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S.C. SUPREME COURT

The State of South Carolina
In The Supreme Court

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

Appellate Case No. 2012-213499

John Doe, ... Petitioner

v.

City of Duncan ..... Respondent

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

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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 by an order filed August 17, 2016.

Question Presented for Review

1. Did the Court of Appeals err in either:

    a. construing the statutory definition of "military service" in 50 U.S.C. § 3911(2), as limited to only one form of "active duty" when its plain terms are more expansive, or

    b. ignoring the statutory definition of "period of military service" in 50 U.S.C. 3911(3)?

2. Did the Court of Appeals err in concluding that the 2008 filing that was not served rendered the Act inapplicable?

3. Did the Court of Appeals err in ruling that the later enacted, specific limitations period of S.C. Code § 15-3-555 is subordinate to the general limitations period of S.C. Code § 15-78-110, rather than the reverse?

Grounds for the Petition

This Petition presents four independent grounds, any one of which supports the Court granting review.

(1) The Petition presents novel questions of federal law about interpreting and applying the Servicemembers Civil Relief Act (referred to in this Petition as the Act), now codified at 50 U.S.C. §§ 3901-4042.

(2) The decision of the Court of Appeals appears to conflict with two decisions of the United States Supreme Court. *Boone v. Lightner*, 319 U.S. 561, 575, 63 S.Ct. 1223, 1231 (1943) (the 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"), and *Conroy v. Aniskoff*, 507 U.S. 511, 514, 113

S.Ct. 1562, 1564-1565 (1993) (exclusion for "period of military service" is "unambiguous, unequivocal, and unlimited.")

(3) The Petition presents novel questions of state and federal law given that the Court of Appeals concluded that the 2008 filing, which was not served, constituted "bringing a suit."

(4) The Petition presents a novel question of state law from the Court of Appeals concluding that the later enacted, specific limitations period of S.C. Code § 15-3-555 for "injury to a person rising out of an act of sexual abuse or incest" is subordinate to the general limitations period of the Tort Claims Act, S.C. Code § 15-78-110.

Statement of the Case

Petitioner is a former servicemember discharged in 2011 after multiple combat deployments. He was born in February, 1986, R. App. 12, Complaint ¶ 3, and enlisted four days after his 17th birthday in February, 2003. R. App. 12 ¶¶ 1-4. His dates of service are listed as February 2003 to August 10, 2011. R. App. 66.

Petitioner was sexually abused as a child by a police officer who had access to Petitioner at the Duncan Fire Department, through an overnight program operated by the Department without adequate supervision. R. App. 13-14, 2012 Complaint ¶¶ 6-14. The action related to his sexual abuse was referred to counsel and filed in 2008. R. App. 9-11, 2008 Complaint. When counsel was informed in 2008 that Petitioner was in military service, the 2008 complaint was not served. R. App. 1, Order 1; R. App. 12 ¶ 1; R. App. 43, Transcript at 10. By operation of SCRCP 3, the 2008 filing did not commence an action.

After Petitioner was discharged, an amended complaint was prepared, explicitly invoking the Act, and explaining that the 2008 complaint had been filed but not served. R. App. 12 ¶¶ 1-4.

The amended summons and complaint appeared to have been served February 27, 2012, R. App. 15, but the town contended by motion to dismiss, R. App. 16, and at a May 16, 2012 motions hearing on the merits, R. App. 34, that no amended summons was served. R. App. 37; Court of Appeals 2016 Order at 2. An amended summons and complaint was again served on June 6, 2012. R. App. 25; Court of Appeals 2016 order at 2.

The trial court dismissed the action and "estopped" Petitioner from amending the complaint, but in doing so gave no consideration to the Act. R. App. 1-3, trial court order. The Court of Appeals upheld that decision, also without considering the Act. R. App. 104-105, Order of November 12, 2014. In 2015 this Court directed the Court of Appeals to confront the merits of Petitioner's claim, R. App. 123, which required construing the Act.

The Act protects military members by, among other things, excluding from "any period limited by law regulation or order for the brining of any action or proceeding in a court," 50 U.S.C. § 3936(a), "[t]he period of a servicemember's military service." In short, the Act extends the statute of limitations for servicemembers.

By order of June 8, 2016, the Court of Appeals again affirmed the dismissal, finding untimely Petitioner's complaint, despite the Act. R. App. 125-132. The Court of Appeals construed the current text of 50 U.S.C. §3911(2) as applying to only a narrow interpretation of the Petitioner's "active duty" service time.[1] The Court of Appeals considered only a narrow definition of what comprises "active duty," rather than the full definition in the Act for "military service," at 50 U.S.C. § 3911(2), or for "period of military service," at 50 U.S.C. § 3911(3). The Court additionally concluded that the 2008 filing that was not served constituted filing suit,

[1] R. App. 130, Court of Appeals Order at p. 6: "The Act, however, tolls the running of the statute

which rendered the Act inapplicable. R. App. 129, Court of Appeals order at 5. Yet the Court also concluded that the 2008 filing meant "Doe failed to commence a civil action" and that "no suit existed." R. App. 131, Court of Appeals Order at 7.

Finally, the Court concluded that the applicable time period for Petitioner's injury claim that arose from an action of sexual abuse was two years under the Tort Claims Act, S.C. Code § 15-78-110, rather than the broader time provisions in S.C. Code § 15-3-555. R. App. 129-130, Court of Appeals order at 5-6. This issue is unnecessary to reach if the Act is construed so as to apply to more than "active duty," but the order should at minimum be vacated in that respect, if not reversed.

Argument in Support of the Petition

1. The Court of Appeals erred in limiting "military service" in 50 U.S.C. § 3911(2), to only one narrow concept of what constitutes "active duty" rather than the full scope of the statutory definitions in 50 U.S.C. § 3911(2) (defining "military service" and "period of military service" in 50 U.S.C. 3911(3).

The Court of Appeals cited readily distinguishable cases, and ignored the plain language of the Act, in concluding that only one concept of "active duty" counted for Petitioner's benefits under the Act. The Court cited in its analysis only part of the definition at 50 U.S.C. § 3911(2), meaning only 50 U.S.C. § 3911(2)(a)(i), and excluded § 3911(2)(a)(ii), the section which explicitly includes in "active duty" both National Guard service and, through the explicit reference to 10 U.S.C. 101(d), service in the Reserves, both of which (Army National Guard and U.S. Army Reserves), Petitioner undisputedly has. R. App. 126, 2016 Order at p. 2 note 2; R. App. 66.

Nor did the Court consider the application of 50 U.S.C. § 3911(2)(C), which includes in

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of limitations only during periods of *active* duty," emphasis in original.

"active duty" any "other lawful cause" of absence from duty. For example, the Court of Appeals construction excluded all of Petitioner's basic training after his 2003 enlistment at age 17, when he was hardly at liberty from his military obligations.

The Court of Appeals also gave no consideration to the Act's explicit definition of "period of military service," 50 U.S.C. § 3911(3), which provides:

> 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.

As reflected on R. App. 66, Petitioner entered military service in February 2003, when he enlisted. He concluded his military service August 10, 2011. Id. Despite this explicit definition, the Court of Appeals construction excludes the time period between his entry and his 18th birthday, and then excludes all time after that 2003 to his first listing for "active duty" on August 19, 2014. R. App. 130, Order at 6. Doing so excluded not less than five months and 21 days from the benefit otherwise available to Petitioner, a time period which by itself would satisfy even the Court of Appeals time calculation for Petitioner's claim being timely.

The Court of Appeals was unresponsive to how its interpretation rendered the statutory section meaningless as to the time the servicemember is supposed to benefit beginning from when he "enters military service." R. App. 106-107, Petition to Rehear.

At page 6 of its order, R. App. 130, the Court cited two cases as support for its interpretation. Each is readily distinguishable. In *Boone v. United States*, 78 Fed. Appx. 108 (Fed. Cir. 2003), the servicemember enlisted for a four-year term. One month before that term ended he was charged with serious criminal offenses and was imprisoned, later convicted. 78 Fed. Appx. at 109. His enlistment term ended while he was imprisoned, so he was undisputedly

not in active or any other duty status once his term ended. 78 Fed. Appx. at 110. The second case, *Lazarski v. Archdiocese of Philadelphia*, 926 A.2d 459 (Pa. 2007), is also readily distinguishable. Lazarski had "undisputed periods of inactive duty," 926 A.2d at 469, and had "no factual support in the record," *Id.*, to buttress his contention that he was absent for lawful cause.

By contrast, R. App. 66 reflects when petitioner entered military service and when he was released, as well as his Army National Guard and Army Reserve service. The record supports Petitioner's claim that he should be entitled to "active duty" status to cover even the narrow limitations period applied by the Court of Appeals. See, R. App. 131, Order at 7, calculating that Petitioner's claim became untimely after February 12, 2012.

It is undisputed that the plaintiff was not "released from military service" until August 10, 2011 (R. App. 66; R. App. 130, Court of Appeals 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 unduly 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....

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

2. The Court of Appeals erred in concluding that the 2008 filing not having been served rendered the Act inapplicable.

Beginning at page 4 of its order, R. App. 128, the Court of Appeals committed three errors: two of state law and one of federal law. The state law errors were, first, recognizing that the City appeared at the May 12, 2012 hearing and (among other things) "argued the merits of the case" (Court of Appeals order at p. 2), but not finding it to be an act which consented to the court's jurisdiction, mooting all service issues. 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.) Both the voluntary appearance at the May 16, 2012 hearing (R. App. 34, a period of 81 days from the 2012 filing) and service of the amended summons (R. App. 25, 91 days from the filing) are within 120 days of the 2012 amended complaint filing on February 21, 2012.

Second, the Court of Appeals concluded inconsistent things about the 2008 filing that was not served because Petitioner was deployed. On one hand, the Court determined, R. App. 131, Order at 7, that "Doe failed to commence a civil action" when the pleadings were not served, and "no suit existed," Id., but in other places the Court of Appeals concluded that the 2008 filing constituted "bringing a suit," and his having chosen "to file suit." E.g., R. App. 129, Order at 5. Both interpretations cannot be correct.

The 2008 filing had "commenced" nothing, according to S.C. Code § 15-3-20(B) and SCRCP 3. See also, *Mims v. Babcock Center, Inc.*, 732 S.E.2d 395, 398 (S.C. 2012), which permits a party to amend by right when an original complaint was not served:

> we agree with Mims that, contrary to Defendants' assertion, Rule 15(a), SCRCP 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 R. App. 131, Order at p. 7, where the Court again contradicted *Mims* in concluding that the 2012 amended complaint was a nullity. *Mims* explicitly permits the amended pleading.

The Court of Appeals' error of federal law was in concluding, R. App. 128, Order at 4, that the Act applies "to toll statutes of limitation for *bringing* a suit, not serving or amending a suit." This conclusions rests on (a) the faulty premise that the 2008 filing constituted "bringing a suit," when it had no effect, as noted above, and (b) the supposed holdings of four cases, cited at R. App. 128, Order at 4, in which the party *opposing* the servicemember was trying to assert the protections of the statute, which the courts would not permit.[2] 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," and on this record, Petitioner is

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[2] The cases are (1) *Zitomer v. Holdsworth*, 449 F.2d 724 (3rd. Cir. 1971) (where the pleadings had been filed and served, and the servicemember's adversary was seeking protections of the Act) 449 F.2d at 725; (2) *Zarlinsky v. Laudenslager*, 167 A.2d 317 (Pa. 1949), where the action was undisputedly filed and the writ of summons issued and the servicemember's adversary sought the protections of the Act for a continuance; (3) *Thornley v. Superior Court*, 201 P.2d 567 (Cal. App. 1949), where two cases had been filed and served and the servicemember's adversary sought protections of the Act, and (4) *Puchek v. Elledge*, 160 F.Supp 286 (N.D. Ind. 1958), where the case had been filed and served, 160 F. Supp. at 286, and the servicemember's

entitled to the protections of the Act.

3. The Court of Appeals erred in ruling that the later enacted, specific limitations period of S.C. Code § 15-3-555 is subordinate to the general limitations period of S.C. Code § 15-78-110, rather than the reverse.

This issue is moot if the Act is interpreted consistent with Petitioner's position. But the Court of Appeals ruling should be addressed, either to reverse it or to vacate it in light of the federal and state issues above.

Petitioner was born in February, 1986. R. App. 12, ¶ 3. He did not turn 27 until 2013. His abuse occurred after August 31, 2001, when the limitations provision of S.C. Code § 15-3-555 was enacted, extending the time period for suit to age 27.

The Court of Appeals concluded that S.C. Code § 15-3-555 was inapplicable and that the two-year provision of S.C. Code § 15-78-110 applied. R. App. 130, Order at 6.

Where two statutes are conflict, the more recent and specific statute prevails. *See Hodges v. Rainey*, 533 S.E.2d 578, 581 (S.C. 2000). "Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." *Spectre, LLC v. S.C. Dept. of Health and Envtl. Control*, 386 S.C. 357, 688 S.E.2d 844, 851 (2010). "Specific statutes are not to be considered repealed by a later general statute unless there is a direct reference to the earlier statute or the intent of the legislature to do so is explicitly implied." *Denman v. City of Columbia*, 387 S.C. 131, 138-39, 691 S.E.2d 465, 469 (2010).

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adversary sought protection from the Act. 160 F. Supp. at 287.

The Tort Claims Act, enacted in 1986, contains a general limitations provision, S.C. Code § 15-78-110, which states:

> Except as provided for in Section 15-3-40 [related to claims by minors], 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.

In 2001, the legislature enacted S.C. Code § 15-3-555, a specific limitations period for actions involving sexual abuse, which expanded the limitations period to six years after the victim becomes twenty-one, or three years from the time of discovery of the injury and its connection to the abuse, whichever occurs later. Section 15-3-555(A) provides in pertinent part:

> An action to recover damages for injury to a person arising out of an act of sexual abuse or incest must be commenced within 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.

Giving the statute its plain and ordinary meaning, S.C. Code § 15-3-555 is the later, and more specific, provision compared with the general limitations period in the Tort Claims Act, and should control.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges*, 533 S.E.2d at 581. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *Id.* Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Id.* "The legislature's intent should be ascertained primarily from the plain language of the statute."

Georgia-Carolina Bail Bonds, Inc. v. Cnty. of Aiken, 579 S.E.2d 334, 336 (S.C. App. 2003). The statute's text is the best evidence of the legislative intent or will, and courts are bound to effect that expressed intent. *Hodges*, 533 S.E.2d at 581. The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose. *Hitachi Data Sys. v. Leatherman*, 309 S.C. 174, 420 S.E.2d 843 (1992). "A statute must receive a practical and reasonable interpretation consistent with the 'design' of the legislature." *Smith v. South Carolina Ins. Co.*, 350 S.C. 82, 87, 564 S.E.2d 358, 361. "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." *South Carolina Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989). See also, *James v. S.C. Dept. Transportation*, 711 S.E.2d 919, 924 (S.C. App. 2011) ("when a general statute and a specific statute conflict, the specific statute prevails.").

Nothing indicates the legislature intended to limit the application of the statute simply because the defendant happens to be a municipality. The legislative intent underlying S.C. Code § 15-3-555 suggests that the legislature intended the statute to apply to all claims arising out of sexual abuse. Specifically, S.C. Code § 15-3-555 was passed and made effective in 2001—after the Tort Claims Act. In addition, the legislative history of S.C. Code § 15-3-555 suggests no intent to limit the applicability of the statute with regard to claims against a government entity. *See,* South Carolina Bill Summary, 2001 Reg. Sess. H.B. 3131 (describing the purpose of the act as:

> to amend Chapter 3, Title 15 by adding section 15-3-555 so as to provide a statute of limitations for actions based on sexual abuse or incest of six years from the time a person becomes twenty-one or within three years of discovering the injury and the causal relationship between the injury and the abuse or incest.

The legislature implicitly highlighted the importance of providing a remedy to victims of sexual abuse, not to just those sexual abuse victims whose abuse involved negligence of private actors.

In *Doe v. R.D.*, 417 S.E.2d 541 (S.C. 1992), this Court recognized the unjust result of a narrow statute of limitations on victims of childhood sexual abuse. In so noting, the Court observed:

> We are aware of the damage that sexual abuse can cause in the lives of the victims. We also recognize that the application of a statute of limitations can appear unjust. In Note, *Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations: A Call for Legislative Action,* 26 Wake Forest L.Rev. 1245 (1991), the author details the rationale for statute of limitations and the application of such statutes in sexual abuse cases. A number of states have amended their statute of limitations to protect the sexually abused. A few courts have allowed the plaintiff to avoid the statute of limitations because the plaintiff has successfully claimed a disability. Several other states have applied the discovery rule by allowing the plaintiff to maintain an action where, as in the case at bar, the plaintiff discovered the causal connection between the injury and abuse within the statutory period. ***While the result may be appealing, we are without authority to amend our statute. An exception to the plain and unambiguous language of our statute of limitations must come from our legislature.***

Id., at 417 S.E.2d at 542-43 (emphasis added) (footnotes and internal citations omitted).

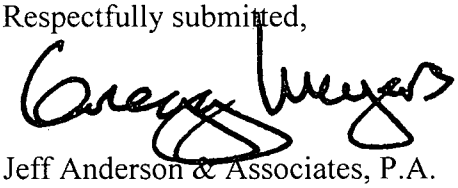
Doe v. R.D. observed, *Id.* at 142, n. 4, and the legislature responded to the observation, that other state legislatures had created specific statute of limitations to accommodate adult survivors of sexual abuse.

Nor is it unusual to apply to Tort Claims Act defendants statutes of limitations governing other specific causes of action. E.g., the medical malpractice statute of limitations and repose provisions of § 15-3-545 has been applied to government hospitals. *See, Kerr v. Richland Mem'l Hosp.*, 383 S.C. 146, 149, 678 S.E.2d 809, 811 (2009).

Conclusion

The Petition should be granted to enable the Court of Appeals decision to be reviewed.

Respectfully submitted,



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Proof of Service

I hereby affirm that I have served upon counsel for the defendant/respondent a copy of

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

by causing a copy of the document to be placed in the United States mails, first-class postage pre-paid wrapper, properly addressed to:

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