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The State of South Carolina  
In The Court of Appeals

**RECEIVED**  
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SC Court of Appeals

Appeal from Spartanburg County  
Hon. J. Derham Cole, Circuit Court Judge  
2008-CP-42-0475

Appellate Case No. 2012-213499

John Doe, ..... Appellant

v.

City of Duncan ..... Respondent

**Petition for Rehearing**

Plaintiff John Doe hereby petitions the Court for rehearing of the June 8, 2016 order affirming the trial court dismissal of this action. The case presents issues of first impression in South Carolina. The Court of Appeals panel has erred in the following respects.

1. The Court has failed to properly interpret the plain language of 50 U.S.C. § 3911 (Order at p. 6). In this regard, the Court has committed two errors. First, the Court has failed to recognize that in 50 U.S.C. § 3911(3), Congress explicitly defined, for use in U.S.C. § 3936, the phrase “period of military service,” and defined it more broadly than as construed by the Court.<sup>1</sup>

<sup>1</sup> 50 U.S.C. § 3911(3) provides (emphases added):  
The term “period of military service” means the period beginning on the date on which a servicemember *enters* military service and ending on the date on which the servicemember is *released from* military service or dies while in military service.

This is broader than merely “active duty.” As applied to John Doe, his “period of military service” ran from February, 2003 until his release in August 10, 2011, as the Court properly calculated in its Order (footnote 6 on page 6) as eight years and seven months.

Second, the Court has erred in how it has construed “military service” in 50 U.S.C. § 3911(2), recognizing only the “active duty” portion in the beginning of the definition at 50 U.S.C. § 3911(2)(A)(i), but excluding the rest of the conjunctive parts of the definition in 50 U.S.C. § 3911(2). Specifically, the Court has excluded the conjunctive provisions in 50 U.S.C. §§ 3911(B) and (C), including “or other lawful cause” in § 3911(2)(C). “Active duty” is only one part of the statutory definition of “military service,” not the entirety of the definition,<sup>2</sup> and even that definition defers to the explicit definition of “period of military service” in 50 U.S.C. § 3911(3) for use in 50 U.S.C. § 3936.

It is undisputed that the Plaintiff was not “released from military service” until August 10, 2011 (Order at p. 6, n. 6). The Plaintiff was not “released from military service” in between his periods of active duty. The Court’s limiting construction is irreconcilable with the explicit definitions of both “military service” in 50 U.S.C. § 3911(2), and of “period of military service” in 50 U.S.C. § 3911(3), and also conflicts with *Conroy v. Aniskoff*, 507 U.S. 511, 514, 113 S.Ct. 1562, 1564-1565 (1993), where the United States Supreme Court made plain that the time protection of 50 U.S.C. § 3936 must not be limited:

The statutory command in § 525 [now 50 U.S.C. § 3936] is unambiguous, unequivocal, and unlimited. It states that the period of military service “shall not be included” in the computation of “any period now or hereafter provided by any law....

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<sup>2</sup> Properly interpreted, the Plaintiff’s “military service” includes the Plaintiff’s periods of active duty and any period during which he was absent from active duty “for other lawful cause,” meaning the time he was permitted to stand down between active duty periods. He remained subject to, and was, recalled to active duty. But his “period of military service” for purposes of 50 U.S.C. § 3936 is still defined by 50 U.S.C. § 3911(3).

In refusing to recognize the Congressional definition of “period of military service” in 50 U.S.C. § 3911(3), the Court has erred.

2. The Court has erred in recognizing that the City appeared at the May 12, 2012 hearing and (among other things) “argued the merits of the case” (Order at p. 2), without also recognizing that in doing so the City made a voluntary appearance, thereby consenting to the court’s jurisdiction. E.g., *Stearns Bank National Assn v. Glenwood Falls, LP*, 644 S.E.2d 793, 796 (S.C. App. 2007) (voluntary appearance by letter from counsel); *In re Cannon*, 685 S.E.2d 814, 823 (S.C. App. 2009) (voluntary appearance by appearing and arguing the merits.) All service issues are moot. Both the voluntary appearance at the May 16, 2012 hearing (81 days) and service of the amended summons (91 days) are within 120 days of the 2012 amended complaint filing on February 21, 2012.

3. The Court has erred in concluding (Order at p. 2), that 50 U.S.C. § 3936(a) applies to “*bringing* a suit, not serving or amending a suit.”<sup>3</sup> This holding embodies two errors. First, it presumes, in error, that by the 2008 filing a suit had “commenced,” when under each of S.C. Code § 15-3-20(B) and SCRCP 3 the 2008 filing without service did not commence a civil action.<sup>4</sup> Second, the ruling conflicts with the holding in *Mims v. Babcock Center, Inc.*, 732 S.E.2d 395, 398 (S.C. 2012), which permits a party to amend by right when the original complaint was not served:

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<sup>3</sup> To support this conclusion, the Court cited four cases where the party *opposing* the servicemember was trying to assert the protections of the statute. Under *Conroy v. Aniskoff*, 507 U.S. 511, 514, 113 S.Ct. 1562, 1564-1565 (1993), the servicemember’s time protections as a matter of law are “unambiguous, unequivocal, and unlimited.”

<sup>4</sup> The 2008 filing was not served only because after filing, counsel learned the Plaintiff had

we agree with Mims that, contrary to Defendants' assertion, Rule 15(a), SCRPC does allow the filing and service of an amended complaint without leave of court, even if the original complaint has not been served, because a party may amend her pleadings once without leave of court before a responsive pleading is served, and no responsive pleading had been served by Defendants prior to Mims's service of the amended complaint.

This error is also reflected in the Order at p. 7, where the Court again contradicts *Mims* in concluding that the 2012 amended complaint was a nullity. *Mims* explicitly permits the amended pleading.

4. This issue would be mooted by the Court correcting the errors identified above, but the Court also erred in concluding (Order at p. 5) that minor tolling and the two-year limit in the Tort Claims Act governed the Plaintiff's claim against the City rather than the more expansive time limits in S.C. Code § 15-3-555. The legislature enacted S.C. Code § 15-3-555 on August 31, 2001, to expand the limitations period for all injury claims "arising out of an act of sexual abuse." In doing so, the legislature provided more time than is ordinarily included in the general two-year provision of S.C. Code § 15-78-110 and the minor tolling provision of S.C. Code § 15-3-40.

Among other things, the Court's Order conflicts with S.C. Code § 15-78-40, which requires that state actors be liable "in the same manner and to the same extent as a private individual under like circumstances." The Court's Order also conflicts with each of two settled principles of statutory construction articulated, among other places, in *Hodges v. Rainey*, 533 S.E.2d 578 (S.C. 2000):

- (A) Where two statutes conflict, the more recent and specific statute prevails. 533 S.E.2d at 583 n.3.

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been recalled to active duty in Afghanistan. R. App. P. 43.

(B) Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative. 533 S.E.2d at 583.

As the more recent and specific statute, S.C. Code § 15-3-555 controls the Plaintiff's claim, given that abusive acts are alleged to have occurred after August 31, 2001 (R. App. at pp. 9, Complaint ¶ 2 and 12, Amended Complaint ¶ 4), when S.C. Code § 15-3-555 was enacted. The limitations period that properly applies is "six years after the person becomes twenty-one years of age or within three years from the time of discovery by the person of the injury and the causal relationship between the injury and the sexual abuse or incest, whichever occurs later." S.C. Code § 15-3-555(A).

#### Conclusion

The Court of Appeals panel should grant this petition to rehear and address these four fundamental errors. The Court should overturn the trial court's failure to apply the Servicemembers Civil Relief Act and, consistent with *Conroy v. Aniskoff*, 507 U.S. 511, 113 S.Ct. 1562 (1993), permit a more than amply earned day in court for this Servicemembers, who served in combat, risking his life for his country.

Respectfully submitted,



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