

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

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

John Doe,Appellant,

v.

City of Duncan,Respondent.

**RESPONDENT’S RETURN TO THE
PETITION FOR REHEARING**

Though the Court has not requested a return, pursuant to Rule 240(d), SCACR, Respondent files this Return to Appellant’s Petition for Rehearing as the petition for rehearing should be expeditiously and summarily denied. As explained more fully below, Rehearing is not warranted because this Court correctly held in its opinion filed June 8, 2016, that Doe’s arguments on appeal are legally incorrect, and the four arguments in Doe’s Petition for Rehearing are unavailing because this Court did not overlook or misapprehend any points of law or fact. The Court correctly affirmed the decision below.

I. This Court correctly interpreted and applied the SCRA and held the statute of limitations was tolled only during Doe’s intermittent periods of active duty.

This Court correctly interpreted the tolling statute found in the Servicemembers’ Civil Relief Act (“SCRA”) and correctly applied it to Doe’s claim based on the Record evidence. Doe, however, argues this Court’s interpretation and application of the SCRA’s tolling statute

was flawed in two ways. First, he argues the Court erred by interpreting the statute's term "military service" by looking to the SCRA's definition of that term rather than the SCRA's definition of the term "*period of military service*," which he contends is broad enough to encompass his entire time of enlistment, including inactive duty. *See* Doe's Pet. for Rehearing at 1. Second, Doe argues this Court erred by failing to assume (without any supporting evidence) that his periods of absence from active duty were "on account of sickness, wounds, leave, or other lawful cause" and thus constituted "military service." *Id.* at 2. As explained below, Doe's arguments are incorrect.

A. This Court correctly interpreted the tolling provision's term "military service."

In its Opinion, this Court correctly held the SCRA's tolling provision, which tolls statutes of limitations during a servicemember's "military service," applies only during a servicemember's periods of active duty. Doe, however, argues the term "military service" should be construed more broadly without citing a single case for that position. The SCRA's tolling provision states:

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.

50 U.S.C. § 3936(a) (emphasis added). The statutory term "military service," as well as the term "period of military service," are defined in the SCRA:

(2) Military service

The term "military service" means—

- (A) in the case of a servicemember who is a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard—

- (i) *active duty*, as defined in section 101(d)(1) of Title 10, and
 - (ii) in the case of a member of the National Guard, includes service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of Title 32, for purposes of responding to a national emergency declared by the President and supported by Federal funds;
- (B) in the case of a servicemember who is a commissioned officer of the Public Health Service or the National Oceanic and Atmospheric Administration, active service; and
- (C) any period during which a servicemember is *absent from duty on account of sickness, wounds, leave, or other lawful cause*.

(3) Period of military service

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.

50 U.S.C. § 3911 (emphasis added).

Doe argues the Court should have interpreted the tolling statute’s phrase “period of a servicemember’s military service” by relying on the SCRA’s definition of the term, “period of military service,” which he contends is broad enough to encompass his *entire* time of enlistment (including periods of inactive duty). *See* Doe’s Pet. for Rehearing at 1. The flaw in Doe’s argument, however, is that the definition of “period of military service” incorporates and relies on the term “military service” and thus is no broader than the definition of “military service” itself. Accordingly, courts have consistently ruled that a servicemember’s “period of military service” is limited to his time on active duty. *See, e.g., Turner v. A. Passmore & Sons, Inc.*, 341 Fed. Appx. 363, 370 (10th Cir. 2009) (“It is undisputed that he was discharged from active duty no later than January 29, 2008 Accordingly, Mr. Turner’s ‘period of military

service’ and its attendant tolling ended on that date.”); *Lowe v. United States*, 79 Fed. Cl. 218, 225 (Fed. Cl. 2007) (stating that the “critical determination” for determining the servicemember’s “period of military service” was “the date on which plaintiff was released from active duty”).

The fact that the term “period of military service” refers only to active duty is made even more clear in cases interpreting the pre-2003 codification of the SCRA’s tolling provision, which stated, “The *period of military service* shall not be included in computing any period . . . for the bringing of any action or proceeding in any court.” *See* former 50 U.S.C. App. § 525 (emphasis added). Courts interpreting that statute held the term “period of military service” referred only to *active* duty. *See, e.g., Min v. Avila*, 991 S.W.2d 495, 506 (Tex. Ct. App. 1999) (“Section 511(2) of the Relief Act, which defines ‘period of military service’ also contemplates ‘*active service*’ only.”) (emphasis in original); *Hamner v. BMY Combat Sys.*, 869 F. Supp. 888, 891 (D. Kan. 1994) (“The term ‘period of military service’ is defined as the period beginning on the date on which the person enters *active* service and ending on the date of the person’s release from *active* service.”) (emphasis added); *Diamond v. United States*, 344 F.2d 703, 706 (Fed. Cl. Ct. 1965) (holding a “release from active duty terminated his ‘period of military service’”).

Indeed, courts considering the exact argument made by Doe have concluded the term “period of military service” encompasses the same time periods as the term “military service,” namely active duty:

Appellant claims that the entire period from the date of his enlistment on July 1, 1982, to the present qualifies as “military service” for purposes of his “period of military service.”

The short answer to Appellant’s argument is that nowhere does the SCRA provide that its tolling protections are triggered by “enlisting.” Instead, the SCRA expressly points to “active duty” as the touchstone activating its tolling provisions. . . . There are gaps in Appellant’s active duty status, which classifies him as inactive

from 7/1/82 through 1/31/83, 8/7/83 through 2/1/86, and again from 2/15/86 through 11/27/86. [] As a result, because Appellant has undisputed periods of inactive duty, the tolling provision of the SCRA would not apply to those dates.

Lazarski v. Archdiocese of Philadelphia, 926 A.2d 459, 468–70 (Pa. Superior Ct. 2007). In short, whether one uses the SCRA’s definition of “period of military service” or its definition of “military service,” both terms mean *active* duty when considering the tolling provision at issue here. Accordingly, this Court did not err in ruling the SCRA’s tolling provision applied only during Doe’s intermittent periods of active duty. The suit is time barred. Rehearing must be denied.

B. This Court correctly applied the SCRA’s tolling provision to the facts of this case as established by the entirety of the Record evidence.

Doe next argues this Court erred by relying on only part of the SCRA’s definition of the term “military service.” *See* Doe’s Pet. for Rehearing at 2. As noted in the portion of the statute quoted above, the SCRA defines “military service” to include (1) a soldier’s time on active duty, (2) a National Guardsman’s period of service when called to active duty for periods long than 30 days, and (3) periods when a “a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause.” *See* 50 U.S.C. § 3911(2). Focusing on the last of those three categories, Doe argues that because subsection 3911(2)(C) defines “military service” to include certain specific types of absence from active duty, then *all* of Doe’s absences from active duty should be shoehorned into that category. The logical flaw in this argument is that Doe has not proven his absences from active duty were of the type listed in subsection 3911(2)(C). The record is devoid of any such evidence. Indeed, Doe presented no evidence whatsoever to establish the nature of his absences from active duty. Rather, the sole Record evidence regarding his military service is the National Archives and Records Administration (NA) Form 13164, which merely indicates Doe’s 8.5 years of enlistment in the Army, the Army Reserve, and the

Army National Guard contained intervals of active duty adding up to fewer than six years total.
(R. 66.)

Although Doe had ample opportunity before the trial court, he failed to demonstrate that his periods of inactive duty were of the types specified in 50 U.S.C. § 3911(2)(C) to count as “military service.” Such arguments now necessarily fail on appeal. Notably, Doe’s time in the National Guard and the Army Reserve (though the Record does not reveal which periods of time those were) is not “military service” for purposes of the SCRA’s tolling provision, and there are numerous other types absence from active duty which do not count as “military service.” *See, e.g., Smith v. Sikorsky Aircraft Corp.*, 41 F. Supp. 3d 564 (S.D. Tex. 2014) (holding national guard service did not count as “military service” for purpose of SCRA’s tolling provision); *Bowen v. United States*, 292 F.3d 1383 (Fed. Cir. 2002) (same); *Min*, 991 S.W.2d at 506 (“Regular reserve duty is not active duty.”); *Cronin v. United States*, 765 F.3d 1331 (Fed. Cir. 2014) (holding a servicemember’s absence from active duty while on temporary disability status did not constitute “military service” for purposes of the SCRA’s tolling statute). Accordingly, Doe cannot now insist this Court speculate that some or all of his time of inactive duty might fall within the few, narrow types of absence listed in subsection 3911(2)(C).

II. This Court correctly affirmed the dismissal of the suit because the City did not waive its jurisdictional defense by simultaneously asserting other Rule 12(b) defenses.

In his Petition for Rehearing, Doe argues this Court erred by failing to hold the City waived its personal jurisdiction defense when it appeared before the trial court to argue its Motion to Dismiss and “argued the merits of the case.” *See Doe’s Pet. for Rehearing* at 3 (quoting Opinion at 2.). Doe’s argument is incorrect because the Rules of Civil Procedure expressly allow a defendant to do what the City did here—namely to consolidate all its Rule 12(b) defenses into a single motion and/or hearing—and states that doing so does *not* waive the

defenses based on lack of personal jurisdiction, insufficiency of process, or insufficiency of service of process. *See* Rule 12(g)–(h), SCRCP.

Here, the City’s argument on “the merits” to which Doe refers was the City’s argument that “Doe was taking inconsistent positions . . . [by arguing] the chief of the City’s fire department was acting both in his individual capacity and in the course and scope of his employment.” *See* Opinion at 2. The City made this argument pursuant to Rule 12(b)(6). *See* Memo. in Supp. of Def.’s Mot. to Dismiss at 4–6 (R. 21–23). In the same motion and hearing, the City also asserted the defenses of lack of subject matter jurisdiction, lack of personal jurisdiction, insufficient process, and insufficient service of process, pursuant to Rule 12(b)(1), (2), (4), and (5), respectively. *See id.* at 1–3 (R. 18–20).

The Rules of Civil Procedure expressly permit the City to combine its Rule 12(b) defenses in this manner without waiving any of them. *See* Rule 12(b)(g), SCRCP (“A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him.”); Rule 12(b)(h), SCRCP (stating a party waives its defense for lack of personal jurisdiction or insufficient process *only* if the party fails to make raise that defense in its Motion to Dismiss or its responsive pleading). Accordingly, this Court did not err in affirming the trial court’s ruling dismissing the suit.

III. This Court correctly held the SCRA’s tolling provision tolls only the time period for bringing a suit, not the time period for serving or amending a suit.

In his Petition for Rehearing, Doe argues this Court erred in two ways in holding the SCRA’s tolling provision does not toll time periods for serving or amending a suit. *See* Doe’s Pet. for Rehearing at 3–4. First, Doe argues the Court erred by presuming the filing of an unserved complaint meant a suit had “commenced.” *Id.* at 3. Doe’s argument is flatly contradicted by this Court’s Opinion and the Rules of Civil Procedure, which expressly state and

confirm the opposite, namely that “Doe *failed to commence* a civil action” due to the lack of service. See Opinion at 6 (emphasis added); see also *Puchek v. Elledge*, 160 F. Supp. 286, 287 (N.D. Ind. 1958) (holding the SCRA’s tolling provision does not apply to the time for *servicing* a suit); *Thornley v. Superior Court*, 201 P.2d 567, 568 (Cal. Ct. App. 1949) (same); 36 A.L.R. Fed. 420, § 12 (1978) (stating the SCRA’s tolling provision “is not applicable to, and cannot prevent the running of, time limitations governing the service of process in . . . actions already brought”).

Doe next argues this Court’s holding that the SCRA did not toll the time for Doe to amend his suit conflicts with the holding in *Mims v. Babcock Center, Inc.*, 399 S.C. 341, 732 S.E.2d 395 (2012). The holding in *Mims*, however, is inapplicable and wholly distinguishable from the case at bar. *Mims* involved a plaintiff who filed a complaint but did not serve it until nearly a year later when, *prior to the expiration of the statute of limitations*, he served a summons and amended complaint on the defendants. The Supreme Court held (1) if the statute of limitations has not yet expired, a plaintiff may amend his complaint as a matter of right so long as no responsive pleading has been filed, but (2) if the statute of limitations *has* expired after a complaint is filed and before it is served, “actual service must be accomplished not later than one hundred twenty days after filing.” *Mims*, 399 S.C. at 346, 732 S.E.2d at 397 (quoting Rule 3(a), SCRPC) (emphasis added). The facts in *Mims* presented the former situation where the statute of limitations had yet to expire, while the case at bar involves the latter scenario where the statute of limitations has expired. Doe filed his complaint and the applicable statute of limitations expired before he served the defendant and before he purported to amend the complaint. Because he failed to failed to serve the summons and complaint within 120 days after filing, he failed to commence a civil action. See Rule 3(a), SCRPC; *Mims*, 399 S.C. at 346, 732 S.E.2d at 397. This Court’s ruling does not conflict with *Mims*, and this Court correctly held the SCRA’s tolling provision does not toll the time period for serving or amending a suit.

IV. This Court correctly held Doe’s claim is governed by the statute of limitations found in the South Carolina Tort Claims Act.

In his Petition for Rehearing, Doe argues this Court erred by holding his claim against the City of Duncan was subject to the two-year statute of limitations found in the South Carolina Tort Claims Act (“SCTCA”) rather than the longer statute of limitations found in S.C. Code Ann. § 15-3-555. *See* Doe’s Pet. for Rehearing at 4–5. As explained below, Doe’s arguments on this issue are incorrect.

Doe first argues this Court’s application of the SCTCA’s statute of limitations conflicts with another provision of the SCTCA which, according to Doe, “requires that state actors be liable ‘in the same manner and to the same extent as a private individual under like circumstances.’” *Id.* at 4 (quoting a truncated excerpt from S.C. Code Ann. § 15-78-40). The problem with Doe’s argument is that he quotes only a part of that statute. The statute states in whole:

The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, *subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein.*

S.C. Code Ann. § 15-78-40 (emphasis added). In short, a city’s liability is similar to a private individuals except when the SCTA has imposed a different limitation, which is what the Act has done by imposing a two-year statute of limitations. Accordingly, this Court’s application of the SCTA’s statute of limitations comports, rather than conflicts, with Section 15-78-40.

Doe next argues there is a “conflict” between the SCTA’s statute of limitations and the longer statute of limitations found in S.C. Code Ann. § 15-3-555, and that because the latter is “more recent and specific,” it should prevail. *See* Doe’s Pet. for Rehearing 4. The flaw in Doe’s argument, however, is that *there is no conflict* between the two statutes of limitations. The two

statutes can be reconciled and both of them rendered simultaneously operable by applying the following, simple rule: Section 15-78-110 sets the statute of limitations for claims of sexual abuse asserted against the State, an agency, a political subdivision, or a governmental entity, and Section 15-3-555 sets the statute of limitations for a claim of sexual abuse against any other entity.¹ The flaws in Doe's argument are further demonstrated by the fact that if Section 15-78-110's two-year statute of limitations were in conflict with Section 15-3-555 (which it is not), it would also be a conflict with Sections 15-3-330, -340, -350, -360, -370, -380, -520, -530, -540, -545, and -640, *all of which* set out longer statutes of limitations. But the SCTA's statute is *not* in conflict with any of these statutes of limitations. They can all be harmonized by simply applying the language of the SCTA, which applies only to suits (like this one) brought against the State, an agency, a political subdivision, or a governmental entity. Accordingly, this Court did not err by applying the SCTA's statute of limitations.

CONCLUSION

This Court correctly affirmed the trial court's ruling. This Court's ruling did not overlook or misapprehend any points of fact or law and there is thus is no basis upon which to grant rehearing. Undersigned presents this Return, the briefing before the Court, and the Record as additional support as to why rehearing should be denied.

[SIGNATURE PAGE ATTACHED]

¹ Indeed, our Supreme Court and the courts of other jurisdictions have recognized and applied this very rule, holding claims of sexual abuse against governmental entities are governed by the Tort Claims Act's statute of limitations rather than the longer period provided in the statute of limitations for sexual abuse claims generally. *See Doe v. Greenville Cnty. Sch. Dist.*, 375 S.C. 63, 651 S.E.2d 305 (2007) (noting a negligent supervision claim against school district involving sexual abuse committed by a third party was brought pursuant to the SCTCA); *see also K.J. v. Arcadia Unified Sch. Dist.*, 172 Cal. App. 4th 1299, 1238 (Cal. Ct. App. 2009); *Drahaus v. State*, 584 N.W.2d 270, 275 (Iowa 1998); *Teater v. State*, 559 N.W.2d 758 (Neb. 1997).

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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 the Petition for Rehearing

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