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

SEP 16 2016

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

S.C. SUPREME COURT

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

John Doe,

Petitioner,

v.

City of Duncan,

Respondent

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

Gregg Meyers, SC Bar No. 9908
Jeff Anderson & Associates, P.A.
366 Jackson St., Suite 100
Saint Paul, MN 55101
Attorney for Petitioner

Other Counsel of Record:

Nelson Mullins Riley & Scarborough, LLP	
William H. Foster	A. Mattison Bogan
PO Box 10084	PO Box 11070
Greenville, SC 29601	Columbia, SC 29201

Charles Franklin Turner
Wilson Jones Carter & Baxley, P.A.
872 South Pleasantburg Drive
Greenville, SC 29607

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The State of South Carolina
In The Court of Appeals

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

Case No. 2012-213499

John Doe, ... Appellant

v.

City of Duncan Respondent

Record On Appeal

Gregg Meyers
Jeff Anderson & Associates, P.A.
366 Jackson Street Suite 100
St. Paul, MN 55101
651-227-9990

Attorney for Appellant

William H. Foster
Miles Coleman
Nelson, Mullins, Riley & Scarborough
Poinsett Plaza, Suite 900
104 South Main Street
Greenville SC 29601
864-250-2222

Attorneys for Respondents

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- | | |
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| 02-04-2009 Email from Appellant's counsel, appears in the Record at | p. 51 |
| 2-21-2012 Amended Complaint, appears in the Record starting at | p. 12 |
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16. July 1, 2009 Answer in Doe v. Frost, 2009-CP-42-2662 p. 55

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

John Doe,)
Plaintiff,)

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS

v.)
City of Duncan,)
Defendant.)

Civil Action Number **2008-CP-42-0475**

THIS MATTER CAME BEFORE THE COURT upon Defendant Town of Duncan's ("Duncan") Motion to Dismiss in the instant case pursuant to Rules 12(b)(1), 12(b)(2), and Rule 3 of the South Carolina Rules of Civil Procedure. On May 16, 2012, the parties appeared before the Court for oral argument on Defendant's Motion. Gregg Meyers appeared on behalf of the Plaintiff, and Charles F. Turner, Jr. and William H. Foster appeared on behalf of the Defendant. In support of its Motion, Defendant also submitted a Memorandum of Law with supporting documentation. After considering all of the arguments of the attorneys for the parties, as well as after due consideration of the pleadings, the Memorandum of Law submitted by defense counsel, as well as the documentation submitted by the parties, the Court hereby grants Defendant's Motion and dismisses this action, with prejudice.

Plaintiff filed this action on January 28, 2008. Plaintiff then made no attempt to serve the Complaint for more than four years and, apparently, intended that the Complaint be dismissed. In an email of February 3, 2009, Plaintiff's counsel advised the Spartanburg County Clerk's office that the Complaint was not served during the prescribed 120-day period and that he would submit a voluntary dismissal. Plaintiff, however, failed to submit the promised dismissal.

SCANNED

1 of 3
R. App. 000001

COMPUTER PGL 4694538v1

On February 21, 2012, over four years after the original Complaint was filed, Plaintiff filed an "Amended Complaint," that simply restates the allegations of the original pleading. The Plaintiff did not file a Motion to Amend the original Complaint or otherwise seek leave to amend his pleading. On or about February 27, 2012, the Plaintiff purported to serve the Amended Complaint on the Defendant; however, no Summons was served upon the Defendant. The Defendant filed this Motion to Dismiss on March 15, 2012.

This Court concludes that the Plaintiff failed to commence this action pursuant to Rule 3 of the South Carolina Rules of Civil Procedure. Rule 3 of the South Carolina Rules of Civil Procedure provides that a civil action is commenced when the Summons and Complaint are filed with the Clerk of Court if: (1) the Summons and Complaint are served within the statute of limitations in any manner prescribed by law; or (2) if not served within the statute of limitations, actual service must be accomplished not later than 120 days after filing. South Carolina case law is clear that a civil action is commenced by the filing and service of a Summons and Complaint. *Brown v. Evatt*, 322 S.C. 189, 470 S.E.2d 848 (1996). If a plaintiff files a Complaint but fails to make actual service upon the defendant as required, the action is not yet commenced. *Blyth v. Marcus*, 322 S.C. 150, 470 S.E.2d 389 (Cl. App. 1996). Subject matter jurisdiction only vests in the Circuit Court upon commencement of the action, that is, when the Summons and Complaint was served, and not when filed. *First Palmetto State Bank v. Boyles*, 302 S.C. 136, 394 S.E.2d 313 (1990).

In this matter, the Plaintiff filed his Complaint on January 28, 2008. Pursuant to Rule 3 of the South Carolina Rules of Civil Procedure, the Plaintiff was required to serve the Defendant with the Complaint within 120 days of filing. Instead, over four years passed since the filing of the action. Thus, Plaintiff failed to commence this action within the requirements stated in Rule

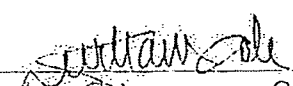
3 of the South Carolina Rules of Civil Procedure. Furthermore, because this action has not been commenced, the Court lacks jurisdiction over the Defendant. Accordingly, the Court dismisses this matter pursuant to Rules 3, 12(b)(1) and 12(b)(2) of the South Carolina Rules of Civil Procedure.

The Court also concludes that the Plaintiff did not seek leave from the Court to amend his Complaint pursuant to Rule 15 of the South Carolina Rules of Civil Procedure. The Plaintiff is estopped from asserting that he can file an Amended Complaint in this matter because, at the time Plaintiff sought to file and serve his purported Amended Complaint there was no action to amend.

Accordingly, the Court hereby grants the Defendant's Motion to Dismiss and orders the Clerk of Court to dismiss this action with prejudice.

IT IS SO ORDERED.

Date: October 29 2012
_____, S.C.



J. Derham Cole Circuit Court Judge

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2012 NOV -1 AM 10:12
CLERK OF COURT

The South Carolina Court of Appeals

John Doe, Appellant,

v.

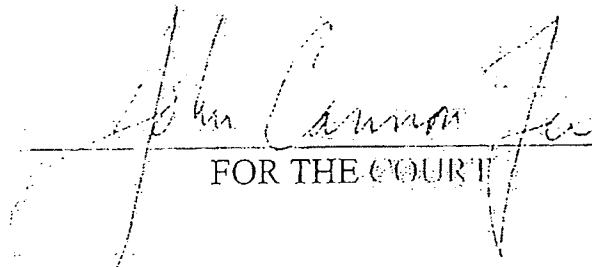
City of Duncan, Respondent.

Appellate Case No. 2012-213499

ORDER

We deny Respondent's motion to dismiss. At this phase of the appeal, we interpret the trial court's statement about jurisdiction as a finding that Respondent was never served with a summons and complaint. The order making that finding is the type of order over which this court has jurisdiction pursuant to section 14-8-200 of the South Carolina Code (Supp. 2012).

This order is without prejudice to the parties to address the issue of jurisdiction in their briefs.

 C.J.
FOR THE COURT

Columbia, South Carolina

cc:

Gregg E. Meyers

Charles Franklin Turner, Jr.

William Harrell Foster, III

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8/16/13

ML

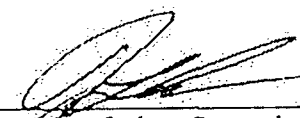
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C.A. NO.: 2009-CP-42-2662
	)	
John Doe,	)	
	)	
Plaintiff,	)	CONSENT ORDER OF DISMISSAL
	)	PURSUANT TO RULE 40(j)
v.	)	
	)	
Barry Frost,	)	
	)	
Defendant.	)	
	)	

YOU WILL PLEASE TAKE NOTICE that the parties, by and through their respective attorneys, hereby consent to the dismissal of the above-referenced case pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure, pending the outcome of the appeal of the companion case *Doe v Town of Duncan*, C.A. No.: 2008-CP-42-00475; with leave to restore the case to the trial docket within one year of the filing of this Order.

THEREFORE, it is so ordered that the above-referenced case be dismissed pursuant to Rule 40(j) of the *South Carolina Rules of Civil Procedure* with leave to restore the case to the trial docket within one year of the filing of this Order.

IT IS SO ORDERED.

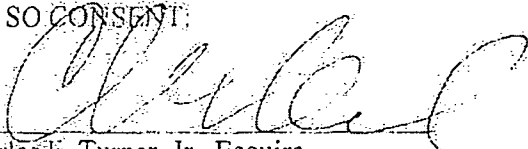
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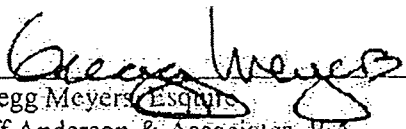


Presiding Judge, Seventh Judicial Circuit

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2013 SEP -9 AM 11:27
M. HOPE BLACKLEY

WE SO CONSENT:


Charles F. Turner, Jr., Esquire
Turner Padget Graham & Laney, P.A.
P.O. Box 1509
Greenville, South Carolina 29602
Attorneys for Defendant.


Gregg Meyers, Esquire
Jeff Anderson & Associates, P.A.
366 Jackson Street
St. Paul, MN 55101
Attorneys for Plaintiff

May 16, 2013
Greenville, South Carolina

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2013 SEP -9 AM 11:27
M. HOPE BLACKLEY

TPGL 5101351v1

In the State of South Carolina

County of Spartanburg

John Doe,

Plaintiff,

vs.

City of Duncan Fire Department,

Defendants.

Court of Common Pleas

Seventh Judicial Circuit

2008-07-12
Case No. 07-CP-42-012-00
FILED

0475

2008 JUN 28 PM 3:06
CLERK OF COURTS

Summons

TO: City of Duncan Fire Department

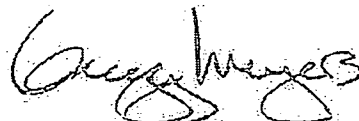
YOU ARE HEREBY SUMMONED and required to answer the complaint in this action. A copy of the complaint is served upon you with this summons.

Your answer to the complaint is to be served upon the attorney for the plaintiff at his office, PO Box 1297, Charleston, South Carolina, 29402.

According to the South Carolina Rules of Civil Procedure, which govern litigation, you are required to appear and defend yourself in this action by making and serving an answer to this complaint within thirty (30) days after the complaint is served upon you. The thirty days begin to run from the date after this summons and complaint are served upon you; the date the service is made is excluded.

If within that time you fail to appear and defend as you are required to do by the Rules of Civil Procedure, the plaintiff in this action shall apply to the Court for the relief demanded in this Complaint and judgment by default will be rendered against you for the relief demanded in the complaint.

Respectfully submitted,



Gregg Meyers
PO Box 1297
Charleston, S.C. 29402
843/720-8714

843/720-8704 facsimile
Attygm@gmail.com

2009 JAN 20 PM 3:05
10/20/09 1:15 PM

In the State of South Carolina

County of Spartanburg

2008-07-22
Court of Common Pleas
Seventh Judicial Circuit
Case No. 07-EP-42-0475

John Doe,

Plaintiff,

vs.

City of Duncan Fire Department,

Defendants.

Jury Trial Requested

Negligent Supervision

2008 JUN 20 PM 3:06
MAIC WILLIAMS

Complaint

1. John Doe is a pseudonym for a South Carolina resident presently serving in the United States armed forces and stationed overseas. His identity is withheld due to the sensitivity and private nature of these allegations, as these claims arise from an act of sexual abuse.
2. This cases arises from one or more acts of sexual abuse, some of which occurred after August 31, 2001. As a result, this claim is brought under authority of S.C. Code § 15-3-555.
3. The City of Duncan is a South Carolina municipality located in Spartanburg County.

For a Cause of Action: Negligent Supervision

4. When the plaintiff was a minor, he was invited through his mother to participate in activities at the Duncan Fire Department.
5. Plaintiff's mother on his behalf sought assurances that her son would be properly supervised during those activities. In response to her inquiries, she was assured, by Barry Frost, the Chief of the Duncan Fire Department, "your son will be well supervised."

6. Through Barry Frost, defendants assumed a duty to the plaintiff if the duty was not already inherent in having sponsored the activities for children.

7. Based on Barry Frost's assurance to her about the proper supervision to be given to her son, the plaintiff's mother permitted him to attend the activities for children operated by the Duncan Fire Department.

8. During the course of activities sponsored for children by the Duncan Fire Department neither Barry Frost nor any other supervisory official at the Duncan Fire Department properly supervised fire department personnel, and the plaintiff was sexually abused by a person employed by the Duncan Fire Department.

9. As a result of that sexual abuse, plaintiff has been harmed, and has continuing injuries.

10. Defendant's personnel were grossly negligent in supervising plaintiff.

11. Defendant's negligence is the proximate cause of plaintiff's sexual abuse, and entitles the plaintiff to actual damages as a result.

Request for Jury Trial

12. John Doe requests a trial by jury.

WHEREFORE, plaintiff requests actual damages for the cause of action set forth above, that all costs of this action be taxed against the defendant, that all factual issues be decided by a jury, and for such other and further relief as the Court and jury shall deem just and proper.

Respectfully submitted,

MOONEYHAM FLOWERS BERRY & KAROW

David Flowers
P.O. Box 8359
Greenville, SC 29604
864-421-0036
df60@charter.net



Gregg Meyers
39 Broad Street, Suite 300
Charleston SC 29401
843/720-8714
attygm@gmail.com

2009 JAN 28 PM 3:06
CANCILLERS

In the State of South Carolina
County of Spartanburg

John Doe,
Plaintiff,

vs.

City of Duncan,

Defendants.

Court of Common Pleas
Seventh Judicial Circuit
C.A. No. 08-CP-42-475

Jury Trial Requested

Negligent Supervision

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SPARTANBURG COUNTY
2012 FEB 21 AM 10:08
M. HOPE BLACKLEY

Amended Complaint

1. The original complaint in this action was filed in January, 2008, while the Plaintiff was engaged in military service for the United States of America.

2. John Doe is a pseudonym for a South Carolina resident who until August, 2011 served in the United States armed forces. His identity is withheld due to the sensitivity and private nature of these allegations, as these claims arise from an act of sexual abuse.

3. John Doe was born in February, 1986. His period of military service began Four days after his 17th birthday in February, 2003, and ended in August, 2011.

4. This case arises from one or more acts of sexual abuse, some of which occurred after August 31, 2001. As a result, this claim is brought under authority of S.C. Code § 15-3-555. In addition, the action is brought pursuant to the Servicemembers Civil Relief Act, 50 App. U.S.C.A. § 501 et seq., particularly 50 App. U.S.C.A. § 525, which tolls every statute of limitations during the period of a servicemember's military service, and excludes that period from "computing any period limited by law, regulation, or order for the bringing of any action or

proceeding in a court" by the servicemember.

5. The City of Duncan is a South Carolina municipality located in Spartanburg County, and its Fire Department is part of the city. Each is a political subdivision of the State of South Carolina, and each is subject to the Servicemember's Civil Relief Act.

For a Cause of Action: Negligent Supervision

6. When the plaintiff was a minor, he was invited by the City, through its agents communicating with the Plaintiff's mother, to participate in activities at the Duncan Fire Department.

7. Plaintiff's mother, on his behalf, sought assurances that her son would be properly supervised during those activities. In response to her inquiries, she was assured, by Barry Frost, the Chief of the Duncan Fire Department, "your son will be well supervised." In giving the assurance, Frost acted either individually, or as an agent of the Defendant, or as both.

8. Through Barry Frost, defendants assumed a duty to the plaintiff if the duty was not already inherent in having undertaken to sponsor the activities for children.

9. Based on Barry Frost's assurance to her about the proper supervision to be given to her son, the plaintiff's mother permitted the Plaintiff to attend the activities for children operated by the Duncan Fire Department.

10. During the course of activities sponsored for children by the Duncan Fire Department neither Barry Frost nor any other supervisory official at the Duncan Fire Department properly supervised fire department and other City personnel associated with the program, and the Plaintiff was sexually abused by a person employed by the City of Duncan at the Duncan Fire Department. Specifically, Plaintiff was sexually abused by Duncan City Police Officer Joseph

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CLERK OF COURT
SPARTANBURG COUNTY
2018 FEB 21 AM 10:08
M. HOPE BLACKLEY

Dale White.

11. White has admitted committing lewd acts on three boys, ages 12 to 16, while White was on duty. One of those children was the Plaintiff.

12. As a result of that sexual abuse, plaintiff has been harmed, and has continuing injuries.

13. Defendant's personnel were grossly negligent in supervising plaintiff.

14. Defendant's negligence is the proximate cause of plaintiff's sexual abuse, and entitles the plaintiff to actual damages as a result.

Request for Jury Trial

15. John Doe requests a trial by jury.

WHEREFORE, plaintiff requests actual damages for the cause of action set forth above that all costs of this action be taxed against the defendant, that all factual issues be decided by a jury, and for such other and further relief as the Court and jury shall deem just and proper.

Respectfully submitted,



Gregg Meyers
Jeff Anderson & Associates, P.A.
1 Poston Road, Suite 110
Charleston SC 29407
843/556-1025, 556-1055 facsimile
attygm@gmail.com

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 FEB 21 AM 10:08
M. HOPE BLACKBERRY

STATE OF SOUTH CAROLINA

John Doe
Plaintiff

VS.
City of Dunecko
Defendant

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me the undersigned, who being duly sworn, says that he served:

() Complaint with Summons and Responses

() Certified Rule to Show Cause

() Temporary Restraining Order

Amended Complaint
Case # 08-CP-42-475

In this action on _____

Registered Agent for _____

() by personal delivery to him

() by delivery to _____
a person of discretion residing in the same residence and present in such residence at the time of service.

(X) by delivery to Bridget Mustata Town Clerk for Dunecko
at her place of employment and present at her place of employment 2:30 PM Town Hall
of service.

And leaving with him ^{her} certified copies of the same at 153 W. Main St Dunecko S.C
at 2:30 PM hrs.

on the 27 day of Feb 2012 and that the deponent is not a party to this action, nor were the papers served Sunday.

R. App.
SERVED BY

SWORN TO BEFORE ME this the
27 day of February 2012
12-13-12

Notary Public for South Carolina

My Commission Expires: December 23rd, 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

John Doe,)
)
Plaintiff,)
)
v.)
)
City of Duncan Fire Department,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS

C.A. NO.: 2008-CP-42-475

DEFENDANT'S NOTICE OF MOTION
AND MOTION TO DISMISS

You will please take notice that the Defendant moves before the presiding Judge for the 7th Judicial Circuit in Spartanburg County, South Carolina, on the tenth day of the service hereof, or at such time and place as is convenient to the Court and to counsel, for an order dismissing the Plaintiff's Complaint in accordance with Rules 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5), and Rule 12(b)(8) of the South Carolina Rules of Civil Procedure. The Defendant further moves for this action to be dismissed in accordance with Rule 15 of the South Carolina Rules of Civil Procedure. This Motion is based upon the following grounds:

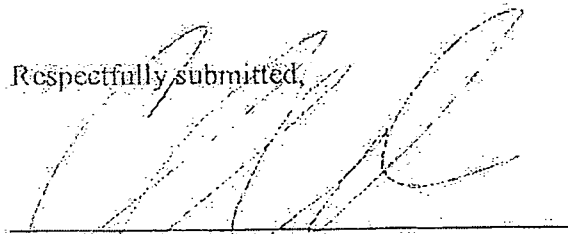
1. Plaintiff filed his Summons and Complaint in January of 2008. Plaintiff failed to serve the Defendant with said Summons and Complaint. The Plaintiff failed to commence this action in 2008 as required by Rule 3 of the South Carolina Rules of Civil Procedure.
2. Plaintiff's January 2008 Summons and Complaint was not filed and served within the applicable statute of limitations and should be dismissed.
3. Plaintiff's Complaint should be dismissed pursuant to Rule 12(b)(8) of the South Carolina Rules of Civil Procedure in as much as another action is pending for the same claim. Said civil action is entitled *John Doe v. Barry Frost*, Civil Action No.: 2009-CP-42-2662.

4. Plaintiff's Amended Complaint should be dismissed as Plaintiff failed to attach a summons and, as such, failed to perfect service and service of process in accordance with Rule 12(b)(4)(5) of the South Carolina Rules of Civil Procedure.

5. Plaintiff failed to move to amend his Complaint pursuant to Rule 15 of the South Carolina Rules of Civil Procedure. Rule 15 of the South Carolina Rules of Civil Procedure requires such motion and therefore said Amended Complaint should be dismissed.

This Motion will be based upon the pleadings in this matter, the common and statutory law of the state of South Carolina, as well as any memorandum of law filed hereafter.

Respectfully submitted,


Charles E. Turner, Jr. (SCBar#64996)
Anne R. Culbreath (SCBar#15536)
TURNER, PADGET, GRAHAM & LANEY, A
P. O. Box 1509
Greenville, SC 29602
(864) 552-4600
Attorney for Defendant

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAR 15 AM 8:46
M. HOPE BLACKLEY

March 12, 2012
Greenville, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

John Doe,)
)
Plaintiff,)
)
v.)
)
City of Duncan,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS

C.A. NO.: 2008-CP-42-475

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS**

**TO: PLAINTIFF AND HIS ATTORNEY OF RECORD, GREGG MEYERS,
ESQUIRE:**

Defendant City of Duncan Fire Department respectfully submits this memorandum in support of its Motion to Dismiss.

Facts

A Complaint, but no Summons, was filed in this matter on January 28, 2008. Over four years later, on February 21, 2012, an Amended Complaint, but still no summons, was filed. The Plaintiff did not file a motion to amend the original Complaint. Thereafter, on or around February 27, 2012, the Plaintiff purported to serve the Amended Complaint (again, with no Summons) on the Defendant. On March 15, 2012, this Motion was filed.

Argument

1. Plaintiff failed to commence this action

The Plaintiff has failed to commence this action for a number of reasons. First, S.C. Code Ann. § 15-3-20(b) provides that a civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing. (emphasis added). Moreover, the South Carolina Supreme Court has stated that "in South Carolina a civil action is commenced by the filing and service of a

summons and complaint." *Brown v. Evatt*, 322 S.C. 189, 470 S.E.2d 848 (1996) (citations omitted)(emphasis added). In this case, the Plaintiff did not file a summons with his original Complaint, nor did he file one with his Amended Complaint. Since the Plaintiff failed to file and serve a summons, this matter should be dismissed.

Next, as set forth above, S.C. Code Ann. § 15-3-20(b) provides that a civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing. (emphasis added). In this case, the Plaintiff does not even purport to serve the Defendant (with the Amended Complaint) until over four years after this action was filed. Thus, even assuming *arguendo* that the Plaintiff *did* file and/or serve a summons in this case, the delay in service is well in excess of the 120 day time limit set forth in S.C. Code Ann. § 15-3-20(b). Therefore, this matter should be dismissed.

Finally, by failing to file a summons and to timely file and serve the Defendant with a summons and complaint, this court has neither subject matter jurisdiction over the action, nor personal jurisdiction over the Defendant. Subject matter jurisdiction vests in the circuit court upon commencement of the action, that is, when the summons and complaint was served, not when filed. *First Palmetto State Bank vs. Boyles*, 302 S.C. 136, 394 S.E.2d 313 (1990). Moreover, a summons is not 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, 470 S.E.2d 848 (1996). Again, in this case, the Plaintiff has failed to file and serve a summons within the time period allowed by S.C. Code Ann. § 15-3-20(b) and, as such, this action has not been commenced. Therefore, this Court lacks both personal jurisdiction over the Defendant and subject matter jurisdiction over this action. Thus, this matter should also be

dismissed pursuant to Rules 12(b)(1) and 12(b)(2) of the South Carolina Rules of Civil Procedure.

2. Plaintiff's Amended Complaint should be dismissed as Plaintiff failed to attach a summons and, as such, failed to perfect service and service of process in accordance with Rule 12(b)(4)(5) of the South Carolina Rules of Civil Procedure

As discussed above, the Plaintiff has failed to perfect service of process in this case. Rules 12(b)(4) and (5) of the South Carolina Rules of Civil Procedure allow a party to raise the issues of insufficiency of process and insufficiency of service of process, respectively, by way of a Motion to Dismiss. As set forth above, in South Carolina a civil action is commenced by the filing and service of a summons and complaint. *Brown v. Evatt*, 322 S.C. 189, 470 S.E.2d 848 (1996) (citations omitted). 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. *Id.* In this case, the Plaintiff has failed to serve the Defendant with a Summons. Moreover, the only pleading with which this Defendant has been served is the Amended Complaint that was purportedly served on February 27, 2012. Since no summons has ever been filed or served, this matter should be dismissed pursuant to Rules 12(b)(4) and (5) of the South Carolina Rules of Civil Procedure.

3. Plaintiff failed to move to amend his Complaint pursuant to Rule 15 of the South Carolina Rules of Civil Procedure. Rule 15 of the South Carolina Rules of Civil Procedure requires such motion and therefore said Amended Complaint should be dismissed

The Plaintiff did not seek leave from the Court to amend his Complaint. Rule 15 of the South Carolina Rules of Civil Procedure states:

a party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to

which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fifteen days after service of the named amended pleading, whichever period may be the longer, unless the court otherwise orders.

In the present case, the Plaintiff simply filed the Amended Complaint without seeking leave from the Court. Under normal circumstances, this case would have been placed on the trial roster well before the Amended Complaint was filed. As such, the Plaintiff would have needed leave from the Court to file the Amended Complaint pursuant to Rule 15.

In this case, however, as set forth in an email from counsel for the Plaintiff to the Spartanburg County Clerk of Court (a copy of which is attached hereto as "Exhibit A" and incorporated by reference herein), the Plaintiff intended to voluntarily dismiss the case in February of 2009. Presumably, the case was never placed on the trial roster because the Plaintiff's counsel indicated that he was going to dismiss it. Accordingly, the Plaintiff is estopped from asserting that he can file the Amended Complaint in this matter without leave of this Court. Therefore, the Amended Complaint is invalid and should be dismissed.

4. This action should be dismissed pursuant to Rule 12(b)(6) on the grounds that the Plaintiff is judicially estopped from bringing this action

The Plaintiff has filed an almost identical complaint in *John Doe vs. Barry Frost*, Case No.: 2009-CP-42-2662. Barry Frost served as the Chief of the Duncan Fire Department at the time of the actions complained of by the Plaintiff in that case, as well as this case. In that case, the Defendant moved to dismiss that action on the grounds that the Plaintiff failed to name the agency or political subdivision liable for the act (i.e., allegedly, the City of Duncan) in accordance with the Tort Claims Act. S.C. Code Ann. § 15-78-70(c) provides that a person,

when bringing an action against a governmental entity under the provisions of [the Tort Claims Act], shall name as a party defendant only the agency or political subdivision for which the employee was acting. At the hearing on that Motion to Dismiss, the Plaintiff argued that he did not need to name the City of Duncan because Mr. Frost was individually liable because his liability did not arise out of his employment as fire chief for the Town of Duncan.

In order for a government employee to be individually liable for a tort, pursuant to S.C. Code Ann. § 15-78-70(b), the employee's conduct must not have been within the scope of his official duties, or it must have constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. Conversely, S.C. Code Ann. § 15-78-60(17) provides that a governmental entity is not liable for loss resulting from employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. Thus, by arguing that the City of Duncan did not have to be named in the case against Mr. Frost, the Plaintiff has effectively taken the position that the City of Duncan is not liable in this matter. Therefore, the Plaintiff is now judicially estopped from asserting that the City is liable and bringing this action.

The following elements are necessary for the application of the doctrine of judicial estoppel: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. *Cothran vs. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004). Applying these

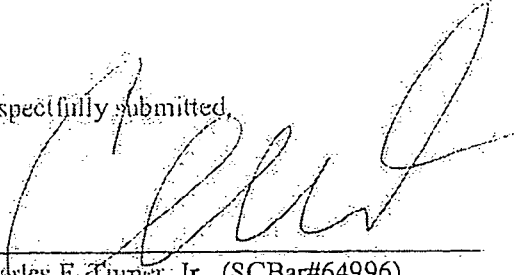
elements to the present case, the Plaintiff is judicially estopped from asserting that the Defendant City of Duncan is liable in this matter.

In *Doe vs. Frost*, the Plaintiff took the position that Mr. Frost was individually liable (i.e., that his conduct fell outside his scope of employment); whereas, in this matter, the Plaintiff now attempts to connect the alleged actions of Mr. Frost to the City of Duncan (i.e., that his conduct was within his scope of employment). These inconsistencies were taken by the same party (the Plaintiff), in the same proceedings involving the same facts. Moreover, the Plaintiff benefited from this position in the *Doe vs. Barry Frost* case by using that position to contest a motion to dismiss. These positions are totally inconsistent and, upon information and belief, were taken as part of an intentional effort to mislead this Court. Therefore, the Plaintiff is estopped from asserting that the City of Duncan is liable in this matter. As such, the Plaintiff has failed to state a claim upon which relief can be granted, and this matter should be dismissed with prejudice.

Conclusion

Based on the arguments and authorities presented above, the Court should grant the Defendant's Motion to Dismiss.

Respectfully submitted,



Charles F. Turner, Jr. (SCBar#64996)
Anne R. Culbreath (SCBar#15536)
TURNER, PADGET, GRAHAM & LANEY, P.A.
P. O. Box 1509
Greenville, SC 29602
(864) 552-4600
Attorney for Defendant

May 16, 2012
Greenville, South Carolina

In the State of South Carolina	)	Court of Common Pleas
	)	Seventh Judicial Circuit
County of Spartanburg	)	C.A. No. 08-CP-42-475
John Doe,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
City of Duncan,	)	
	)	
Defendants.	)	
	)	

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAY 22 PM 2:23
M. HOPE BLACKLEY

Amended Summons

TO: City of Duncan

YOU ARE HEREBY SUMMONED and required to answer the amended complaint in this action. A copy of the complaint is served upon you with this summons.

Your answer to the complaint is to be served upon the attorney for the plaintiff at his office, 1 Poston Road, Suite 110, Charleston, South Carolina, 29407.

According to the South Carolina Rules of Civil Procedure, which govern litigation, you are required to appear and defend yourself in this action by making and serving an answer to this complaint within thirty (30) days after the complaint is served upon you. The thirty days begin to run from the date after this summons and complaint are served upon you; the date the service is made is excluded.

If within that time you fail to appear and defend as you are required to do by the Rules of Civil Procedure, the plaintiff in this action shall apply to the Court for the relief demanded in this Complaint and judgment by default will be rendered against you for the relief demanded in the complaint.

Respectfully submitted,



Gregg Meyers
Jeff Anderson & Associates, P.A.
1 Poston Road Suite 110
Charleston, S.C. 29407
843/556-1025, 556-1055 facsimile
Attygm@gmail.com

STATE OF SOUTH CAROLINA

John Doe

Plaintiff

VS.

City of Duncan

Defendant

AFFIDAVIT OF SERVICE

CASE # 08-CP-42-475

PERSONALLY appeared before me the undersigned, who being duly sworn, says that he served:

() Complaint with Summons and Responses

() Certified Rule to Show Cause

() Temporary Restraining Order

(x) Amended Summons and Amended Complaint

In this action on _____

Registered Agent for Town Clerk Duncan Town Hall

(x) by personal delivery to him Melody Millwood, Clerk of Court

() by delivery to _____
a person of discretion residing in the same residence and present in such residence at the time of service.

() by delivery to _____
His/her place of employment and present at his/her place of employment at time of service.

And leaving with her certified copies of the same at Town Hall, Duncan SC
29334 at 1057 AM hrs.

on the 06 day of JUNE, 2012 and that the deponent is not a party to this action, nor were the papers served Sunday.

SERVED BY

SWORN TO BEFORE ME this the

06 day of JUNE, 2012

[Signature]

Notary Public for South Carolina

My Commission Expires: December 23rd, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C.A. NO.: 2008-CP-42-0475
	)	
John Doe,	)	
	)	
Plaintiff,	)	DEFENDANT'S NOTICE OF MOTION
	)	AND MOTION TO DISMISS
v..	)	
	)	
City of Duncan,	)	
	)	
Defendant.	)	
	)	

YOU WILL PLEASE TAKE NOTICE that the Defendant moves before the presiding Judge for the Seventh Judicial Circuit in Spartanburg County, South Carolina, on the tenth day of the service hereof, or at such time and place as is convenient to the Court and to counsel, for an Order dismissing the Plaintiff's Summons and Complaint in accordance with Rules 12(b)(1) and 12(b)(2) of the South Carolina Rules of Civil Procedure, as well as Rule 3 of the South Carolina Rules of Civil Procedure.

The Defendant filed a previous Notice of Motion and Motion to Dismiss the Plaintiff's Complaint in March of 2012. The Court entertained said Motion on May 16, 2012 and took the matter under advisement. The Court has not yet ruled on said Motion. The Defendant incorporates its previous Motion herein.

This Motion will be based upon the pleadings filed in this matter, the common and statutory law of the state of South Carolina, as well as any memorandum of law filed hereafter.

Respectfully submitted,



Charles F. Turner, Jr. (#64996)

Anne R. Culbreath (#15536)

TURNER, PADGET, GRAHAM & LANEY, PA

P. O. Box 1509

Greenville, SC 29602

(864) 552-4600

ATTORNEY FOR DEFENDANTS

June 27, 2012

Greenville, SC

THE STATE OF SOUTH CAROLINA
In the 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

MOTION TO DISMISS

Pursuant to Rules 240 and 260 of the South Carolina Appellate Court Rules, Respondent City of Duncan (hereinafter "Respondent") hereby moves to dismiss the above-captioned appeal filed by Appellant John Doe ("Appellant"). Appellant commenced this appeal on November 23, 2012, raising a single issue for review: Whether the trial court erred when it dismissed this action under state law time limits without applying the Servicemember's Civil Relief Act. However, because *it is undisputed that Appellant never served Respondent with a summons and complaint in this matter*, no civil action has been commenced as a matter of law and therefore this Court lacks jurisdiction over Respondent. Accordingly, the Court should grant Respondent's Motion and dismiss this appeal in its entirety.

Procedural Background

The following facts are undisputed in the record below.

Appellant filed this civil action on January 28, 2008 ("January 2008 Complaint"), asserting a single claim against Respondent for negligent supervision based upon alleged sexual abuse that occurred at the City of Duncan Fire Department. (Compl. ¶¶ 2, 4-11 attached as *Exhibit A*.) Specifically, Appellant claimed that he was sexually abused by a City of Duncan police officer sometime in or around 2001, while he attended a program for children sponsored by the Fire Department. (*Id.* ¶ 8.)

Appellant never served Respondent with the January 2008 Summons and Complaint. On February 3, 2009, Appellant's counsel sent an email to the Spartanburg County Clerk of Court acknowledging that the Summons and Complaint had not been served and stating that he would voluntarily dismiss the action. (Email from Gregg Myers to Spartanburg County Clerk of Court, attached as *Exhibit B*.) Appellant, however, failed to submit a stipulation of dismissal or take any other action to close the case.

On February 21, 2012, over four years after filing the original Complaint, Appellant filed an Amended Complaint in which he again asserted a single claim against Respondent for negligent supervision based upon alleged sexual abuse that occurred sometime in or around 2001. (Am. Compl. ¶¶ 6-14, attached as *Exhibit C*.) The Amended Complaint was accompanied by neither a summons nor a motion to amend pursuant to Rule 15 of the South Carolina Rules of Civil Procedure.

On March 15, 2012, Respondent filed a Motion to Dismiss pursuant to Rules 12(b)(1), (b)(2), (b)(4), (b)(5) and (b)(6) of the South Carolina Rules of Civil Procedure, contending that Respondent had never been served with the Summons and Complaint and

thus Appellant had failed to properly commence an action pursuant to Rule 3 of the South Carolina Rules of Civil Procedure. (Resp't Mem. Supp. Mot. Dismiss 1-3, attached as *Exhibit D*.) Alternatively, Respondent argued that Appellant's Amended Complaint should be dismissed because Appellant failed to file a motion to amend as required by Rule 15 of the South Carolina Rules of Civil Procedure. (*Id.* at 3-4.)

On May 16, 2012, the Honorable J. Derham Cole held a hearing on Respondent's Motion to Dismiss. Following the hearing, Judge Cole issued an Order finding that Appellant had failed to properly serve Respondent with the summons and complaint and concluding that the Court lacked jurisdiction over Respondent. (Oct. 29, 2012 Order 2-3, attached as *Exhibit E*.) From that Order, Appellant filed this appeal.

I. The Court of Appeals Lacks Jurisdiction Over Respondent Because Appellant has Failed to Serve Respondent With A Summons and Complaint.

Appellant contends the trial court erred by dismissing this action under "state law time limits" because the Servicemember's Civil Relief Act operated to toll any time period prescribed by law while Appellant was deployed to Afghanistan. (Appellant Br. 2-3.) This Court, however, is unable to reach the issue presented by Appellant because, as the trial court found, Appellant never properly served Respondent with a summons and complaint. Thus, under well established South Carolina law, no civil action has been commenced and this Court lacks jurisdiction over Respondent. Therefore, the Court should dismiss this appeal in its entirety.

Rule 3(a) of the South Carolina Rules of Civil Procedure provides that "[a] civil action is commenced when the summons and complaint are filed with the clerk if: (1) the summons and complaint are served within the statute of limitations in any manner

prescribed by law; or (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.” The Supreme Court of South Carolina has interpreted Rule 3(a) to mean that “a civil action is commenced by the filing *and* service of a summons and complaint.” *First Palmetto State Bank & Trust Co. v. Boyles*, 302 S.C. 136, 139, 394 S.E.2d 313, 315 (1990). “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); *see also Fin. Federal 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 and gives the court the power to render a personal judgment against the person served.”). It is well settled that “[a] judgment is void if a court acts without personal jurisdiction,” *Ex parte S.C. Dep’t of Revenue*, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct. App. 2002) (internal alterations omitted), and therefore, a plaintiff’s failure to properly serve a defendant with a summons compels dismissal of the action. *See, e.g., Brown*, 322 S.C. at 194, 470 S.E.2d at 850 (“Brown admits that he never served and filed a summons and complaint in this matter. Therefore, original jurisdiction was not properly instituted and the circuit court did not have personal jurisdiction over Respondent.”); *Estate of Corley*, 299 S.C. 525, 527, 386 S.E.2d 264, 266 (Ct. App. 1989) (affirming lower court’s dismissal of case where defendant was not served with a summons). The burden rests with the plaintiff to demonstrate that it has properly filed and served defendant with a summons and complaint sufficient to confer

personal jurisdiction on the Court. *See Fasset v. Evans*, 364 S.C. 42, 47, 610 S.E.2d 841, 843 (Ct. App. 2005).

Despite filing this civil action over five years ago, Appellant has failed to properly serve Respondent with a summons and complaint. In fact, Appellant readily concedes that he never served the January 2008 Summons and Complaint upon Respondent. (May 16, 2012 Hr'g Tr. 10, attached as *Exhibit F.*) Although Appellant served Respondent with the Amended Complaint in February 2012, the Amended Complaint was accompanied by neither a summons nor a motion to amend pursuant to Rule 15 of the South Carolina Rules of Civil Procedure. Indeed, the Spartanburg County Clerk of Court has confirmed that Appellant failed to file a summons with his Amended Complaint. (*Id.* at 15.)

As the trial court correctly found, Appellant has failed to proffer any demonstrable proof that he ever served Respondent with a summons for this civil action. *See Fasset*, 364 S.C. at 47, 610 S.E.2d at 843-44 (explaining that the plaintiff shoulders the burden in demonstrating proper service sufficient to confer personal jurisdiction over defendant). Because Appellant has failed to show that he properly served a summons and complaint upon Respondent, no civil action has been commenced and this Court lacks jurisdiction over Respondent. Accordingly, the Court should grant Respondents' Motion to Dismiss.

Conclusion

For the foregoing reasons, Respondent respectfully requests that the Court dismiss this appeal in its entirety.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: William H. Foster III

William H. Foster III, SC Bar No. 66221
E-Mail: bill.foster@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

TURNER, PADGET, GRAHAM & LANEY, P.A.

Charles L. Turner, SC Bar No. 64996
E-Mail: cturner@turnerpadget.com
Post Office Box 1509
Greenville, SC 29602
(864) 552-4600

Attorneys for Respondents

Greenville, South Carolina
May 29, 2013

1	STATE OF SOUTH CAROLINA	)	
2	COUNTY OF SPARTANBURG	)	IN THE COMMON PLEAS COURT
3			
4	John Doe,	)	
5	Plaintiff,	)	TRANSCRIPT OF RECORD
6	-vs-	)	2008-CP-42-475
7	City of Duncan Fire,	)	
8	Department,	)	
9	Defendant.	)	May 16, 2012
10			Spartanburg, South Carolina
11			
12	B E F O R E:		
13	HONORABLE J. DERHAM COLE, JUDGE		
14			
15			
16	A P P E A R A N C E S:		
17	J. DAVID FLOWERS, ESQUIRE		
18	GREGG E. MEYERS, ESQUIRE		
19	Attorneys for the Plaintiff		
20	CHARLES FRANKLIN TURNER, JR., ESQUIRE		
21	Attorney for the Defendant		
22			
23			
24	Linda D. Moffitt		
25	Circuit Court Reporter		

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INDEX

Motion -- page 3.

No sworn testimony; no exhibits entered into evidence.

1 THE COURT: All right. Doe vs. Duncan Fire
2 Department -- City of Duncan.

3 MR. TURNER: Yes, sir, Your Honor. May it please the
4 Court.

5 THE COURT: This is defendant's motion to dismiss.

6 MR. TURNER: Yes, sir, it is.

7 Your Honor, I represent the -- it's actually the Town
8 of Duncan, but semantics aside I represent the Town of
9 Duncan and Berry Frost, the fire chief in this case.

10 And if Your Honor will give me a little -- a little
11 bit of leeway here, I need to take you through some
12 procedural background of this case, because there's
13 actually two pending cases that has added some confusion to
14 it. And if nothing else today, maybe we can straighten out
15 the confusion.

16 But this case arises out of alleged sexual abuse of a
17 minor at the Duncan Fire Department that occurred back 11
18 years ago or so now. The plaintiff was a minor. He was
19 alleged to have been sexually assaulted by a then Duncan,
20 Town of Duncan, police officer who has since been
21 prosecuted and is serving time in Columbia.

22 The original complaint in this case was filed in
23 January of 2008. I am not aware that a summons was filed
24 with that complaint. There may have been one filed. I
25 don't know. And it doesn't matter all of that much for the

1 purposes of the motion.

2 But in January of 2008 it was filed. It was given a
3 case number of 0475. It was filed Doe vs. the City of
4 Duncan Fire Department.

5 In that complaint there was a specific allegation made
6 against the fire chief, Barry Frost, who allegedly told the
7 plaintiff's mother that he would take care of her son, and
8 that based upon this representation he assumed the duty,
9 and he didn't fulfill that duty. And there's basically a
10 negligence supervision claim made against him as a result
11 not supervising the plaintiff as a minor.

12 What is important is that that particular action was
13 never served on anyone with the Town of Duncan. Subsequent
14 to the filing of 0475, that original case, the plaintiff
15 filed a separate action against Barry Frost individually on
16 May the 7th of 2009.

17 And in that case, which was assigned a separate of
18 course case number, 2662, the same allegations were made
19 that Barry Frost was individually liable because of the
20 assurances he had made to the plaintiff's mother.

21 He -- the allegations even go so far as to say that
22 those assurances were given in a social setting when he was
23 not working -- and that's paragraph seven in that
24 particular complaint -- and as a result he negligently
25 supervised the plaintiff, the same allegations, the same,

1 very same, essentially the same, pleadings that are made in
2 this case.

3 Subsequent to that action which was, in fact, served
4 on Barry Frost we answered on his behalf. In one of our
5 defenses we asserted in our answer and through a motion
6 that was heard before Your Honor now approximately a year
7 or a year and a half ago -- was that Barry Frost was an
8 improper defendant because he was the fire chief the Town
9 of Duncan and the Tort Claims Act prevented his individual
10 liability as fire chief.

11 That motion was denied partly because the plaintiff
12 asserted in that case that -- that he was acting
13 individually, and individually he can be held -- held
14 liable, and the case was against him individually for his
15 own -- his own negligence that arose outside the course and
16 scope of -- of his employment.

17 That case was stayed. The plaintiff was in the
18 National Guard or Army Reserves or something and was put on
19 active duty. He's now off active duty and that case is
20 proceeding.

21 We have filed the motion in this case, Your Honor, and
22 specifically want to address the issues that have come up
23 in this case.

24 There are now two actions that are filed, two separate
25 actions, against two defendants that allege essentially the

1 same thing.

2 The first action was never served. That's 0475. The
3 second action was served and pending. But in February --
4 I'm sorry. Let me go back. In February of 2009
5 plaintiff's counsel -- and this is Exhibit A to our
6 memorandum -- plaintiff's counsel sent an email to the
7 clerk's office saying he was going to voluntarily dismiss
8 this action, 0475.

9 I'm not aware that any dismissal order was ever
10 entered, any type of consent order. Because it was never
11 served we never made an appearance in this case on behalf
12 of the Town of Duncan.

13 What complicates the matter is on February -- in
14 February of this year, February 21st of 2012, an amended
15 complaint was filed by the plaintiff in 0475, this case.
16 It was filed with the clerk's office. No summons was filed
17 with it. No motion to amend was filed seeking the Court's
18 permission to amend the allegations of the complaint.

19 And the amended complaint was served on the Town of
20 Duncan through Brian Cothran who is acting as the town's
21 administrator on February the 27th of 2012. Again, no
22 summons was served with the amended complaint on Chief
23 Cothran.

24 We had filed a motion to dismiss, Your Honor, in this
25 case and submitted a memorandum of law. The basis of the

1 motion is essentially four things -- the plaintiff has
2 failed to properly commence this action under South
3 Carolina law; there's no jurisdiction over the Town of
4 Duncan because no summons was ever served on it; the
5 plaintiff has attempted to improperly amend his complaint
6 under Rule 15 and should be estopped to allowed to amend it
7 based on his representations to the -- to the clerk that
8 the action was going to be dismissed; and that the
9 plaintiff should be judicially estopped from making the
10 allegations in this case due to inconsistent positions
11 presented in this case versus the subsequent case, 2662.

12 Your Honor, South Carolina law is clear that an action
13 is commenced through the filling of a summons and complaint
14 with the clerk of court if actual service is accomplished
15 within 120 days after filing. And that's section
16 15-3-20(b).

17 Our Supreme Court has affirmed that principle in that
18 a civil action is commenced by filing and service of the
19 summons and complaint. That's Brown vs. Evatt.

20 In this case the plaintiff did not properly commence
21 this action. We don't have a record of a summons being
22 issued in the first action that was filed in January of
23 2008. But even if it was, it wasn't served ever at all.

24 The 120-day time limit long went out the window.
25 We're now four years after the fact. And the failure to

1 find -- we believe the failure to file -- the failure to
2 file and timely serve the summons and complaint in this
3 action is, in fact, failed.

4 Also, Your Honor, the amended complaint in this case
5 did not include a summons. We don't believe that even if
6 the Court believes that the case should move forward -- it
7 was not, the amended action was not, properly served
8 because it did not have a summons on it.

9 A summons under South Carolina is a means by giving
10 the Court jurisdiction, and unless waived the Court
11 otherwise did not obtain personal jurisdiction over
12 defendant. And on top of that the plaintiff never sought
13 leave of the Court to amend the complaint to address the
14 additional allegations.

15 What's more troublesome or is as troublesome, Your
16 Honor, is the issue that has now come up. The plaintiff is
17 making and has made specific allegations against Barry
18 Frost, again, responding to our motion in the Barry Frost
19 case, the subsequent case, saying we believe that Barry
20 Frost is liable separate and apart from his employment with
21 the City of Duncan, the Town of Duncan, because he made
22 these assurances to the plaintiff's mother in a social
23 setting specifically alleging in the complaint that he was
24 not at work when these assurances were made and that he's
25 individually liable separate and apart from his employment

1 with the Town of Duncan.

2 Now the plaintiff in this case, again, the first case
3 that's now attempting to be revived, is attempting to
4 allege that the Town of Duncan is liable by virtue of Barry
5 Frost's failure to supervise, failure to live up to the
6 duty that he assumed based on -- based on the assurances he
7 made to the mother that the Town of Duncan is now
8 vicariously liable through respondeat superior as Barry
9 Frost is fire chief based on the failure of him living up
10 to those assurances.

11 And, Your Honor, our position is they can't have it
12 both ways. They can plead alternatively. I understand
13 that, and there's no issue with that. But they're taking
14 the position that Barry Frost is liable, period,
15 individually because he was not -- he was not at work, and
16 made a specific argument to the Court against our motion to
17 dismiss on that basis. And now they're proceeding on a
18 theory of respondeat superior vicarious liability against
19 the town for those same allegations.

20 And I don't think they can have it both ways. I mean,
21 either Barry Frost was in the course and scope of his
22 employment or he's not. And they're taking inconsistent
23 positions in this case.

24 We don't think the case has been properly initiated,
25 commenced. There's no summons been served on the -- on the

1 Town of Duncan ever in this case either through the
2 original pleading or the amended pleading. And we don't --
3 we don't think that's proper. We don't think there's
4 jurisdiction. And on that basis, Your Honor, we would ask
5 for this particular action to be dismissed.

6 The subsequent action, the 2009 action, has been --
7 has been served. We're proceeding with that. We're
8 defending that. But this case against the Town of Duncan
9 we think is -- is improperly brought, no jurisdiction.
10 It's not been commenced.

11 THE COURT: Mr. Meyers.

12 MR. MEYERS: Thank you, Your Honor.

13 There has been an amended complaint filed and the --
14 all of the difficulties in this case arise from the
15 plaintiff having been entered in the military service prior
16 to age 18.

17 He was in active combat in Afghanistan for a number of
18 years. And he has come out relatively a few months ago.
19 And so under the federal statute that applies to service
20 members he had had time to initiate this case.

21 The initial case wasn't served. We agree with that.
22 But his time to perfect that service extends under the
23 federal statute. The amended complaint recites his
24 military service as I understand it's required to do. And
25 the case is initiated, we contend, properly based on the

1 amended pleading.

2 So it's not clear to me why we're arguing about the
3 initial complaint since the federal law protects a service
4 member the entire time he's in military service and for a
5 period of time after he leaves military service. The case
6 has been amended within that period of time.

7 So we think under the service issue there's not really
8 an issue, that the initial complaint -- we agree it wasn't
9 served under state law, but we also agree that's irrelevant
10 because the plaintiff was in the military service, had no
11 obligation to pursue, had no obligation to perfect. It's
12 protected by federal statute, which of course overrides any
13 state law to the contrary. So we think that issue is
14 governed by the federal law and it's in the statute.

15 The motion I got had to do with a prior pending
16 action. I didn't get a motion about service. I didn't get
17 any of that stuff. But that's okay because that's the
18 essence of the rationale for the amended complaint. And we
19 think the federal law covers that.

20 The case against Mr. Frost is based on the
21 solicitation he made of the mother to have her son
22 participate in this program at the fire station.

23 The case against the town is about the molestation
24 that occurred at the fire station. So we think it's not
25 either-or. We think they both have liability, Mr. Frost

1 for his individual actions that he took outside the
2 workplace and the town for the lack of supervision that
3 applied when the police officer molested the boys at the
4 fire station, one of which was the plaintiff.

5 So I'm a little confused about the complaint. We're
6 not saying it's one or the other. We're saying it's both,
7 as we can do it in one action. But Mr. Frost has no
8 individual liability if he's acting solely on behalf of the
9 town, but he was acting in a social setting.

10 So it seemed to us that it was fair to bring a claim
11 against Mr. Frost individually and also bring it against
12 the town. That's the rationale for it. And I really don't
13 see what the issue is.

14 MR. TURNER: Your Honor, the issue is a summons -- a
15 summons has never been served on the Town of Duncan in four
16 years in this case. That's the issue.

17 In order to get personal jurisdiction over the Town of
18 Duncan a summons has to be served on them. I don't know
19 how much clearer the rules can be and I don't know how much
20 clearer the Supreme Court decisions can be.

21 There's a statute right on point. This is not a
22 statute-of-limitations argument. I'm not making an
23 argument that the plaintiff was out of time, although I may
24 at some point do that. I'm not waiving that at this point.
25 But it's not an issue of whether the plaintiff was in

1 service or not.

2 The plaintiff -- what's interesting about this case is
3 the plaintiff chose while he was in service to initiate
4 this action. And -- and there's no federal law that
5 affects South Carolina saying how an action should be
6 commenced regardless of whether it's in time or out of time
7 or the statute of limitations is tolled.

8 If he makes a choice to initiate the action, which he
9 did, it's got to be commenced properly under South Carolina
10 law, and it's not a -- a summons has never been served on
11 the Town of Duncan ever.

12 The -- to say that they both could have liability, I
13 agree they both could have liability. Both the town and
14 Barry Frost can have liability. But if they're taking the
15 position that the town's liability through Barry Frost's
16 actions -- the town is liable by virtue of Barry Frost's
17 actions and on the same breath Barry Frost is acting
18 individually and that's the basis of his liability, they
19 can't make those allegations. That is inconsistent.

20 They can't say Barry Frost is outside the course and
21 scope of his employment in a social setting and that's the
22 basis of his liability and in the same breath say and, oh,
23 by the way, the town's liable for that too because Barry
24 Frost is the fire chief. That is an inconsistent position.

25 Either he's in the course and scope of his employment

1 in the social setting, or in a social setting, and he's
2 not. And to me that's where the rub -- that's where the
3 rub lies, that they're trying to have their cake and eat it
4 too.

5 They're trying to say, well, he made it in a social
6 setting, he's individually liable on that basis, but, oh,
7 by the way, the town is liable too because he's the fire
8 chief and was acting in that capacity.

9 Either he -- and this goes to the Tort Claims Act,
10 Your Honor. As we referenced in our memo, the Tort Claims
11 Act says in 15-78-70 and 200 that a -- that a person acting
12 in the course and scope of their employment or governmental
13 entity is not liable. And under 15-78-60 -- and I think
14 it's sub-paren 16 or 17 -- a governmental agency is not
15 liable if an employee is acting outside of the course and
16 scope at the time that the act was committed or was done
17 with actual malice, intent to harm, which is not this case
18 with Barry Frost.

19 And, Your Honor, that's our difficulties with it.
20 It's a commencement issue. It's not a
21 statute-of-limitations issue at this point under this
22 motion. It's whether the case was properly commenced, and
23 it was not. No summons was ever -- was ever served.

24 THE COURT: Mr. Meyers, I don't recall you addressing
25 the summons issue. I understand about the allegations.

1 what about the summons?

2 MR. MEYERS: I think it's correct that in the initial
3 filing it was not served and -- so the summons was not
4 served. But the amended complaint, summons and complaint,
5 were served, so.

6 THE COURT: Well, I can look at the file. That's what
7 Mr. Turner's is saying, it's not. He says that wasn't
8 served with the summons either.

9 MR. MEYERS: Yeah. That's news to me, Your Honor,
10 because the -- everything was sent out by my.

11 THE COURT: Well, I don't have the 2662 file. I've
12 just have just the 475 file.

13 MR. TURNER: It is the 475 file, Your Honor, that's at
14 issue.

15 THE COURT: Oh.

16 MR. MEYERS: And it's the amended complaint as I
17 understood Mr. Turner to recite that there was a motion to
18 amend, there was a summons and there was the amended
19 complaint. So all of those things should have been what
20 was served, and as I understood it was served.

21 MR. TURNER: We've checked with the clerk's office and
22 they do not a summons with the amended complaint. And Mr.
23 Meyers admits that he never served the original summons and
24 complaint on the town.

25 MR. MEYERS: Well, as I understood it, we had a

1 summons and -- with the amended complaint. All of that was
2 sent to the town. So that's -- that's my best information
3 without being able to check. And that's where I'm at a
4 disadvantage because I didn't have any indication that
5 issue was a part of this motion. But I can certainly check
6 that very easily. I can pull the affidavit of service or
7 the mailing of what was sent.

8 MR. TURNER: Your Honor, just for the record.

9 THE COURT: Well, I've got a -- I've got a summons
10 filed here with the court on January the 28th of 2008.
11 There is a summons attached to a complaint.

12 MR. TURNER: And that was the original pleading.

13 THE COURT: That's January the 28th.

14 MR. TURNER: And that was never served.

15 MR. MEYERS: Of this year.

16 MR. TURNER: Of 2008.

17 THE COURT: 2008.

18 MR. TURNER: That was never served on the Town of
19 Duncan.

20 THE COURT: All right. I've got an affidavit of
21 service for the amended complaint. You say the amended
22 complaint does not have a summons, so.

23 MR. TURNER: That's right. Your Honor, I did raise
24 this issue in my motion.

25 THE COURT: Okay.

1 MR. TURNER: It's ground No. 1.
2 THE COURT: All right. Anything -- I will read the
3 memo. Anything else? I've got the file.
4 MR. MEYERS: I don't think so, Your Honor.
5 MR. TURNER: Nothing, Your Honor.
6 THE COURT: Okay. I'll issue an order.
7 END OF REQUESTED TRANSCRIPT OF RECORD
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Greene, Debbie

From: ClerksOffice
Sent: Wednesday, February 04, 2009 8:31 AM
To: Greene, Debbie
Subject: FW: Case 2008CP4200475 - John Doe VS City Of Duncan Fire added to Court Roster for period 2009-02-18 through 2009-02-18.

From: Gregg Meyers [mailto:attygm@aol.com]
Sent: Tuesday, February 03, 2009 9:11 PM
To: ClerksOffice
Subject: Re: Case 2008CP4200475 - John Doe VS City Of Duncan Fire added to Court Roster for period 2009-02-18 through 2009-02-18.

Thanks for this notice.

This complaint was never served, so I will be submitting a voluntary dismissal.

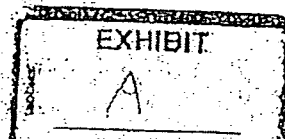
Gregg Meyers, PO Box 1297, Charleston SC 29402 843-720-8714, 720-8704 facsimile.

---Original Message---

From: Clerksoffice@spartanburgcounty.org
To: Attygm@aol.com
Sent: Tue, 3 Feb 2009 3:52 pm
Subject: Case 2008CP4200475 - John Doe VS City Of Duncan Fire added to Court Roster for period 2009-02-18 through 2009-02-18.

THE STATUS CONFERENCE ROSTER FOR WEDNESDAY, FEBRUARY 18TH, 2009 HAS NOW BEEN PUBLISHED ON THE JUDICIAL WEBSITE. CONFERENCES ARE AT 9:30 A.M. BEFORE THE HONORABLE J. MARK HAYES, II. ATTORNEYS ARE TO SUBMIT A PRE-TRIAL FORM.

Carnations mean admiration, Tulips mean love - what do Roses mean? Find out now!



R. App. 000051

In the State of South Carolina	)	Court of Common Pleas
	)	Seventh Judicial Circuit
County of Spartanburg	)	C.A. No. 09-CP-42- <u>2662</u>
John Doe,	)	Jury Trial Requested
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Barry Frost,	)	Negligence
	)	
	)	
Defendants	)	
	)	

Complaint

1. John Doe is a pseudonym for a South Carolina resident presently serving in the United States armed forces and stationed overseas. His identity is withheld due to the sensitivity and private nature of these allegations, as these claims arise from an act of sexual abuse.
2. This cases arises from one or more acts of sexual abuse, some of which occurred after August 31, 2001. As a result, this claim is brought under authority of S.C. Code § 15-3-555.
3. Barry White is a resident of Spartanburg County.
4. The court has jurisdiction of the persons involved in this action and of the subject matter of this action.

For a Cause of Action: Negligence

5. When the plaintiff was a minor, he was invited through his mother to participate in activities at the Duncan Fire Department.
6. Plaintiff's mother on his behalf sought assurances that her son would be properly

FILED
 2009 MAY -7 PM 1:10
 MARC KITCHEN

supervised during those activities. In response to her inquiries, she was assured, by Barry Frost, "your son will be well supervised."

7. This assurance was given by Mr. Frost in a social setting, when he was not working.

8. Plaintiff was a minor at the time and relied on his mother for his safety and supervision.

9. Barry Frost's assurance to the plaintiff's mother assumed a duty to the plaintiff through his mother that his information about the safety of the program at the Fire Department and its program for children.

10. Based on Barry Frost's assurance to her about the proper supervision to be given to her son, the plaintiff's mother permitted him to attend the activities for children operated by the Duncan Fire Department.

11. During the course of activities sponsored for children by the Duncan Fire Department neither Barry Frost nor any other supervisory official at the Duncan Fire Department properly supervised fire department personnel, and the plaintiff was sexually abused by a person participating in the program.

12. As a result of that sexual abuse, plaintiff has been harmed, and has continuing injuries.

13. Defendant was negligent in advising the plaintiff's mother that he would be properly supervised during the Fire Department program. He knew, or should have known, that in fact the program enabled a pedophile to have access to the plaintiff, and to sexually abuse the plaintiff.

14. Defendant's negligence is the proximate cause of plaintiff's sexual abuse, and entitles the plaintiff to actual damages as a result.

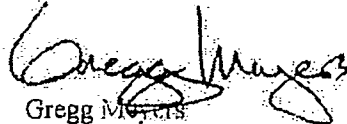
FILED
2009 MAY -7 PM 1:50
MARIE K. CHEN
CLERK OF COURT

Request for Jury Trial

15. John Doe requests a trial by jury.

WHEREFORE, plaintiff requests actual damages for the cause of action set forth above, that all costs of this action be taxed against the defendant, that all factual issues be decided by a jury, and for such other and further relief as the Court and jury shall deem just and proper.

Respectfully submitted,



Gregg Meyers
39 Broad Street, Suite 300
Charleston SC 29401
843/720-8714
attygm@gmail.com

2009 MAY 27 PM 1:50
HARD KITCHENS

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

C.A. NO.: 2009-CP-42-2662

John Doe,)

Plaintiff,)

v.)

Barry Frost,)

Defendant.)

DEFENDANT FROST'S ANSWER TO
PLAINTIFF'S COMPLAINT

(Jury Trial Requested)

The Defendant above-named, answering the Complaint of the Plaintiff herein, would respectfully show unto this Honorable Court that:

1. As to the allegations contained in Paragraph 1 of Plaintiff's Complaint, Defendant lacks sufficient knowledge and information to form a belief as to same; therefore denies same.

2. As to the allegations contained in Paragraph 2 of Plaintiff's Complaint, Defendant lacks sufficient knowledge and information to form a belief as to same; therefore denies same.

3. As to the allegations contained in Paragraph 3 of Plaintiff's Complaint, Defendant lacks sufficient knowledge and information to form a belief as to same; therefore denies same.

4. As to the allegations contained in Paragraph 4 of Plaintiff's Complaint, Defendant lacks sufficient knowledge and information to form a belief as to same; therefore denies same.

5. As to the allegations contained in Paragraph 5 of Plaintiff's Complaint, Defendant lacks sufficient knowledge and information to form a belief as to same; therefore denies same.

6. As to the allegations contained in Paragraph 6 of Plaintiff's Complaint, Defendant denies same.

7. As to the allegations contained in Paragraph 7 of Plaintiff's Complaint, Defendant denies same.

8. As to the allegations contained in Paragraph 8 of Plaintiff's Complaint, Defendant lacks sufficient knowledge and information to form a belief as to same; therefore denies same.

9. As to the allegations contained in Paragraph 9 of Plaintiff's Complaint, Defendant denies same.

10. As to the allegations contained in Paragraph 10 of Plaintiff's Complaint, Defendant denies same.

11. As to the allegations contained in Paragraph 11 of Plaintiff's Complaint, Defendant denies same.

12. As to the allegations contained in Paragraph 12 of Plaintiff's Complaint, Defendant denies same.

13. As to the allegations contained in Paragraph 13 of Plaintiff's Complaint, Defendant denies same.

14. As to the allegations contained in Paragraph 14 of Plaintiff's Complaint, Defendant denies same.

15. In as much as the allegations contained in Paragraph 15 of Plaintiff's Complaint, requests a jury trial, the Defendant neither admits nor denies same, but also requests a trial by jury.

FOR A SECOND DEFENSE

16. The Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

17. The Defendant alleges that if any injuries and damages were sustained by the Plaintiff, said injuries and damages were caused by the greater negligence and/or willfulness of the Plaintiff, which exceeds the negligence and/or willfulness, if any, on the part of the Defendant, without which greater negligence and/or willfulness on the part of the Plaintiff, said alleged injury

or damage would not have occurred or been sustained and for that reason, the Plaintiff is totally barred from recovery.

FOR A THIRD DEFENSE

18. The Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

19. Alternatively, the Defendant alleges that if any injuries and damages were sustained by the Plaintiff, said injuries and damages were caused by the negligence and/or willfulness of the Plaintiff, combining, concurring, and contributing with the negligence and/or willfulness, if any, on the part of the Defendant, and for that reason the Plaintiff's recovery, if any, shall be reduced in proportion to the amount of his own negligence.

FOR A FOURTH DEFENSE

20. The Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

21. The Defendant alleges that even if he was negligent or reckless in any respects which is expressly denied, and admitted solely for the purpose of this defense and no other, he is not liable to the Plaintiff for the resulting damages of the Plaintiff, if any, because of the intervening negligent, grossly negligent, reckless, willful and/or intentional acts of a third party, which negligent and reckless were not reasonably foreseeable and intervened and acted as a direct and proximate cause of the collision, and the resulting damages, if any, sustained by the Plaintiff.

FOR A FIFTH DEFENSE

22. The Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

23. The Defendant alleges that the Complaint of the Plaintiffs fails to state facts sufficient to constitute a cause of action against them and, therefore the Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A SIXTH DEFENSE

24. The Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

25. The Defendant pleads all rights pursuant to Rule 12(b)(8) of the South Carolina Rules of Civil Procedure and alleges that another action is pending between the same parties for the same claim; therefore, Plaintiff's Complaint should be dismissed.

FOR A SEVENTH DEFENSE

26. The Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

27. The Defendant alleges that the Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action against them since the Plaintiff failed to timely file and serve the summons and complaint within the three-year statute of limitations.

FOR AN EIGHTH DEFENSE

28. The Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

29. The Defendant herein alleges all rights pursuant to §15-78-100 and §15-78-110 of the South Carolina Code of Laws; including but not limited to that the Plaintiff has not complied with the applicable statute of limitations found in §15-78-100, subsection A, and The Defendant is entitled to special verdict and apportionment of liability among non-governmental entities or individuals acting outside the course and scope of their employment under §15-78-100, subsection C.

FOR A NINTH DEFENSE

30. Defendant realleges and reiterate each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

31. Defendant asserts punitive damages cannot be recovered under the Plaintiffs claims under South Carolina law and are barred by §15-78-120(b) of the South Carolina Code of Laws Annotated; therefore, the Plaintiffs claim for punitive damages should be stricken.

FOR A TENTH DEFENSE

32. Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

33. Defendant alleges that if any injuries and damages were sustained by the Plaintiff, said injuries and damages were caused by the greater negligence and/or willfulness of the Plaintiff, which exceeds the negligence and/or willfulness, if any, on the part of the Defendant, without which greater negligence and/or willfulness on the part of the Plaintiff, said alleged injury or damage would not have occurred or been sustained and for that reason, the Plaintiff is totally barred from recovery.

FOR AN ELEVENTH DEFENSE

34. Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

35. Defendant alleges that the Plaintiff knew or should have known of the dangers attendant in having sexual relations with Joseph Dale White and also knew or should have know that by engaging in this conduct, he assumed the risk of being involved in the accident in the fashion in which he was.

36. The Defendant alleges that the Plaintiff, nevertheless, freely and voluntarily engaged in this conduct even though he knew or should have known of the attendant risks of doing so and

that in so doing, he assumed the risk of being involved in the accident and sustained the injuries and damages for which his representative is now complaining. Accordingly, his claim is barred.

FOR A TWELFTH DEFENSE

37. Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

38. Defendant asserts §15-78-60 of the South Carolina Code of Laws, including, but not limited to, subsections 2, 3, 4, 5, 6, 12, 16, 17, 20, 25, therefore, Plaintiff's Complaint should be dismissed.

FOR A THIRTEENTH DEFENSE

39. Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

40. Defendant asserts as an affirmative defense to the Plaintiff's Complaint all limitations and provisions pursuant to §15-78-70 and §15-78-200 of the South Carolina Code of Laws, and therefore the Plaintiff's Complaint should be dismissed.

FOR A FOURTEENTH DEFENSE

41. Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

42. Defendant asserts as an affirmative defense to the Plaintiff's Complaint the provisions and limitations of §15-78-30(f) and (g) of the South Carolina Code of Laws, and therefore the Plaintiff's Complaint should be dismissed.

FOR A FIFTEENTH DEFENSE

43. Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

44. The Defendant pleads all rights, defenses and limitations of liability found in §15-78-120 including, but not limited to, the statutory cap or limitation of damages recoverable under

§15-78-120 and exclusion of punitive or exemplary damages of any claims; therefore, Plaintiff's Complaint should be dismissed.

FOR A SIXTEENTH DEFENSE

45. Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

46. Defendant alleges the provisions of §15-78-100 of the South Carolina Code of Laws, and therefore the Plaintiff's Complaint should be dismissed.

FOR A SEVENTEENTH DEFENSE

47. Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

48. Defendant alleges that any personal injuries or property damages sustained by the Plaintiff, as alleged in the Complaint, were due to and caused by the sole acts of negligence, recklessness and wantonness on the part of the Plaintiff and that the sole negligence, recklessness and wantonness of the Plaintiff was the proximate cause of his injuries.

FOR AN EIGHTEENTH DEFENSE

49. Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

50. The Defendant alleges that if any injuries and damages were sustained by the Plaintiff, said injuries and damages were caused by the greater negligence and/or willfulness of the Plaintiff, which exceeds the negligence and/or willfulness, if any, on the part of the Defendant, without which greater negligence and/or willfulness on the part of the Plaintiff, said alleged injury or damage would not have occurred or been sustained and for that reason, the Plaintiff is totally barred from recovery.

FOR A NINETEENTH DEFENSE

51. Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

52. Alternatively, the Defendant alleges that if any injuries and damages were sustained by the Plaintiff, said injuries and damages were caused by the negligence and/or willfulness of the Plaintiff, combining, concurring, and contributing with the negligence and/or willfulness, if any, on the part of the Defendant, and for that reason the Plaintiff's recovery, if any, shall be reduced in proportion to the amount of his own negligence.

FOR A TWENTIETH DEFENSE

53. Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

54. The Defendant alleges that he is entitled to set off for any amounts paid to Plaintiff by Defendant Joseph Dale White through any volunteered payment or payment of restitution or fine through the proceedings of his criminal charges.

FOR A TWENTY-FIRST DEFENSE

55. Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

56. Defendant asserts any and all provisions of South Carolina Tort Claims Act and case law constituting same which are not specifically raised previously herein.

FOR A TWENTY-SECOND DEFENSE

57. Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

58. The Defendant alleges that the Plaintiff's complaint fails to state facts sufficient to constitute a cause of action against them since the Plaintiff failed to timely file and serve the

summons and complaint within the applicable statute of limitations under South Carolina law, including, but not limited to §15-78-110 of the South Carolina Code of Laws.

FOR A TWENTY-THIRD DEFENSE

59. Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

60. Defendant alleges Plaintiff's consent as an affirmative defense to Plaintiff's Complaint.

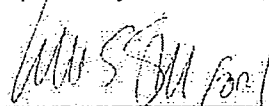
FOR A TWENTY-FOURTH DEFENSE

61. Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

62. The Defendant alleges that the Plaintiff has failed to mitigate his damages; and therefore, the Plaintiff's Complaint should be dismissed.

WHEREFORE, the Defendant above-named, having answered the Complaint of the Plaintiff herein, respectfully requests the court to dismiss the Plaintiff's Complaint, for costs in this action, and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,



Charles F. Turner, Jr. (#64996)
TURNER, PADGET, GRAHAM & LANEY, P.A.
P. O. Box 1509
Greenville, SC 29602
(864) 552-4600
Attorney for Defendant Barry Frost

July 1, 2009
Greenville, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	C.A. NO.: 2008-CP-42-475
John Doe,	)	
	)	
Plaintiff,	)	
	)	
v.	)	DEFENDANT'S NOTICE OF MOTION
	)	AND MOTION TO DISMISS
Barry Frost,	)	
	)	
Defendant.	)	
	)	

You will please take notice that the Defendant moves before the presiding Judge for the 7th Judicial Circuit in Spartanburg County, South Carolina, on the tenth day of the service hereof, or at such time and place as is convenient to the Court and to counsel, for an order dismissing the Plaintiff's Complaint in accordance with Rules 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5), and Rule 12(b)(8) of the South Carolina Rules of Civil Procedure. The Defendant further moves for this action to be dismissed in accordance with Rule 15 of the South Carolina Rules of Civil Procedure. This Motion is based upon the following grounds:

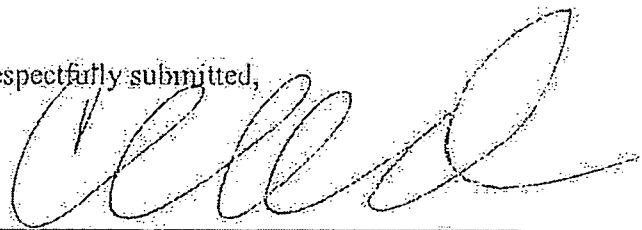
1. Plaintiff filed his Summons and Complaint in January of 2008. Plaintiff failed to serve the Defendant with said Summons and Complaint. The Plaintiff failed to commence this action in 2008 as required by Rule 3 of the South Carolina Rules of Civil Procedure.
2. Plaintiff's January 2008 Summons and Complaint was not filed and served within the applicable statute of limitations and should be dismissed.
3. Plaintiff's Complaint should be dismissed pursuant to Rule 12(b)(8) of the South Carolina Rules of Civil Procedure in as much as another action is pending for the same claim. Said civil action is entitled *John Doe v. Barry Frost*, Civil Action No.: 2009-CP-42-2662.

4. Plaintiff's Amended Complaint should be dismissed as Plaintiff failed to attach a summons and, as such, failed to perfect service and service of process in accordance with Rule 12(b)(4)(5) of the South Carolina Rules of Civil Procedure.

5. Plaintiff failed to move to amend his Complaint pursuant to Rule 15 of the South Carolina Rules of Civil Procedure. Rule 15 of the South Carolina Rules of Civil Procedure requires such motion and therefore said Amended Complaint should be dismissed.

This Motion will be based upon the pleadings in this matter, the common and statutory law of the state of South Carolina, as well as any memorandum of law filed hereafter.

Respectfully submitted,



Charles F. Turner, Jr. (SCBar#64996)
Anne R. Culbreath (SCBar#15536)
TURNER, PADGET, GRAHAM & LANEY, P.A.
P. O. Box 1509
Greenville, SC 29602
(864) 552-4600
Attorney for Defendant

March 9, 2012
Greenville, South Carolina

INFORMATION RELEASABLE UNDER THE FREEDOM OF INFORMATION ACT

NAME: [Redacted]

BRANCH OF SERVICE AND SERIAL/SERVICE NUMBER(S):

United States Army / United States Army Reserve / Army National Guard

DATES OF SERVICE:

February 2003 to August 10, 2011

Active Duty periods: August 19, 2004 to October 8, 2004//February 10, 2005 to May 23, 2006//January 29, 2007 to August 10, 2011

DUTY STATUS:

Discharged

RANK/GRADE:

Private

SALARY:

N/A

SOURCE OF COMMISSION:

N/A

PROMOTION SEQUENCE NUMBER:

N/A

ASSIGNMENTS AND GEOGRAPHICAL LOCATIONS:

Ft. Leonard Wood, MO

Ft. Bragg, NC

Ft. Jackson, SC

Ft. Sill, OK

Ft. Richardson, AK

MILITARY EDUCATION:

Combat Engineer Course//Combat Lifesaver Course//Airborne Course

DECORATIONS AND AWARDS:

Army Commendation Medal//Army Achievement Medal//Army Reserve Components

Achievement Medal//Valorous Unit Award//National Defense Service

Medal//Afghanistan Campaign Medal w/ Two Service Stars//Global War on

Terrorism Service Medal//Armed Forces Reserve Medal w/ M Device//Combat Action

Badge//Army Service Ribbon//Overseas Service Ribbon w/ Numeral 2//NATO Medal

TRANSCRIPT OF COURT-MARTIAL TRIAL:

Not in file

PHOTOGRAPH:

N/A

PLACE OF ENTRY:

Wellford, SC

PLACE OF SEPARATION:

Elmendorf-Richardson, AK

FOR DECEASED VETERAN ONLY

PLACE OF BIRTH

DATE OF DEATH

LOCATION OF DEATH

PLACE OF BURIAL

NOTE: N/A denotes information is not available in the veteran's records

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

C.A. NO.: 2009-CP-42-2662

John Doe,)
)
Plaintiff,)
)
v.)
)
Barry Frost,)
)
Defendant.)

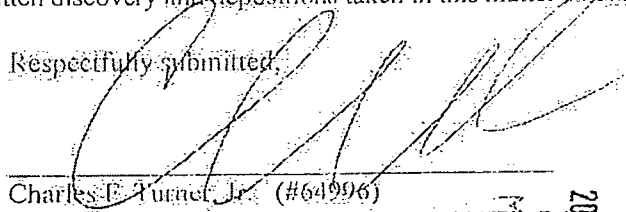
DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

YOU WILL PLEASE TAKE NOTICE that this Defendant by and through his undersigned attorneys, will move before the Court on the 10th day of service hereof, or at such other time and place as is convenient to the Court and counsel, for an Order granting Defendant summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure and for an Order dismissing the claims against it as set forth below:

1. Defendant Barry Frost is entitled to immunity under §15-78-70 and §15-78-200 of the South Carolina Code of Laws.
2. There is no material issue of fact that Barry Frost negligently supervised the Plaintiff.
3. Plaintiff has not complied with statute of limitations found under §15-78-10 et seq. of the South Carolina Code of Laws.

This Motion is based upon pleadings, written discovery and depositions taken in this matter to date.

Respectfully submitted,


Charles F. Turner, Jr. (#64996)
TURNER, PADGET, GRAHAM & LANE, P.A.
P. O. Box 1509
Greenville, SC 29602
Phone: (864) 552-4600; Fax: (864) 552-4600
Attorney for Defendant

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The State of South Carolina
In The Court of Appeals

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

Case No. 2012-213499

John Doe, ...

Appellant

v.

City of Duncan

Respondent

Final Brief of Appellant

Jeff Anderson & Associates, P.A.
Gregg Meyers, SC Bar No. 9908
366 Jackson Street
St. Paul MN 55101
651-227-9990

Attorney for Appellants

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Statement of Issue on Appeal

When the trial court dismissed this action under state law time limits, did the trial court err in failing to apply the Servicemembers Civil Relief Act?

Standard of Review

On appeal from an order granting a motion to dismiss, the facts must be viewed in the light most favorable to plaintiff, and with all doubts resolved in his behalf. *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 415 (Ct. App. 2003).

An abuse of discretion occurs if the court's ruling is controlled by an error of law or if the ruling is based upon findings of fact that are without evidentiary support. *Sharps v. Sharps*, 342 S.C. 71, 79, 535 S.E.2d 913, 917 (2000).

Statement of the Case

An action related to childhood sexual abuse was referred to counsel and filed in 2008 (R. App. pp. 9 - 11, 2008 Complaint) but, when counsel was told that the Plaintiff had been deployed to Afghanistan (R. App. 43, Transcript at p. 10), that action was not served. (R. App. 1, Order 1). After the Plaintiff's period of military service ended (R. App. 12, Amended Complaint), in 2012 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 that it was not properly served with the 2008 pleading, that a motion was necessary before the 2008 complaint could be served, and that the case should be dismissed in its entirety. R. App. pp. 16 to 17.

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), which is undisputed, but the trial court ruled “the Plaintiff is 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 then dismissed the action, with prejudice, which also prevented the servicemember from simply re-filing the complaint in 2012. R. App. p. 3, Order at 3.

This appeal followed by Notice of November 23, 2012.

Argument

The trial court erred when it dismissed this action under state law time limits without applying the Servicemembers Civil Relief Act?

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’s ruling was unduly harsh to the servicemember, and an abuse of discretion, because it failed to apply in any way the SCRA, let alone apply it liberally to protect the servicemember. Under 50 App. U.S.C. §§ 512(a)(2) and 512(b), the Servicemember’s Civil Relief Act applies 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. (R. App. p. 45, Transcript at 12, “this is not a statute-of-limitations argument.”) Thus the trial court erred even in applying SCRCP 3.

On the face of the amended complaint (R. App. 12 to 14),¹ when the trial court dismissed the action with prejudice the servicemember was not even out of time to bring his complaint under S.C. Code § 15-3-555. Had the trial court not improperly applied state time limits and dismissed the action with prejudice, a complaint could have been newly filed in 2012.²

More fundamentally, 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

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), so under S.C. Code § 15-3-555, the servicemember had until his 27th birthday in February, 2013, to bring his complaint. He could readily have done so but for the trial court dismissing the action with prejudice. R. App. 3. 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.

² The defendant appeared, but contended that no summons was served with the amended complaint, which at the hearing was news to plaintiff’s counsel. R. App. 48, Transcript at 15. Absent the trial court’s unduly harsh treatment for the servicemember, dismissing the action with

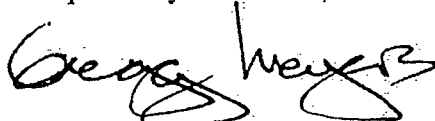
Court's attention to the federal statute (e.g., R. App. 43, Transcript at 10: "his time to perfect that service extends under the federal statute"), the Court applied the 120 day limit of SCRCP 3 and dismissed the action, R. App. 3, Order at 3, then committed a second violation of the SCRA by applying 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.

The trial court erred in dismissing the action with prejudice, necessitating this appeal to restore the action.

Conclusion

The trial court erred and this action should be reinstated and remanded for additional proceedings.

Respectfully submitted,



Gregg Meyers, SC Bar No. 9908
Jeff Anderson & Associates, P.A.
366 Jackson Street
St. Paul, MN 55101
651-227-9990, 651-297-6543
Gregg@andersonadvocates.com

prejudice, this claimed omission could have been readily rectified by a 2012 filing.

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

Case No. 2012-213499

John Doe, ... Appellant

v.

City of Duncan Respondent

Proof of Service

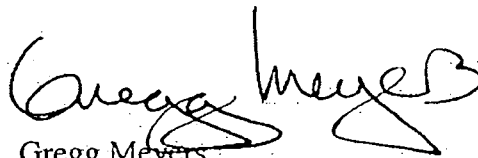
I hereby affirm that I have served upon counsel for the defendant/respondent a copy of

Final Brief of Appellant

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

William H. Foster
Miles Coleman
Nelson Mullins Riley & Scarbrough
Poinsett Plaza, Suite 900
104 South Main Street
Greenville, SC 29601

Done December 23, 2013



Gregg Meyers
Jeff Anderson & Associates, P.A.
366 Jackson Street
St. Paul, MN 29601
651-227-9990
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In the 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,

City of Duffan, Respondent.

FINAL BRIEF OF RESPONDENT

NELSON MULLINS RILEY & SCARBOROUGH LLP

William H. Foster, III
Post Office Box 110084
Greenville, SC 29601
(864) 250-2300

A. Martison Bogan
Miles E. Coleman
Post Office Box 11070
Columbia, SC 29201
(803) 799-2000

TURNER, PADGET, GRAHAM & LANEY, P.A.

Charles B. Turney
Post Office Box 1509
Greenville, SC 29602
(864) 552-4600

Attorneys for Respondent

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Statement of the Case

Doe filed a Complaint on January 28, 2008 asserting a single claim against the City of Duncan for negligent supervision giving rise to alleged sexual abuse that occurred at the City's Fire Department. (See Compl. ¶¶ 2, 4-11; R. 9-10.¹) Doe never served the City with the Summons and Complaint. Doe's counsel acknowledged this in an email sent to the Spartanburg County Clerk of Court more than a year after filing, stating he would be submitting a voluntary dismissal. (See Meyers' Feb. 3, 2009 email; R. 51.) Doe, however, never submitted a stipulation of dismissal or took any other action to terminate the lawsuit he had filed but never served.

On February 21, 2012—more than four years after filing the Complaint—Doe filed an Amended Complaint, in which he again asserted a single claim against the City for negligent supervision based on alleged sexual abuse that occurred at the City's Fire Department. (See Amend. Compl. ¶¶ 6-14; R. 13-14.) Doe did not move to amend nor did he secure the City's written consent prior to filing the Amended Complaint. (See Order Granting City's Motion to Dismiss at 2; R. 2.) Six days after filing the Amended Complaint, Doe served the City with the Amended Complaint but not a Summons. (*Id.*)

On March 15, 2012, the City filed a Motion to Dismiss pursuant to Rules 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(8), SCRCF, arguing that Doe's failure to serve meant that no civil action had been commenced and, alternatively, that Doe's suit had not been filed and served within the applicable statute of limitations. (See City's Motion to Dismiss ¶¶ 1-2; R. 16.) In addition, the motion argued that Doe's Complaint

¹ On May 7, 2009, Doe filed a nearly identical Complaint in a related case arising from the same facts, *Doe v. Barry Frost*, Case No. 2009-CP-42-2662. (See *Doe v. Frost* Compl.; R. 52-54.) Frost was the Chief of the Duncan Fire Department at the time of Doe's alleged sexual abuse. (Compl. at ¶ 5; R. 9.)

should be dismissed because it was duplicative of another action pending for the same claim (*id.* ¶ 3; R. 16), and that his Amended Complaint was neither properly served nor made pursuant to the requirements of Rule 15, SCRCPP (*id.* ¶¶ 4-5; R. 17). The City subsequently filed a memorandum in support of its motion, expanding on these arguments and arguing Doe was judicially estopped in this suit from taking a position inconsistent with his stance in a related suit. (*See* Memo in Support of City's Motion to Dismiss; R. 18-23.)

On May 16, 2012, the Honorable Derham J. Cole held a hearing on the City's Motion to Dismiss. (*See* Tr. of May 16, 2012 hearing; R. 34-50.) The City filed a renewed motion to dismiss on June 27, 2012, incorporating its prior motion and seeking dismissal pursuant to Rules 3, 12(b)(1), and 12(b)(2), SCRCPP. (*See* City's Renewed Motion to Dismiss; R. 26.)

Judge Cole issued an Order on November 1, 2012 granting the Motion to Dismiss. (*See* Order Granting City's Motion to Dismiss; R. 1-3.) The Order concluded that Doe's failure to serve a Summons and Complaint meant that no civil action had been commenced and thus the trial court lacked jurisdiction. (*Id.* at 3; R. 3.) Accordingly, the court granted the City's motion and dismissed Doe's suit pursuant to Rules 12(b)(1) and 12(b)(2), SCRCPP. (*Id.*) In addition, the Order noted that "over four years passed since the filing of the action," and that Doe's failure to serve the City violated the time limitations for service imposed by Rule 3, SCRCPP. (*Id.* at 2-3; R. 2-3.) Finally, the Order noted that Doe could not file an Amended Complaint because there was no civil action to amend. (*Id.* at 3; R. 3.) Doe did not file a motion pursuant to Rule 59(e), SCRCPP to alter or amend the trial court's Order.

Doe appealed from the trial court's Order. On May 29, 2013, the City filed a Motion to Dismiss the Appeal, arguing that because no civil action has been commenced, this Court lacks jurisdiction and should dismiss the appeal. (*See* Motion to Dismiss Appeal; R. 28-33.) This Court denied the motion but invited the parties to address the issue of jurisdiction in their briefs. (*See* Court of Appeals' Order of Aug. 16, 2013; R. 4.)

Statement of the Facts

Doe is a 27-year-old South Carolinian. (*See* Appellant's Brief at 3 n.1; *see also* Compl. ¶ 1; R. 9.) Doe's pseudonymous Complaint alleges that, while he was a minor, he was invited to participate in activities held at the Duncan Fire Department. (Compl. ¶ 4; R. 9.) He further alleges that his mother was told by the Chief of the Fire Department, Barry Frost, that Doe would be well supervised during these activities. (*Id.* at ¶ 5; R. 9.) Doe alleges he was subsequently sexually abused by a City employee on or around August 31, 2001. (*Id.* at ¶¶ 2, 8; R. 9-10.²)

In early 2003, shortly after his 17th birthday, Doe enlisted in the United States military, and he continued in military service until August of 2011. (Appellant's Brief at 3 n.1.) During that period of time, Doe was on active duty for only certain periods of time, namely from August 19, 2004 to October 8, 2004; from February 10, 2005 to May 23, 2006; and from January 29, 2007 to August 10, 2011—a combined total of 5 years, 11 months, and 14 days of active duty service. (*See* FOIA response of the National Personnel Records Center; R. 66.)

² Doe has made inconsistent statements regarding whether the alleged abuser was an employee of the Fire Department (*see* 2008 Compl. ¶ 8; R. 10) or an employee of the Police Department (*see* Amend. Compl. ¶ 10; R. 13-14).

Standard of Review

When a trial court dismisses a suit for lack of personal jurisdiction, the appellate court will not disturb that ruling unless it is entirely unsupported by the evidence or controlled by an error of law. *Ex parte S.C. Dept. of Revenue*, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct. App. 2002) (“The court’s exercise of personal jurisdiction over a party ‘will not be disturbed on appeal unless wholly unsupported by the evidence or manifestly influenced or controlled by error of law.’”) (quoting *Indus. Equip. Co. v. Frank G. Hough Co.*, 218 S.C. 169, 173, 61 S.E.2d 884, 885 (1950)); *Bargesser v. Coleman Co.*, 230 S.C. 562, 567, 96 S.E.2d 825, 827 (1957) (holding the exercise of personal jurisdiction over a party will not be disturbed on appeal unless unsupported by the evidence or influenced by error of law).³

A trial court’s interpretation and application of statutes and rules—including the applicability of a statutory tolling provision, determination of the applicable statute of limitations, and the effect of state statutes and procedural rules—are questions of law, and an appellate court’s review is limited to correcting errors of law. *Ranucci v. Crain*,

³ Although the trial court based its dismissal on Rules 12(b)(1) and 12(b)(2), the City does not and need not rely on the 12(b)(1) aspect of the ruling. South Carolina precedent is conflicting as to whether a trial court’s subject matter jurisdiction is dependent on service of the summons and complaint. Compare *Mims v. Babcock Center, Inc.*, 399 S.C. 341, 347, 732 S.E.2d 395, 398 (2012) (“[W]e note the failure of proper service does not impact the court’s subject matter jurisdiction.”), with *First Palmetto State Bank & Trust Co. v. Boyles*, 302 S.C. 136, 139, 394 S.E.2d 313, 315 (1990) (“We hold that subject matter jurisdiction vested in the circuit court upon commencement [*i.e.*, service] of the action,” not the earlier date when the complaint was filed). This uncertainty is irrelevant here. As explained below, a number of independent grounds exist that are sufficient to affirm the trial court’s order. In any event, Doe cannot challenge this aspect of the trial court’s ruling because he did not raise this issue in his Statement of Issues on Appeal. See Rule 208(b)(1)(B), SCACR (“Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.”).

397 S.C. 168, 171, 723 S.E.2d 242, 243 (Ct. App. 2012); *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 425, 702 S.E.2d 246, 250 (2010) ("Statutory interpretation is a question of law.") (citation omitted).⁴

Argument

This Court should dismiss this appeal or, alternatively, should affirm the trial court's order of dismissal. First, as explained below, because no Summons was ever served on the City, no civil action was ever commenced, thus the trial court lacked jurisdiction and the appellate court, in turn, lacks jurisdiction over the appeal. Second, even if this Court has jurisdiction to consider the appeal, it should affirm the trial court because Doe failed to preserve the sole issue he raises on appeal. Third, this Court should affirm the trial court's Order because the Servicemember's Civil Relief Act ("SCRA") does not remedy Doe's failure to serve the City. Fourth, under general principles of South Carolina law, the trial court correctly determined that dismissal of Doe's case was mandated by Doe's failure to serve the City prior to the expiration of the applicable statute of limitations. Finally, the Record presents an additional sustaining ground,

⁴ Doe's statement of the standard of review errs in two respects. First, it errs by reciting the "abuse of discretion" standard, *see* Appellant's Brief at 1, which, as explained above, is not the correct standard to review the trial court's ruling here. Indeed, the case Doe's brief cites in support of the "abuse of discretion" standard involves the entirely different issue of a family court's discretion to award alimony. Second, Doe's brief errs by reciting the standard used to review a trial court's dismissal pursuant to Rule 12(b)(6), *see id.*, which is different from the standard used to review a dismissal pursuant to Rule 12(b)(2). Specifically, because a 12(b)(6) motion requires an evaluation of the facts and allegations in the Complaint to determine whether they present a claim upon which relief can be granted, both the trial court and the appellate court view the facts in light most favorable to plaintiff. *See Disabato v. S.C. Ass'n of Sch. Admins.*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013). In contrast, as explained above, when an appellate court reviews a 12(b)(2) dismissal, it does not apply a plaintiff-favoring view, and it will not disturb the trial court's ruling unless it is entirely unsupported by the evidence or controlled by an error of law.

namely that as a result of Doe's stance in a related proceeding, Doe is judicially estopped from claiming that the City is liable for his alleged injuries.

I. Because Doe never commenced a civil action, this Court lacks jurisdiction over the appeal and should dismiss it.

Before even considering the merits of Doe's argument on appeal, this Court must determine whether it has jurisdiction to consider the appeal. *See Holroyd v. Requa*, 361 S.C. 43, 52-53, 603 S.E.2d 417, 422 (Ct. App. 2004) (analyzing appellate jurisdiction as a "threshold matter"); *Fed. Land Bank v. State Highway Dept.*, 172 S.C. 207, 210, 173 S.E.2d 635, 636-37 (1934) ("It appears necessary that the jurisdictional point must be decided before any of the other questions involved in the appeal be considered. As has been said, 'This question meets us at the threshold.' If the Court had no jurisdiction, the other questions presented by the appeal, interesting as they are, are rendered academic.").

The jurisdictional question arises from Doe's failure to serve a Summons on the City. The service of a Summons and Complaint is a mandatory prerequisite to commence a civil action. The Rules of Civil Procedure require service of *both* documents before a civil action is commenced:

A civil action is commenced when the summons and complaint are filed with the clerk of court if:

- (1) the summons *and* complaint are served within the statute of limitations in any manner prescribed by law; or
- (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

Rule 3(a), SCRPC (emphasis added); *see also First Palmetto State Bank & Trust Co. v. Boyles*, 302 S.C. 136, 139, 394 S.E.2d 313, 315 (1990) ("[A] civil action is commenced by the filing and service of a summons and complaint.").

Here, it is undisputed that Doe did not comply with this mandatory procedure to commence a civil action. Doe concedes the 2008 Summons and Complaint were not served on the City. *See* Appellant's Brief at 1. He further concedes that only the purported Amended Complaint *but no Summons* was served on the City in 2012. *Id.* ("The amended *pleading* was filed and served, and an affidavit of service for the amended *complaint* was filed with the court.") (emphasis added); *see also* Order Granting City's Motion to Dismiss at 2; R. 2 ("On or about February 27, 2012, the Plaintiff purported to serve the Amended Complaint on the Defendant; however, no Summons was served upon the Defendant.").

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. When a trial court dismisses a suit for lack of jurisdiction because the Summons and Complaint were not timely served and thus no civil action was commenced, the appellate court also lacks jurisdiction and the appeal should be dismissed. *See, e.g., Morris Comm., Inc. v. S.C. Pub. Serv. Comm.*, 267 S.C. 207, 226 S.E.2d 892 (1976); *State v. Gorie*, 256 S.C.

539, 541, 183 S.E.2d 334, 335 (1971) (“Since the order appealed from was a complete nullity for lack of jurisdiction, the appeal presents no issue for consideration or decision by this Court and the appeal is, accordingly, Dismissed.”); *see also Jaramillo v. Cathern & Smith*, 701 A.2d 817 (R.I. 1997) (summarily dismissing appeal of trial court’s order granting a motion to dismiss for failure to properly serve defendant with the Complaint).

These cases’ holdings comport with the statute granting this Court’s appellate jurisdiction. The South Carolina Code states that this Court “has jurisdiction over any case in which an appeal is taken from an order, judgment, or decree of the circuit court.” S.C. Code Ann. § 14-8-200(a) (emphasis added). Where, as here, an appeal arises from a dispute that is not a “case,” *i.e.*, an actual civil action, this Court has no jurisdiction. *See, e.g., Spivey v. Carolina Crawler*, 367 S.C. 154, 624 S.E.2d 435 (Ct. App. 2005) (dismissing part of appeal that did not yet involve an “actual” controversy); *Main Corp. v. Black*, 357 S.C. 179, 592 S.E.2d 300 (2004) (affirming the Court of Appeals dismissal of an appeal because the trial court had no jurisdiction over a case sent to arbitration, thus there was no appellate jurisdiction pursuant to S.C. Code Ann. § 14-8-200(a)); *see also Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) (“If there is no actual controversy, this Court will not decide moot or academic questions.”).

In short, Doe’s failure to serve a Summons on the City means no civil action was ever commenced. Accordingly, the trial court correctly determined that in the absence of an actual case, it had no personal jurisdiction. Because there is no live case or civil action over which this Court can exercise jurisdiction, it should summarily dismiss the appeal.

II. Doe’s sole issue on appeal is not preserved for this Court’s review.

Doe’s sole argument on appeal—that the SCRA excuses his failure to serve the City—raises an issue that 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 SCRA's tolling provision applied to excuse his failure to serve. (See Hearing Tr. of May 16, 2012 at 10-11; 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. 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) (stating that where trial court fails to rule on an issue, a party must file a Rule 59(e) motion to preserve that issue for appellate review); *Shealy v. Aiken County*, 341 S.C. 448, 459-60, 535 S.E.2d 438, 444 (2000); *Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 85, 529 S.E.2d 6, 9 (2000); *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991); *Halbersberg v. Berry*, 302 S.C. 97, 104, 394 S.E.2d 7, 12 (Ct. App. 1990).

Doe did not file a Rule 59(e) motion asking the trial court to rule on the applicability and effect of the SCRA. Therefore, the trial court never ruled on this issue. Accordingly, Doe's sole argument on appeal is not preserved.

III. The Servicemember's Civil Relief Act does not remedy Doe's failure to serve the City after filing suit.

Even assuming this Court has jurisdiction and Doe preserved the sole issue he raises on appeal, this Court should affirm the trial court's order of dismissal. Doe argues a single issue on appeal: that his failure to commence a civil action by neglecting to serve the City is excused by the operation of the SCRA's tolling provision. Doe, however, is woefully mistaken as to the SCRA's meaning and applicability.

The SCRA is intended to “protect those who have been obliged to drop their own affairs to take up the burdens of the nation.” *Murdock v. Murdock*, 338 S.C. 322, 330, 526 S.E.2d 241, 246 (Ct. App. 1999) (quoting *Boone v. Lightner*, 319 U.S. 561 (1943)). Accordingly, the SCRA contains provisions protecting servicemembers from default judgments, 50 U.S.C. App. § 521,⁵ prohibiting excessive interest rates, *id.* at § 527, preventing eviction by a landlord, *id.* at § 531, and protecting against foreclosure, *id.* at § 533, while the person is in *active* military duty.

The SCRA also includes a tolling provision upon which Doe bases his sole argument on appeal. Specifically, Doe argues that 50 U.S.C. App. § 526 excuses his failure to serve the City. That section, titled “Statute of limitations,” tolls the time limits for determining the date on which the servicemember must file a suit:

(a) Tolling of statutes of limitation during military service

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.

⁵ *Murdock*, for example, dealt with the protection against entry of default judgment against a servicemember who failed to appear in a civil action. That provision—formerly found in 50 U.S.C. App. § 520 and now found in § 521—requires that before a default judgment may be entered in any action, the plaintiff must submit an affidavit stating whether or not the defendant is in military service. In *Murdock*, the plaintiff failed to file the affidavit, which warranted reversal and vacation of the default judgment against the servicemember defendant.

50 U.S.C. App. § 526.⁶ The title and language of § 526(a) makes clear that it applies only to toll statutes of limitation for “bringing” a suit. Doe, however, incorrectly argues that “the action by the SCRA to suspend state law time limits necessarily includes the time provisions under SCRCP 3.” Appellant’s Brief at 3. Doe does not cite a single case in support of this argument, likely because courts considering this issue have held the exact opposite, namely that once a suit is filed, § 526 does *not* toll or extend any subsequent calculations of time such as the time in which to serve the defendant or the duty to prosecute a case. *See, e.g., Zitomer v. Holdsworth*, 449 F.2d 724 (3d Cir. 1971) (affirming trial court’s dismissal of suit for failure to prosecute and noting that the SCRA’s tolling provision “simply tolls the statute of limitations during the period of military service and has no applicability to an action duly filed and served within the applicable statute of limitations”); *Zarlinsky v. Laudenslager*, 167 A.2d 317, 320 (Penn. 1961) (noting the SCRA’s tolling provision “expressly applies to the limitation of time for bringing an action, not to a limitation of time for the continuing of process in an action already brought and avails the plaintiffs nothing”); *Thornley v. Superior Court of San Francisco*, 201 P.2d 567, 568 (Cal. Ct. App. 1949) (“There is nothing in section 525 of the federal act which purports to suspend this mandatory requirement of service. Respondent argues that the word ‘proceeding’ in section 525 of the federal act should be construed as applying to the service of summons or any other procedural step taken in the

⁶ Prior to December 19, 2003, the SCRA was known as the Soldiers’ and Sailors’ Civil Relief Act, and its tolling provision appeared in § 525. *Lowe v. United States*, 79 Fed. Cl. 218, 224 n.7 (Fed. Cl. 2007) (“In 2003, Congress amended the SCRA of 1940, and as part of a general revision, moved the tolling provision then in place at 50 U.S.C. app. § 525 . . . to the current 50 U.S.C. app. § 526.”); *Baker v. England*, 397 F. Supp. 2d 18, 24 (D.D.C. 2005) (noting § 525 is the “immediate predecessor and substantive equivalent” of § 526).

prosecution of the action. This is not sound.”); *see also Puchek v. Elledge*, 160 F. Supp. 286, 287 (N.D. Ind. 1958) (noting that the SCRA had no relation to service of process).

Commentators and legal encyclopedias agree that § 526 does not delay the period for serving a filed summons and complaint. *See* 36 A.L.R. Fed. 420 § 12 (“The tolling provision of the Soldiers’ and Sailors’ Civil Relief Act (50 App. U.S.C. § 525) is not applicable to, and cannot prevent the running of, time limitations governing the service of process in, or the prosecution of, actions already brought.”); Am. Bar Ass’n SCRA Judges’ Guide Checklist at 10, available at apps.americanbar.org/family/military/scra-judgesguidecklist.pdf (noting that § 526 stays the running of statutes of limitation, but “does not, however, affect time periods within a suit, such as time periods to avoid motions to dismiss for failure to prosecute an action”) (last visited September 26, 2013).

In sum, the SCRA’s tolling provision applies only to toll statutes of limitation for bringing a suit. It does not apply to subsequent procedural timelines such as service of process or diligent prosecution of the case. Where, as here, a servicemember chooses to file suit during his time of military service, he cannot later rely on the SCRA to excuse his four-year delay in serving the defendant and prosecuting the action.

IV. Dismissal of Doe’s case was warranted under South Carolina law.

Because the SCRA does not apply, Doe’s failure to serve the City is evaluated in accordance with general principles of state law. The trial court correctly determined that, under South Carolina law, Doe’s failure to serve the City mandated his case be dismissed with prejudice. In addition to the absence of a civil action and the absence of personal jurisdiction over the City, dismissal was warranted because the applicable statute of limitations had expired, as had the time to serve the City or amend the Complaint.

A. *The trial court properly dismissed Doe's suit because no civil action was ever commenced and the court did not have jurisdiction over the City.*

As explained in Part I, *supra*, because Doe never served a Summons on the City, no civil action was ever commenced and the trial court lacked personal jurisdiction over the City. A civil action is commenced not by the filing of a Summons and Complaint but by *service* of those documents on the defendant. *See First Palmetto State Bank & Trust Co. v. Boyles*, 302 S.C. 136, 139, 394 S.E.2d 313, 315 (1990). Because no summons was served on the defendant, Doe's action never commenced. In addition, the lack of service meant the trial court had no jurisdiction over the City. *See Fin. Fed. Credit, Inc. v. Brown*, 384 S.C. 555, 562, 683 S.E.2d 486, 490 (2009) (stating a summons is the method by which a court obtains jurisdiction); *Louden v. Moragne*, 327 S.C. 465, 468, 486 S.E.2d 525, 526 (Ct. App. 1997); *Brown*, 322 S.C. at 194, 470 S.E.2d at 850.

In the absence of a civil action and jurisdiction, the trial court properly dismissed the suit. *See Brown*, 322 S.C. at 194, 470 S.E.2d at 850; *Estate of Corley*, 299 S.C. 525, 527, 386 S.E.2d 264, 266 (Ct. App. 1989) (affirming lower court's dismissal of case where defendant was not served with a summons).

B. *The trial court properly dismissed Doe's suit because the window of time to serve the City or amend the Complaint had passed when the applicable statute of limitations expired.*⁷

In addition, the trial court noted an independent basis for the dismissal, namely that Doe failed to comply with the 120-day service requirement found in Rule 3(a)(2),

⁷ This aspect of the trial court's Order provides an additional, independent basis to affirm its ruling. This part of the trial court's ruling, however, is not otherwise at issue on appeal because Doe's Statement of the Issue on Appeal raises a single issue, namely that the SCRA excuses his failure to serve the City. *See Appellant's Brief* at 1. Because Doe does not take issue with any other aspect of the trial court's ruling, no other issues are properly before this court. *See Rule 208(b)(1)(B), SCACR* ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

SCRCP and in S.C. Code Ann. § 15-3-20(B).⁸ (*See* Order granting City's Motion to Dismiss at 2; R. 2.) Imposition of the 120-day requirement, dismissal with prejudice, and rejection of the purported Amended Complaint were all warranted because the statute of limitations on Doe's claim against the City had expired.

In its Motion to Dismiss, the City had argued that Doe's suit was not filed and served within the applicable statute of limitations (*see* City's Motion to Dismiss ¶ 2; R. 16), and the trial court's Order noted that "over four years passed since the filing of the action" and thus Doe had failed to timely commence the action (*see* Order granting City's Motion to Dismiss at 2-3; R. 2-3). The applicable statute of limitations is not, as Doe asserts, the time period set out in S.C. Code Ann. § 15-3-555. *See* Appellant's Brief at 3 n.1. Rather, because Doe's suit is against a City—a political subdivision of the State—and his sole cause of action alleges negligence by the Fire Chief and other Fire Department officials (*see* Compl. ¶¶ 8, 10; R. 10), the suit is necessarily brought pursuant to the South Carolina Tort Claims Act ("SCTCA"). *See* S.C. Code Ann. § 15-78-70(a) (noting that the SCTCA is "the exclusive remedy for any tort committed by an employee of a governmental entity"); *id.* at § 15-78-200 (stating that the SCTCA "is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty"); *Doe v. Greenville Cnty. Sch. Dist.*, 375 S.C. 63, 651 S.E.2d 305 (2007) (noting a negligent supervision claim against

⁸ Rule 3(a)(2) states if a summons and complaint are "not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing." Similarly, the statute states, "A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing." S.C. Code Ann. § 15-3-20(B).

school district involving sexual abuse committed by a third party was brought pursuant to the SCTCA).

The SCTCA contains its own statute of limitations, imposing a two-year time limit on any action against the State or a subdivision thereof:

Except as provided for in Section 15-3-40,^{9]} *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.

S.C. Code Ann. § 15-78-110 (emphasis added). Under the SCTCA's express and unequivocal language, this is the statute of limitations applicable to Doe's suit.¹⁰

Other courts confronting this question have held that a state's Tort Claims Act's statute of limitations applies, not the longer period provided in the statute of limitations for sexual abuse claims generally. *See, e.g., V.C. v. Los Angeles Unified Sch. Dist.*, 139 Cal. App. 4th 499 (Cal. Ct. App. 2006) (holding that negligent supervision suit against school district arising from sexual abuse was subject to the statute of limitations in the state Tort Claims Act, not the longer statute of limitations for general sexual abuse); *see also Kana v. United States*, No. 2:04-21947-CWH, 2006 U.S. Dist. Lexis 19849 (D.S.C.

⁹ S.C. Code Ann. § 15-3-40 states that if a plaintiff's cause of action accrues when the plaintiff is under the age of 18 or insane, the applicable statute of limitations does not begin to run until the plaintiff reaches the age of 18 or recovers from the disability. As explained below, Doe's negligent supervision cause of action allegedly accrued while he was a minor, thus the SCTCA's two-year statute of limitations began to run on his 18th birthday and had expired long before the trial court dismissed his suit.

¹⁰ In contrast, the statute of limitations Doe asserts should apply—S.C. Code Ann. § 15-3-555—applies to suits against the abuser himself, not against a third party. *See Doe v. Crooks*, 364 S.C. 349, 613 S.E.2d 536 (2005) (analyzing whether S.C. Code Ann. § 15-3-555 applied in suit against the alleged abuser).

March 30, 2006) (holding claim against United States arising from sexual abuse committed by a federal employee was subject to and barred by the statute of limitations in the Federal Tort Claims Act); *K.J. v. Arcadia Unified Sch. Dist.*, 172 Cal. App. 4th 1299, 1238 (Cal. Ct. App. 2009) (“Code of Civil Procedure section 340.1 sets forth a special statute of limitations for victims of childhood sexual abuse. [] However, sexual abuse victims who bring suit against a public entity are bound by the much shorter statute of limitations set forth in section 945.6.”); *Drahaus v. State*, 584 N.W.2d 270, 275 (Iowa 1998) (“We point out that although the legislature has modified other statutes of limitation concerning actions brought by minors, it has not done so with respect to a minor’s claim under the Tort Claims Act. For instance, Iowa Code section 614.8A extends the period for bringing an action for sexual abuse of a child, discovered after the injured person reaches the age of majority. . . . We held in *Harden*, however, that this tolling provision does not apply to claims brought under our Tort Claims Act.”); *Teater v. State*, 559 N.W.2d 758 (Neb. 1997) (holding that, under the statute of limitations in state Tort Claims Act, the plaintiff’s complaint alleging sexual abuse was time-barred).

Here, Doe’s cause of action for negligent supervision allegedly accrued while he was a minor, thus the SCTCA’s statute of limitations did not begin to run until his 18th birthday. *See* S.C. Code Ann. § 15-78-110; *id.* at § 15-3-40. Accordingly, the statute began to run in February of 2004. *See* Appellant’s Brief at 3 n.1 (noting Doe was born in February of 1986). Doe had enlisted in the military prior to the time the statute of limitations began to run, and, as noted in Part III, *supra*, the SCRA’s tolling provision tolls statutes of limitation during a plaintiff’s “military service.” The SCRA, however, tolls the running of the statute *only* during periods of *active* duty. *See Boone v. United*

States, 78 Fed. Appx. 108 (Fed. Cir. 2003) (noting the SCRA's tolling provision applies only to time in active duty); *Lazarski v. Archdiocese of Philadelphia*, 926 A.2d 459 (Penn. Super. Ct. 2007) (noting that a plaintiff servicemember's non-active duty time in the military did not toll the state statute of limitations on his sexual abuse claim because "the SCRA expressly points to 'active duty' as the touchstone activating its tolling provisions. . . . There are gaps in Appellant's active duty status. . . . As a result, because Appellant has undisputed periods of inactive duty, the tolling provision of the SCRA would not apply to those dates.").

Doe was a member of the Army, the Army Reserve, or the Army National Guard from February 2003 until August 10, 2011. (See FOIA response from the National Personnel Records Center; R. 66.) During that time, however, he was on active duty for only a total of 5 years, 11 months, and 14 days. (*Id.* (stating Doe was on active duty only from August 19, 2004 to October 8, 2004; from February 10, 2005 to May 23, 2006; and from January 29, 2007 to August 10, 2011).) Accordingly, by the time the City moved to dismiss Doe's suit, the SCTCA's two-year statute of limitations on his claim had expired,¹¹ and by the time the trial court dismissed the case, the statute of limitations was

¹¹ As noted above, the statute began to run on Doe's 18th birthday, which occurred on an unknown day in February of 2004. Assuming it began to run on February 29th, 5 months and 21 days had expired by the time Doe reached active duty status on August 19, 2004. The clock began to run again during Doe's first hiatus from active duty—from October 8, 2004 to February 10, 2005—which allowed another 4 months and 2 days to expire. The clock resumed its ticking during Doe's second period of inactive duty—from May 23, 2006 to January 29, 2007—during which another 8 months and 6 days expired. The clock began to run again when Doe left military service on August 10, 2011. Accordingly, by the time the City filed its Motion to Dismiss on March 15, 2012, an additional 7 months and 5 days had expired, meaning *a cumulative total of 25 months and 4 day of non-tolled time had passed* since Doe's cause of action accrued. Doe concedes the summons and complaint were not served within this time period.

long gone.¹² The SCTCA's two-year statute of limitations on Doc's cause of action expired on February 11, 2012, *see* note 11, *supra*, at which point the window of time closed to serve the documents. *See* Rule 3(a)(2) ("[I]f not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing."). Because neither document had been served on the City by that date, Doe had failed to commence a civil action and dismissal with prejudice was warranted. *See* S.C. Code Ann. § 15-3-20(B) ("A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing."); *Brown v. Evatt*, 322 S.C. 189, 194, 470 S.E.2d 848 850 (1996) (affirming dismissal with prejudice where plaintiff failed to serve the summons and complaint); *Estate of Corley*, 299 S.C. 525, 527, 386 S.E.2d 264, 266 (Ct. App. 1989) (affirming lower court's dismissal of case where defendant was not served with a summons); *see also Loudon v. Moragne*, 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997) (affirming trial court's grant of summary judgment where plaintiff failed to serve the summons within the statute of limitations, which subsequently expired).

Additionally, because Doe had not commenced a civil action, it was impossible for him to "amend" his Complaint, and because the statute of limitations had expired it was impossible for his purported Amended Complaint to initiate a new suit. *See Spence v. Spence*, 368 S.C. 106, 128, 628 S.E.2d 869, 881 (2006) ("Dismissal of a complaint does not bar a subsequent action brought *before the expiration of the statute of limitations.*") (citations omitted) (emphasis added); *Don Shevey & Spires, Inc. v. Am. Motors Realty*

¹² By the time the trial court filed its Order on November 1, 2012, a total of 32 months and 21 days of non-tolled time had passed since his cause of action accrued, far in excess of the SCTCA's two-year statute of limitations.

Corp., 279 S.C. 58, 301 S.E.2d 757 (1983) (affirming trial court's dismissal where plaintiff, who had not filed and served the summons and complaint prior to expiration of the statute of limitations, sought to amend).

V. Doe is judicially estopped from bringing this action due to his inconsistent position taken in a related suit.

The record presents an additional sustaining ground, namely that dismissal of Doe's suit was warranted because he is judicially estopped from asserting a claim here that is diametrically opposed to the position he has taken in a related suit arising from the same facts.¹³ "Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). Its purpose "is to ensure the integrity of the judicial process." *Id.* As explained in greater detail below, Doe cannot assert in one suit that the Fire Chief is individually liable for statements he made in his *individual* capacity, and then assert in the other suit that the City is also liable because the Fire Chief made those statements in his *official* capacity.

On May 7, 2009, Doe filed a complaint in a related case arising from the same facts giving rise to this suit. (*See Doe v. Frost* Compl.; R. 52-54.) Frost was the Chief of the Duncan Fire Department at the time of Doe's alleged sexual abuse. (Compl. at ¶ 5; R. 9.) Doe's complaint against Frost arises from the same set of facts and is nearly identical to the Complaint giving rise to this appeal. In that suit, one contested issue was whether Frost was individually liable for his alleged acts, which in turn depended on whether

¹³ This issue was argued to, but not relied upon by, the trial court. (*See Memo in Support of the City's Motion to Dismiss* at 4-6; R. 21-23.)

those acts occurred within or without the scope of his employment as Fire Chief. Doe asserted that Frost acted in his *individual* capacity “when he was not working.” (*See Doe v. Frost* Compl. ¶ 7; R. 53.) In response, Frost argued he could not be individually liable and that Doe was required by the SCTCA to sue the agency or political subdivision liable for the alleged acts and omissions, *i.e.*, the City of Duncan. (*See Frost’s Answer* ¶ 40; R. 60; *see also* Frost’s Motion for Summary Judgment ¶ 1; R. 67 (arguing Doe’s sole remedy for Frost’s alleged negligence was a suit against the city pursuant to the SCTCA).) At a motion hearing in that case, Doe argued that he did not need to name the City as a defendant because Frost was individually liable because his alleged assurance of supervision and subsequent negligence did not arise out of his employment as Fire Chief. (*See* Tr. of May 16, 2012 hearing at 5; R. 38 (summarizing arguments made in 2011 hearing regarding motion to dismiss in *Doe v. Frost*).)

Having made that argument in a related case, Doe cannot now argue the opposite in this case, *i.e.*, that Frost’s alleged assurance and subsequent negligence were, in fact, acts taken in his official capacity, and thus the city is liable. The SCTCA is clear. A city is not liable for the acts of its employee that are outside the scope of his employment. *See* S.C. Code Ann. §§ 15-3-60(17) and 15-3-70(b). Accordingly, having taken the position that Frost was individually liable for his acts, Doe is judicially estopped from now asserting that the city is vicariously liable for those same acts.

Judicial estoppel includes five elements: (1) two inconsistent positions taken by the same party; (2) the positions are taken in the same or related proceedings involving the same parties or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position in the prior related suit and must

have received some benefit therefrom; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. *Cothran*, 357 S.C. at 215-16, 592 S.E.2d at 632.

Applying these elements here, Doe is estopped from asserting the City is liable. Doe has taken two totally inconsistent positions in two related proceedings involving the same parties or their privies. Doe benefited from his prior inconsistent argument by avoiding a ruling dismissing his case against Frost.¹⁴ Doe persisted in maintaining his contradictory arguments even after they were brought to his attention (*see* Tr. of May 16, 2012 hearing at 11-13; R. 44-46), which indicates an intentional effort to mislead the court.

In light of his inconsistent argument in a prior, related suit—an argument from which he profited—Doe is estopped from now arguing that the City is liable for Frost's acts. Accordingly, the trial court correctly dismissed Doe's suit.

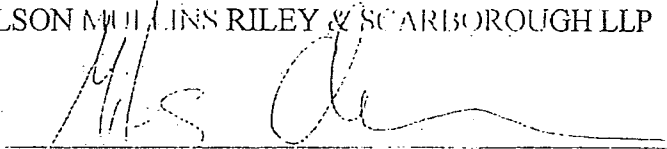
Conclusion

For the foregoing reasons, Respondents respectfully request that this Court affirm the Order of the trial court.

[SIGNATURE PAGE ATTACHED]

¹⁴ The parties in *Doe v. Frost* recently consented to a dismissal of that suit pending resolution of this appeal, with leave to re-file within one year. (*See* Consent Order of Dismissal, filed September 9, 2013; R. 5.)

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

William H. Foster III

SC Bar No. 66221

E-Mail: bill.foster@nelsonmullins.com

104 South Main Street / Ninth Floor

Post Office Box 10084 (29603-0084)

Greenville, SC 29601

(864) 250-2300

A. Mattison Bogan

SC Bar No. 72629

E-Mail: matt.bogan@nelsonmullins.com

Miles E. Coleman

SC Bar No. 78264

E-Mail: miles.coleman@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

TURNER, PADGET, GRAHAM & LANEY, P.A.

Charles L. Turner

SC Bar No. 64996

E-Mail: cturner@turnerpadget.com

200 East Broad Street, Suite 250

Post Office Box 1509

Greenville, SC 29602

(864) 552-4600

Attorneys for Respondent

Columbia, South Carolina
January 3, 2014

THE STATE OF SOUTH CAROLINA
In the 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

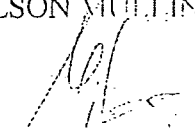
v.

City of Duncan.....Respondent

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b),
SCACR.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By:  

A. Mattison Bogan, SC Bar No. 72629

E-Mail: matt.bogan@nelsonmullins.com

Miles E. Coleman, SC Bar No. 78264

E-Mail: miles.coleman@nelsonmullins.com

Post Office Box 11070

Columbia, SC 29211

(803) 799-2000

William H. Foster III, SC Bar No. 66221

E-Mail: bill.foster@nelsonmullins.com

Post Office Box 10084

Greenville, SC 29603-0084

(864) 250-2300

Attorneys for Respondent

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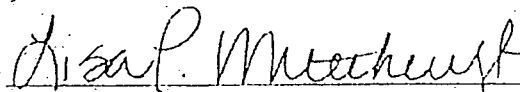
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail,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

Pleadings:

FINAL BRIEF OF RESPONDENT

Counsel Served:

Gregg Meyers
Jeff Anderson and Associates
366 Jackson Street
St. Paul, MN 55101



Administrative Assistant

January 3, 2014

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

John Doe, Appellant,

v.

City of Duncan, Respondent,

Appellate Case No. 2012-213499

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Unpublished Opinion No. 2014-UP-400
Submitted September 1, 2014 – Filed November 12, 2014

AFFIRMED

Gregg E. Meyers, of Jeff Anderson & Associates, of St.
Paul, Minnesota, for Appellant.

William Harrell Foster, III, of Nelson Mullins Riley &
Scarborough, LLP, and Charles Franklin Turner, Jr., of
Willson Jones Carter & Baxley, both of Greenville; and
Allen Mattison Bogan and Miles Edward Coleman, both
of Nelson Mullins Riley & Scarborough, LLP, of
Columbia, for Respondent.

PER CURIAM: John Doe appeals the trial court's dismissal of his action pursuant to Rules 3, 12(b)(1), and 12(b)(2), SCRCP. Doe argues the trial court improperly dismissed his action because it did not apply the Servicemembers Civil Relief Act.¹ We affirm pursuant to Rule 220(b), SCACR, and the following authority: *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding if the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a Rule 59(e), SCRCP, motion to alter or amend the judgment in order to preserve the issue for appellate review).

AFFIRMED.²

FEW, C.J., and THOMAS and LOCKEMY, JJ., concur.

¹ 50 App. U.S.C.A. §§ 501-515 and 516-597b (Supp. 2014).

² We decide this case without oral argument pursuant to Rule 215, SCACR.

The State of South Carolina
In The Court of Appeals

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

Case No. 2012-213499

John Doe, ... Appellant

v..

City of Duncan Respondent

Petition for Rehearing

Plaintiff John Doe hereby petitions for rehearing of the November 12, 2014 per curiam order affirming the trial court on the apparent conclusion that the trial court failed to rule upon the argument below that the Servicemembers Civil Relief Act applied to the amended complaint.

The Court of Appeals panel has erred in concluding the trial court failed to rule on the application of the Servicemembers Civil Relief Act. The trial court granted the Defendant's motion to dismiss on the grounds submitted by the Defendant. We agree the trial court's "order did not restate the ground on which petitioner opposed the motion," *Spence v. Wingate*, 674 S.E.2d 169, 170 (S.C. 2009). That the trial court's order did not do so is irrelevant. *Spence v. Wingate*, 674 S.E.2d 169, 170 (S.C. 2009).

The trial court order granting the motion, R. App. 2 – 3, necessarily rejected the appellant's opposing argument in concluding that state time limits applied to bar the action. R.

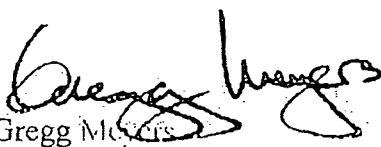
App. 2 – 3. That time limits in state law could not properly be applied in light of the Servicemembers Civil Relief Act was the opposing argument. R. App. 12 ¶ 4, R. App. 43 – 44, the trial court order implicitly rejects that opposing argument. *Spence v. Wingate*, 674 S.E.2d 169, 170 (S.C. 2009); *Walsh v. Woods*, 638 S.E.2d 85, 88 (S.C. 2006) (implicitly denied arguments do not require Rule 59(e) motion).

The Court of Appeals panel's interpretation that a Rule 59(e) motion was required by *I'On, L.L.C. v. Town of Mt. Pleasant*, 526 S.E.2d 716, 724 (S.C. 2000), was itself rejected in *Spence v. Wingate*, 674 S.E.2d at 170 (S.C. 2009). The panel should address the merits of the trial court's

CONCLUSION

The Court of Appeals panel should grant this petition to rehear and address on the merits the trial court's failure to apply the Servicemembers Civil Relief Act.

Respectfully submitted,



Gregg Meyers
Jeff Anderson & Associates, P.A.
366 Jackson Street
St. Paul, MN 55101
651-227-9990, 297-6543 facsimile

The State of South Carolina
In The Court of Appeals

Appeal from Spartanburg County
Hon. J. Derham Cole, Circuit Court Judge

Appeal No. 2012-213499
Case No. 2008-CP-42-0475

John Doe, ... Appellant

v.

City of Duncan Respondent

Proof of Service

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

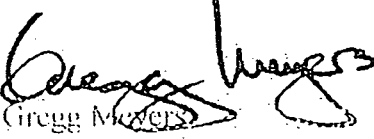
Petition for Rehearing

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

Charles Turner
Wilson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville SC 29607

William Foster
Nelson Mullins Riley & Scarbrough
PO Box 10084
Greenville SC 29603-0084

Done November 24, 2014.


Gregg Meyers
Jeff Anderson & Associates, P.A.
366 Jackson Street
St. Paul, MN 29601
651-227-9990

THE STATE OF SOUTH CAROLINA
In the 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.

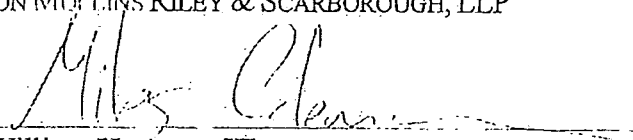
Doe now argues in his Petition for Rehearing that the trial court's order "necessarily rejected" and "implicitly rejected" Doe's argument regarding the SCRA. *See* Pet. for Rehearing at 2-3. This is incorrect. An issue is not ruled on where the "trial court's order is silent on the issue." *Foster v. 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.

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: 

William H. Foster III

SC Bar No. 66221

E-Mail: bill.foster@nelsonmullins.com

104 South Main Street / Ninth Floor

Post Office Box 10084 (29603-0084)

Greenville, SC 29601

(864) 250-2300

A. Mattison Bogan

SC Bar No. 72629

E-Mail: matt.bogan@nelsonmullins.com

Miles E. Coleman

SC Bar No. 78264

E-Mail: miles.coleman@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

TURNER PADGET, GRAHAM & LANEY, P.A.

Charles L. Turner

SC Bar No. 64996

E-Mail: cturner@turnerpadget.com

200 East Broad Street, Suite 250

Post Office Box 1509

Greenville, SC 29602

(864) 552-4600

Attorneys for Respondent

Columbia, South Carolina
December 4, 2014

THE STATE OF SOUTH CAROLINA
In the 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.

PROOF OF SERVICE

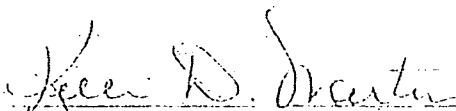
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail,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

Pleadings:

Respondent's Return to Petition for Rehearing

Counsel Served:

Greg E. Meyers, Esquire
Jeff Anderson & Associates, P.A.
366 Jackson Street, Suite 100
St. Paul, Minnesota 55101
Attorneys for Appellant



Kelli Diamond Martin
Administrative Assistant

Dec. 14th, 2014.

The South Carolina Court of Appeals

John Doe, Appellant,

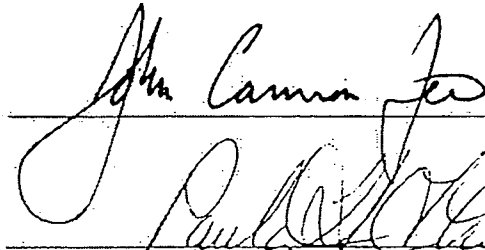
v.

City of Duncan, Respondent.

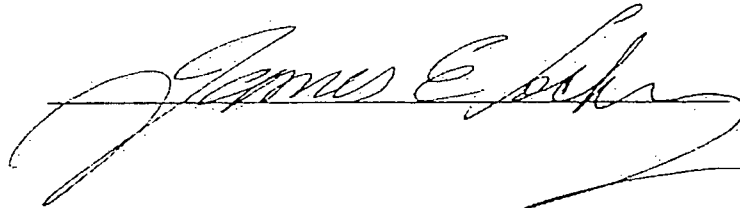
Appellate Case No. 2012-213499

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.

 J.

 J.

Columbia, South Carolina

cc: Gregg E. Meyers, Esquire
Charles Franklin Turner, Jr., Esquire
William Harrell Foster, III, Esquire
Allen Mattison Bogan, Esquire
Miles Edward Coleman, Esquire

FILED

December 17, 2014

**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

Gregg Meyers, SC Bar No. 9908
Jeff Anderson & Associates, P.A.
366 Jackson Suite 100
Saint Paul, MN 55101
Attorney for Appellant-Petitioner

Other Counsel of Record:

William H. Foster
Nelson Mullins Riley & Scarborough
PO Box 10084
Greenville SC 29603-0084

Charles Franklin Turner
Wilson Jones Carter & Baxley, P.A.
872 Pleasantburg Drive
Greenville SC 29607

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.

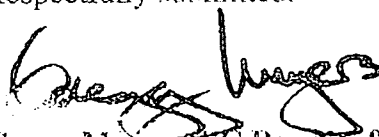
improperly applied state time limits, dismissed the action with prejudice, and estopped the Plaintiff, a complaint could have been newly filed even in 2012.

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.



Gregg Meyers, SC Bar No. 9908
Jeff Anderson & Associates, P.A.
366 Jackson Street, Suite 100
St. Paul, MN 55101
651-227-9990, 651-297-6543 fax
gregg@andersonadvocates.com

**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

Proof of Service

I hereby certify that I have served the enclosed

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

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

William H. Foster
Nelson Mullins Riley & Scarborough
PO Box 10084
Greenville SC 29603-0084

Charles Franklin Turner
Wilson Jones Carter & Baxley, P.A.
872 Pleasantburg Drive
Greenville SC 29607

Done January 15, 2015

A handwritten signature in black ink, appearing to read "Gregg Meyers", with a stylized, looping flourish at the end.

Gregg Meyers, SC Bar No. 9908
Jeff Anderson & Associates, P.A.
366 Jackson Street Suite 100
St. Paul, MN 55101
651-227-9990, 651-297-6543 fax
Gregg@andersonadvocates.com

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

John Doe, Petitioner,

v.

City of Duncan, Respondent.

Appellate Case No. 2015-000074

Lower Court Case No. 2008-CP-42-00475

**ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS**

Appeal From Spartanburg County
The Honorable J. Derham Cole, Circuit Court Judge

Memorandum Opinion No. 2015-MO-019
Submitted March 19, 2015 – Filed April 15, 2015

REVERSED AND REMANDED

Gregg E. Meyers, of Jeff Anderson & Associates, PA, of
St. Paul, Minnesota, for Petitioner.

William Harrell Foster, III, of Nelson Mullins Riley &
Scarborough, LLP, of Greenville; A. Mattison Bogan,
and Miles E. Coleman, both of Nelson Mullins Riley &
Scarborough, LLP, of Columbia; and Charles Franklin

Turner, Jr., of Willson Jones Carter & Baxley, P.A., of
Greenville, for Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari to review the decision of the Court of Appeals in *Doe v. City of Duncan*, Op. No. 2014-UP-400 (S.C. Ct. App. filed Nov. 12, 2014). We grant the petition on petitioner's Question 1, deny the petition on petitioner's Question 2, and dispense with further briefing.

The only argument made by petitioner before the circuit court was that his summons and complaint were timely served because the time for serving them was tolled under the Servicemembers Civil Relief Act. Although the circuit court judge did not specifically state he did not believe the Act applied in this case, he implicitly rejected petitioner's argument by finding the service was not timely. Therefore, the Court of Appeals incorrectly held the issue raised by petitioner was not preserved for appellate review. *Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543 (2000) (this Court does not require parties to engage in futile actions in order to preserve issues for appellate review); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (only when the losing party raised an issue in the lower court, but the lower court failed to rule on it, is the party required to file a motion to alter or amend the judgment in order to preserve the issue for appellate review).

Accordingly, we reverse the opinion of the Court of Appeals and remand this matter to the Court of Appeals to rule on the merits of petitioner's appeal.

REVERSED AND REMANDED.

**TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ.,
concur.**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John Doe, Appellant,

v.

City of Duncan, Respondent.

Appellate Case No. 2012-213499

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 5411
Heard January 14, 2016 – Filed June 8, 2016

AFFIRMED

Gregg E. Meyers, of Jeff Anderson & Assoc. P.A., of
Saint Paul, Minnesota, for Appellant.

William Harrell Foster, III, of Nelson Mullins Riley &
Scarborough, LLP, of Greenville; Allen Mattison Bogan
and Miles Edward Coleman, both of Nelson Mullins
Riley & Scarborough, LLP, of Columbia; and Charles
Franklin Turner, Jr., of Willson Jones Carter & Baxley,
P.A., of Greenville; for Respondent.

LOCKEMY, J.: John Doe appeals the circuit court's decision to dismiss his action pursuant to Rules 3, 12(b)(1), and 12(b)(2), SCRCF. Doe argues the circuit court failed to apply the Servicemembers Civil Relief Act (the Act).¹ We affirm.

FACTS

On January 28, 2008, Doe filed a complaint against the City of Duncan (the City), asserting a cause of action for negligent supervision. In his complaint, Doe alleged he was sexually abused while participating in activities sponsored by the City's fire department. Doe acknowledged he failed to serve the City with the summons or complaint.

Over four years later on February 21, 2012, Doe filed an amended complaint in which he alleged the same cause of action as in the original complaint and added that the action was brought pursuant to the Act.² An affidavit of service, dated February 27, 2012, indicated the amended complaint was delivered to "Bridget Musteata[,], Town Clerk for Duncan Town." The City subsequently filed a motion to dismiss, arguing Doe failed to file and serve a summons with his original and amended complaints.

At the circuit court hearing on the motion to dismiss, the City acknowledged Doe served it with the amended complaint but stated Doe did not serve it with a summons. Conversely, Doe stated the amended summons was served on the City. The City also argued the merits of the case and stated Doe was taking inconsistent positions. Namely, the City asserted Doe argued the chief of the City's fire department was acting both in his individual capacity and in the course and scope of his employment. The circuit court dismissed the action, ruling (1) Doe filed a complaint in 2008 but failed to serve the City with the complaint within 120 days of its filing; (2) Doe failed to serve the City with the 2012 summons; (3) Doe failed to seek leave from the trial court to amend his complaint; (4) Doe failed to timely commence the action pursuant to Rule 3, SCRCF; and (5) the court lacked personal and subject matter jurisdiction over the City pursuant to Rules 3, 12(b)(1), and 12(b)(2), SCRCF. The circuit court's order did not mention the Act by name.

¹ Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901-4043 (previously 50 U.S.C. app. §§ 501-597(b) (2012 & Supp. II 2014)).

² During his military career (February 2003 and August 10, 2011), Doe served in the United States Army, the United States Army Reserve, and the United States Army National Guard.

On May 22, 2012, Doe filed an amended summons. An affidavit of service dated June 6, 2012, showed Doe served the summons to "Melody Millwood, Clerk of Court."

Doe subsequently filed a notice of appeal with this court. This court affirmed the circuit court in an unpublished opinion finding Doe's argument the circuit court erred in dismissing his action without applying the Act was not preserved for appellate review. *Doe v. City of Duncan*, Op. No. 2014-UP-400 (S.C. Ct. App. filed Nov. 12, 2014).

Thereafter, the supreme court granted Doe's petition for a writ of certiorari and held Doe's argument was preserved for appellate review. *Doe v. City of Duncan*, Op. No. 2015-MO-019 (S.C. Sup. Ct. filed Apr. 15, 2015). The court found "[a]lthough the circuit court judge did not specifically state he did not believe the Act applied in this case, he implicitly rejected [Doe]'s argument by finding the service was not timely." *Id.* The supreme court remanded to this court to rule on the merits of Doe's appeal. *Id.*

LAW/ANALYSIS

Doe argues the circuit court erred in dismissing his action without applying the Act. Specifically, Doe contends the Act preempts any state law time limits to file an action. We disagree.

Pursuant to Rule 3(a), SCRCP,

[a] civil action is commenced when the summons and complaint are filed with the clerk of court if: (1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

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." *Murdock v. Murdock*, 338 S.C. 322, 330, 526 S.E.2d 241, 246 (Ct. App. 1999) (quoting *Boone v. Lightner*, 319 U.S. 561, 575 (1943)). The applicable section of the Act, entitled "Tolling of statutes of limitation during military service" 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).³

Doe contends the circuit court erred in dismissing his action without applying the Act. Although the circuit court did not specifically state it did not believe the Act applied in this case, it implicitly rejected Doe's argument by finding service was not timely. *See Doe*, Op. No. 2015-MO-019. Accordingly, this issue is preserved.

We find the language of section 3936(a) applies only to toll statutes of limitation for *bringing* a suit, not serving or amending a suit. Doe argues "the action by the [the Act] to suspend state law time limits necessarily includes the time provisions under SCRCP 3." Doe, however, does not cite any case law to support this argument. Other courts considering this issue have held the opposite, namely that once a suit is filed, section 3936(a) does not toll or extend any subsequent calculations of time such as the time in which to serve the defendant or the duty to prosecute a case. *See, e.g., Zitomer v. Holdsworth*, 449 F.2d 724, 726 (3d Cir. 1971) (affirming the trial court's dismissal of a suit for failure to prosecute and noting the Act's tolling provision "simply tolls the statute of limitations during the period of military service and has no applicability to an action duly filed and served within the applicable statute of limitations"); *Zarlinsky v. Laudenslager*, 167 A.2d 317, 320 (Penn. 1961) (noting the Act's tolling provision "expressly applies to the limitation of time for *bringing* an action, not to a limitation of time for the continuing of process in an action already brought and avails the plaintiffs nothing"); *Thornley v. Superior Court in & for City & Cty. of San Francisco*, 201 P.2d 567, 568 (Cal. Ct. App. 1949) ("There is nothing in section 525 of the federal act which purports to suspend this mandatory requirement of service. Respondent argues that the word 'proceeding' in section 525 of the federal act should be construed as applying to the service of summons or any other procedural step taken

³ 50 U.S.C. § 3936(a) was previously cited as 50 U.S.C. app. § 526(a).

in the prosecution of the action. This is not sound."); *Puchek v. Elledge*, 160 F. Supp. 286, 287 (N.D. Ind. 1958) (noting the Act has no relation to service of process); *see also* 36 A.L.R. Fed. 420, § 12 (1978) ("The tolling provision of the [the Act] (50 App. U.S.C.A. § 525) is not applicable to, and cannot prevent the running of, time limitations governing the service of process in, or the prosecution of, actions already brought.").

In sum, we hold the Act's tolling provision applies only to toll statutes of limitations for *bringing* a suit. It does not apply to subsequent procedural timelines such as service of process. When, as here, a servicemember chooses to file suit during his time of military service, he cannot later rely solely on the Act to excuse his four-year delay in serving the defendant and prosecuting the action.

We further find the circuit court properly dismissed Doe's action because he did not serve the City or amend the complaint within the applicable statutory time period. We disagree with Doe's assertion the applicable statute of limitations is the time period set forth in section 15-3-555 of the South Carolina Code.⁴ Rather, because Doe's suit is against the City and his sole cause of action alleges negligence by the fire chief and other fire department officials, the suit is pursuant to the South Carolina Tort Claims Act (SCTCA). *See* S.C. Code Ann. § 15-78-70(a) (2005) (stating the SCTCA is "the exclusive remedy for any tort committed by an employee of a governmental entity"); S.C. Code Ann. § 15-78-200 (stating the SCTCA "is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty"); *Doe v. Greenville Cty. Sch. Dist.*, 375 S.C. 63, 70-71, 651 S.E.2d 305, 309 (2007) (noting a negligent supervision claim against the school district involving sexual abuse committed by a third party was brought pursuant to the SCTCA).

The SCTCA imposes a two-year statute of limitations on any action brought against the State or a subdivision thereof. *See* S.C. Code Ann. § 15-78-110 (2005). Because Doe's cause of action for negligent supervision allegedly occurred while he was a minor, the SCTCA's statute of limitations did not begin to run until his

⁴ Pursuant to section 15-3-555(A), "[a]n 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." S.C. Code Ann. § 15-3-555(A) (2005).

eighteenth birthday. See S.C. Code Ann. §§ 15-78-110 and 15-3-40 (2005).

Accordingly, the statute began to run in February 2004.⁵

Doe enlisted in the military prior to the time the statute of limitations began to run for bringing a suit, and as noted above, the Act's tolling provision tolls the statute of limitations during a plaintiff's military service. The Act, however, tolls the running of the statute only during periods of *active* duty. See 50 U.S.C. § 3911(2), (defining "military service" as "active duty"); *Boone v. United States*, 78 Fed. Appx. 108, 110-11 (Fed. Cir. 2003) (noting the Act's tolling provision applies only to time in active duty); *Lazarski v. Archdiocese of Phila.*, 926 A.2d 459, 469 (Pa. Super. Ct. 2007) (noting that a plaintiff servicemember's non-active duty time in the military did not toll the state statute of limitations on his sexual abuse claim because "the [Act] expressly points to 'active duty' as the touchstone activating its tolling provisions There are gaps in appellant's active duty status As a result, because appellant has undisputed periods of inactive duty, the tolling provision of the [Act] would not apply to those dates").

During his military career (February 2003 to August 10, 2011), Doe served in the Army, the Army Reserve, and the Army National Guard. During that time, he was on active duty for a total of five years, eleven months, and fourteen days.⁶ The statute began to run on Doe's eighteenth birthday, which occurred on an unknown day in February of 2004. Assuming it began to run on February 29, five months and twenty-one days had expired by the time Doe reached active duty status on August 19, 2004. The clock began to run again during Doe's first hiatus from

⁵ Doe was born in February 1986. His actual birth date is not in evidence.

⁶ Normally, proof of military service, including periods of active duty service, are listed on Defense Department Form 214 (DD 214). Here, a DD 214 is not in the record. Instead, the record contains National Archives and Records Administration (NA) Form 13164, which extracts certain information from the DD 214. The NA 13164 indicates Doe's total term of service in the United States Army, Army Reserve, and Army National Guard was approximately eight years and seven months (we note although Doe's exit from service is listed as August 10, 2011, his entry date is listed only as February 2003). Service in the Army Reserve and National Guard do not necessarily require active duty service. The NA 13164 reflects Doe's tours of active duty. It also indicates his duty assignments, military education, and awards received as well as his discharge rank of Private. Although Doe's name on the form is redacted, neither party disputes it accurately represents Doe's military service.

active duty (October 8, 2004, to February 10, 2005), which allowed another four months and two days to expire. The clock resumed during Doe's second period of inactive duty (May 23, 2006, to January 29, 2007), during which another eight months and six days expired. The clock began to run again when Doe left military service on August 10, 2011.

The SCTCA's two-year statute of limitations on Doe's cause of action expired on February 11, 2012, at which point the window of time closed to serve the summons and complaint. Because neither document had been served on the City by that date, Doe failed to commence a civil action and dismissal was warranted. *See* S.C. Code Ann. § 15-3-20(B) (2005) ("A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing."); *Brown v. Evatt*, 322 S.C. 189, 194, 470 S.E.2d 848 850-51 (1996) (affirming dismissal when plaintiff failed to serve the summons and complaint); *Estate of Corley*, 299 S.C. 525, 527, 386 S.E.2d 264, 266 (Ct. App. 1989) (affirming dismissal when defendant was not served with a summons); *see also Loudon v. Moragne*, 327 S.C. 465, 468-69, 486 S.E.2d 525, 526-27 (Ct. App. 1997) (affirming trial court's grant of summary judgment when plaintiff failed to serve the summons within the statute of limitations).

Additionally, as a result of Doe's failure to commence a civil action, no suit existed in which an amended complaint could be filed. Rule 15(a), SCRCF, provides:

A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party.

The plain language of Rule 15(a) allows an amendment only of a pleading that has been served. Doe failed to serve the 2008 summons and complaint. Accordingly, we find, pursuant to Rule 15, SCRCF, Doe's service of the February 2012 amended complaint was a nullity.

CONCLUSION

The circuit court's dismissal of Doe's action is

AFFIRMED.

KONDUROUS, J., and FEW, A.J., concur.

The State of South Carolina
In The 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.¹

¹ 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,² 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....

² 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.”³ 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.⁴ 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:

³ 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.”

⁴ 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.

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,



Gregg Meyers
Jeff Anderson & Associates, P.A.
366 Jackson Street
St. Paul, MN 55101
651-227-9990, 297-6543 facsimile

The State of South Carolina
In The Court of Appeals

Appeal from Spartanburg County
Hon. J. Derham Cole, Circuit Court Judge

Appeal Case No. 2012-213499
Case No. 2008-CP-42-0475

John Doe, ... Appellant

v.

City of Duncan Respondent

Proof of Service

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

Petition for Rehearing

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

Charles F. Turner, Jr.
Wilson Jones Carter & Baxley, P.A.
872 South Pleasantburg Drive
Greenville, SC 29607

William H. Foster, III
Nelson Mullins Riley & Scarborough, LLP
PO Box 10084
Greenville, SC 29601

A. Mattison Bogan
Nelson Mullins Riley & Scarborough, LLP
P.O. Box 11070
Columbia, SC 29201

Done June 21, 2016



Gregg Meyers
Jeff Anderson & Associates, P.A.
366 Jackson Street
St. Paul, MN 29601
651-227-9990

THE STATE OF SOUTH CAROLINA
In The 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 *serving* 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), SCRCP) (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), SCRCP; *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).

By: A. Mattison Bogan

A. Mattison Bogan
SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

William H. Foster III
SC Bar No. 66221
E-Mail: bill.foster@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

WILLSON JONES CARTER & BAXLEY, P.A.

Charles F. Turner, Jr.
SC Bar No. 64996
E-Mail: cfturner@wjlaw.net
872 South Pleasantburg Drive
Greenville, SC 29607
(864) 672-3711

Attorneys for Respondent

Columbia, South Carolina
July 1, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

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

John Doe, ... Appellant.

v.

City of Duncan, ... Respondent,

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):

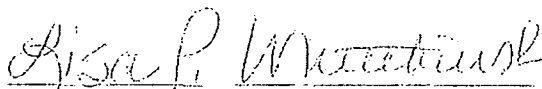
Pleadings:

Respondent's Return to the Petition for Rehearing

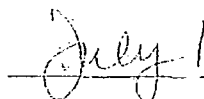
Counsel Served:

Gregg E. Meyers
Jeff Anderson & Associates, P.A.
366 Jackson Street
St. Paul, MN 29601

Charles F. Turner, Jr.
Wilson Jones Carter & Baxley, P.A.
872 South Pleasantburg Drive
Greenville, SC 29607



Lisa Whitehurst
Administrative Assistant

 2016

The South Carolina Court of Appeals

John Doe, Appellant,

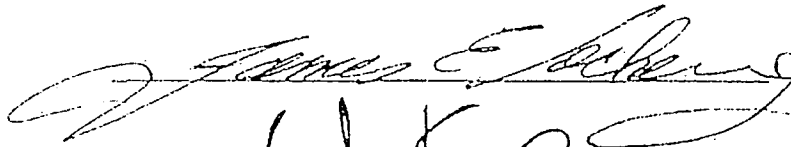
v.

City of Duncan, Respondent.

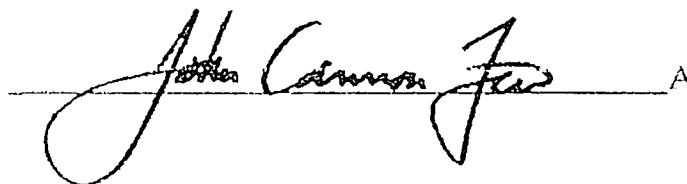
Appellate Case No. 2012-213499

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 CJ.

 J.

 A.J.

Columbia, South Carolina

cc:

Gregg E. Meyers, Esquire
Charles Franklin Turner, Jr., Esquire
William Harrell Foster, III, Esquire
Allen Mattison Bogan, Esquire
Miles Edward Coleman, Esquire

FILED

August 17, 2016