner*, 319 U.S. 561, 575, 63 S.Ct. 1223, 1231 (1943). The trial court and the Court of Appeals each erred as a matter of law, and abused discretion, in failing to apply in any way the SCRA, let alone apply it liberally to protect the servicemember. The Court of Appeals additionally erred when it affirmed the dismissal for lack of a Rule 59(e) motion, when

the *only* ground argued below, the SCRA (Hearing Transcript at pp. 10 – 11), was necessarily rejected by the trial court. No Rule 59(e) motion is needed when the only ground is rejected by a trial court. *Spence v. Wingate*, 674 S.E.2d 169, 170 (S.C. 2009).

Under 50 App. U.S.C. §§ 512(a)(2) and 512(b), the SCRA applies to each state’s judicial proceedings “commenced in any court or agency in any jurisdiction.” 50 App. U.S.C. § 512(b). Under 50 App. U.S.C. § 526, “the period of a servicemember’s military service may not be included in computing *any* period limited by law, regulation, or order” for bringing an action. Emphasis added.

Obviously, the action by the SCRA to suspend state law time limits necessarily includes the time provisions under SCRCP 3. Even more fundamentally, the 120 day limitation period for service of a complaint under SCRCP 3(a)(2) applies only if the complaint has been served outside of the statute of limitations. Compare SCRCP 3(a)(2) with SCRCP 3(a)(1). No argument was even made that the Plaintiff was out of time to file, even in 2012. (R. App. p. 45, Transcript at 12, R. App. p. 45, “this is not a statute-of-limitations argument.”) Thus the trial court erred even in applying SCRCP 3, and “estopping” the Plaintiff, since on the face of the amended complaint time remained for the Plaintiff to bring the action (R. App. pp. 12 to 14, R. App. pp. 45 to 47),¹ when the trial court dismissed the action with prejudice the servicemember was not out of time to bring his complaint under S.C. Code § 15-3-555. Had the trial court not

¹ R. App. p. 12, Amended Complaint at ¶¶ 3 and 4. The Plaintiff was born in February, 1986 (R. App. 12, ¶ 3), and acts of abuse occurred after August 31, 2001 (R. App. 12 ¶4). Under S.C. Code § 15-3-555, the servicemember had until his 27th birthday (February, 2013) to bring his complaint. He could readily have done so but for the trial court dismissing the action with prejudice and estopping him. R. App. 3. Even without S.C. Code § 15-3-555, his military service began four days after his 17th birthday in February, 2003, and ended in August, 2011 (R. App. 66), none of which time under the SCRA can be counted against his time to file.

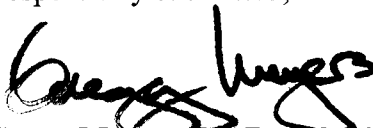
improperly applied state time limits, dismissed the action with prejudice, and estopped the Plaintiff, a complaint could have been newly filed even in 2012.

Under the SCRA, state law time limits cannot be applied to terminate the servicemember's right to bring his action. Despite the SCRA, and despite efforts to call the Court's attention to the federal statute (e.g., R. App. 43, Transcript at 10: "his time to perfect that service extends under the federal statute"), the Court applied the 120 day limit of SCRCP 3 and dismissed the action, R. App. 3, Order at 3, then committed a second violation of the SCRA by applying SCRCP 15 to "estop" the servicemember from amending his pleading, *Id.*, and a third violation by applying time limits to dismiss his case with prejudice, *Id.*, preventing a new filing as of 2012.

Conclusion

The Petition for *Certiorari* to the Court of Appeals should be granted to address the denial of the Plaintiff's federal right.

Respectfully submitted,



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City of Duncan,

Respondent

Proof of Service

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**Petition for Writ of *Certiorari*
and Appendix**

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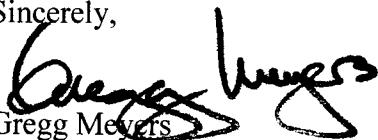
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South Carolina Court of Appeals
PO Box 11629
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Re: Appeal 2012-213499
Doe v. City of Duncan, Case No. 08-CP-42-0475
(Spartanburg County, Hon. J. Derham Cole)

Dear Ms. Kitchings:

Enclosed please find a Petition for Writ of *Certiorari* to the Court of Appeals and a Proof of Service in the above matter.

Sincerely,


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GM/tld

Enclosures

cc: w/enclosures
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Done January 15, 2015

A handwritten signature in black ink, appearing to read "Gregg Meyers". The signature is fluid and cursive, with the first name "Gregg" being more prominent than the last name "Meyers".

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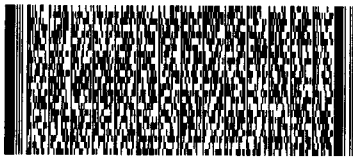
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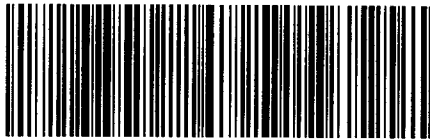
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