

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 08-CP-42-00475
Appellate Case No. 2016-001909

RECEIVED

OCT 11 2016

S.C. SUPREME COURT

John Doe,Petitioner,

v.

City of Duncan,Respondent.

**RESPONDENT'S RETURN TO THE
PETITION FOR CERTIORARI**

This Court should deny Doe's Petition for Certiorari. None of the factors in Rule 242(b), SCACR exist to justify the issuance of the writ. There is no novel question of law, no dissenting opinion at the Court of Appeals, no conflict with this Court's precedent, no substantial constitutional issues, and no conflict with the United States Supreme Court on any question of federal law. In an attempt to make this matter appear to be worthy of certiorari, Doe incorrectly argues the Court of Appeals' opinion presents novel questions of state and federal law and "appears to conflict with two decisions of the United States Supreme Court." (Pet. for Cert. at 2-3.) This is not accurate.

As explained below, however, the Court of Appeals correctly applied the well-established precedent of this Court and the United States Supreme Court to the issues raised in Doe's appeal. This Court should thus deny the Petition for Certiorari.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals, in agreement with every court to consider the issue, correctly apply the express definitions in the Servicemembers' Civil Relief Act ("SCRA") and hold the terms "military service" and "period of . . . military service" found in the Act's tolling provision apply only to periods of active duty and other specific periods not present here?
2. Did the Court of Appeals correctly hold Doe's failure to serve the City with a Summons and Complaint was neither excused by the SCRA nor rectified by any subsequent action, and therefore he never commenced a civil action?
3. Did the Court of Appeals correctly hold Doe's claim against the City of Duncan was subject to the two-year statute of limitations found in the South Carolina Tort Claims Act?

COUNTER-STATEMENT OF THE CASE

Doe is a 30-year-old South Carolinian. (*See* Appellant's Brief at 3 n.1, App. 73; *see also* Compl. ¶ 1; App. 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; App. 9.) He further alleges his mother was told by the Chief of the Fire Department that Doe would be well supervised during these activities. (*Id.* at ¶ 5; App. 9.) Doe alleges he was subsequently sexually abused by a City employee on or around August 31, 2001. (*Id.* at ¶¶ 2, 8; App. 9–10.¹)

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, App. 73.) 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; App. 66.)

¹ Doe has made inconsistent statements regarding whether the alleged abuser was an employee of the Fire Department (*see* 2008 Compl. ¶ 8; App. 10) or an employee of the Police Department (*see* Amend. Compl. ¶ 10; App. 13–14).

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; App. 9–10.) 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; App. 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 a purported 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; App. 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; App. 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), SCRCP, 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; App. 16.) In addition, the motion argued that Doe's Complaint should be dismissed because it was duplicative of another action pending for the same claim (*id.* ¶ 3; App. 16),² and that his Amended Complaint was neither properly served nor compliant with the requirements of Rule

² On May 7, 2009, Doe had filed a nearly identical Complaint in a case arising from the same facts, *Doe v. Barry Frost*, Case No. 2009-CP-42-2662 (App. 52–54). Frost was the Chief of the Duncan Fire Department at the time of Doe's alleged sexual abuse. (Compl. at ¶ 5; App. 9.)

15, SCRCPP (*id.* ¶¶ 4–5; App. 17). The City filed a memorandum in support of its motion, further detailing why Doe was judicially estopped in this suit from taking a position inconsistent with his stance in the related suit. (*See* Memo in Support of City’s Motion to Dismiss; App. 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; App. 34–50.) After the hearing, 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; App. 26.)

Judge Cole issued an Order on November 1, 2012, granting the renewed Motion to Dismiss. (*See* Order Granting City’s Motion to Dismiss; App. 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; App. 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; App. 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; App. 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. The Court of Appeals received briefing and, on November 12, 2014, held in an unpublished opinion that Doe’s argument on appeal was not preserved for appellate review. (*See* App. 104–05.) Doe’s subsequent Petition for Rehearing was denied. (App. 114.) On April 15, 2015, this Court granted certiorari, reversed the Court of Appeals’ ruling, and remanded for the Court of Appeals to rule on the merits of Doe’s appeal. (App. 123–24.) On January 14, 2016, the Court of Appeals held oral argument in this matter on

the merits. The Court of Appeals subsequently filed an opinion on June 8, 2016, analyzing the merits of Doe's appeal and affirming the trial court's dismissal of his suit. (App. 125–32.) Doe's Petition for Rehearing was denied. (App. 151.) Doe petitioned this Court for a writ of certiorari.

ARGUMENT

Doe's petition incorrectly claims certiorari is warranted on several bases. Specifically, he asserts the Court of Appeals' ruling conflicts with the precedent of this Court and of the United States Supreme Court and that his appeal involves "novel" questions about the SCRA, the necessity of service of process, and the applicable statute of limitations. (*See* Pet. for Cert. at 2–3.) As explained below, Doe's assertions are incorrect. His appeal does not raise a single novel question of law nor does it conflict with binding precedent. Rather, the Court of Appeals' well-reasoned opinion decided each issue in accordance with the long-standing, binding precedent of this Court and the United State Supreme Court, and in concord with the persuasive precedent of every court to confront the issues raised in this suit.

I. The Court of Appeals correctly interpreted the SCRA and held the Act's tolling provision operated only during Doe's periods of active duty military service as defined by the SCRA.

Doe argues the Court of Appeals erred by holding the SCRA's tolling provision operates only during a servicemember's periods of active duty and therefore did not toll the statute of limitations during Doe's extensive periods of inactive duty. (*See* Pet. for Cert at 5–8.) Doe's argument hinges on the meaning of terms used in the SCRA's tolling provision, which tolls the time limits for determining the date on which a servicemember must file a suit. The SCRA's tolling statute states:

(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.

50 U.S.C. § 3936(a) (emphasis added).³ The Court of Appeals interpreted this provision in light of the SCRA's definitions, which define the terms "military service" and "period of military service" to include only periods of active duty and other specifically enumerated periods of time:

(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

³ From December 19, 2003 to December 1, 2015, this statute appeared at 50 U.S.C. App. § 526. On December 1, 2015, the Appendix to title 50 of the United States Code was eliminated and its provisions were transferred to Title 50. See <http://uscode.house.gov/editorialreclassification/t50a-elim/index.html> (last visited September 21, 2016.) Prior to December 19, 2003, the SCRA was known as the Soldiers' and Sailors' Civil Relief Act, and its tolling provision appeared at 50 U.S.C. App. § 525. See *Baker v. England*, 397 F. Supp. 2d 18, 24 (D.D.C. 2005) (noting § 525 was the "immediate predecessor and substantive equivalent" of § 526).

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 of Appeals' interpretation and application of these terms erred in four ways, each of which is discussed below.

A. *The Court of Appeals did not overlook Doe's National Guard and Army Reserve service because he provided no evidence that his service in those units was the type of "active service" that constitutes "military service" under the SCRA.*

Doe argues the Court of Appeals ignored the SCRA's section 3911(2)(a)(ii), which, according to Doe, includes National Guard and Reserve duty in "military service." (See Pet. for Cert. at 5.) It is Doe, however, who overlooks that the subsection he cites applies only to particular instances of "active service" in the National Guard. See 50 U.S.C. § 3911(2)(a)(ii). Indeed, it is well-settled that not all service in the National Guard and Army Reserve constitutes "military service" under the SCRA. 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.").

Moreover, Doe has presented no evidence that he ever performed any "active service" role in the National Guard as mentioned in subsection 3911(2)(a)(ii). Even assuming *arguendo* that Doe's service in the National Guard included periods of "active service," that service is included in the sole Record evidence of his military service, which lists *all* of Doe's periods of active service in the Army, Army Reserve, and Army National Guard. See National Archives and Records Administration (NA) Form 13164 (App. 66). This is the Record evidence upon which the Court of Appeals relied, and thus the Court did not fail to consider Doe's active National Guard service, if any. The Court of Appeals did not err by concluding the SCRA's tolling provision operated only during Doe's periods of active duty military service documented in the Record evidence.

B. *The Court of Appeals did not overlook Doe's absences from active duty because Doe provided no evidence showing his absences were of the specific, limited types that count as "military service" under the SCRA.*

Doe argues the Court of Appeals overlooked the SCRA's section 3911(2)(C), which defines the term "military service" to include a servicemember's absence from duty due to "sickness, wounds, leave, or other lawful cause." (See Pet. for Cert. at 5–6.) In essence, Doe argues that because subsection 3911(2)(C) defines "military service" to include certain specific types of absence from active duty, *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.⁴ Although he had ample opportunity to do so before the trial court, Doe failed to demonstrate that his periods of inactive duty were of the types specified in subsection 3911(2)(C). Such arguments now necessarily fail with the appellate courts. Doe cannot now insist the appellate courts speculate that some or all of his time of inactive duty are of the few, narrow types of absence listed in subsection 3911(2)(C).

C. *The Court of Appeals did not fail to consider the SCRA's definition of "period of military service."*

Doe argues the Court of Appeals 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 Pet. for Cert. at 6.) The flaw in Doe's argument, however, is that the SCRA's definition of "period of military service" incorporates and relies on the term "military service" and thus is no broader than the definition of "military

⁴ As noted above, the sole Record evidence regarding his military service 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 that add up to fewer than six years total. (App. 66.)

service” itself, *i.e.*, active duty. *See* 50 U.S.C. § 3911(3) (defining “period of military service” as the time beginning when a servicemember “enters military service” and ending when he “is released from military service”). Accordingly, 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); *see also 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.”); *Boone v. United States*, 78 Fed. Appx. 108 (Fed. Cir. 2003) (noting the SCRA’s tolling provision applies only to time in active duty); *Lowe v. United States*, 79 Fed. Cl. 218, 225 (Fed. Cl. 2007) (stating the “critical determination” for determining the servicemember’s “period of military service” was “the date on which plaintiff was released from active duty”); *Min v. Avila*, 991 S.W.2d 495, 506 (Tex. Ct. App. 1999) (holding the SCRA’s definition of “‘period of military service’ . . . 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’”).⁵ Because the statutory term “period of military service” is no broader than the term “military service,” the Court of Appeals’ holding did not overlook or misapprehend the SCRA’s definitions.

D. The Court of Appeals’ opinion does not conflict with United States Supreme Court precedent.

Finally, Doe argues the Court of Appeals interpretation of the SCRA’s tolling provision conflicts with *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993). (See Pet. for Cert. at 7.) Doe relies on *Conroy’s* statement that the SCRA’s tolling provision “is unambiguous, unequivocal, and unlimited” in its statement that “military service ‘shall not be included’” in computing statutes of limitations. (*Id.*) The issue in *Conroy*, however, had nothing to do with the question of what types of service (*e.g.*, active, inactive, leave, deployments, etc.) constituted “military service,”⁶ and *Conroy* expresses no opinion on that point. Rather, the issue in *Conroy* was whether the SCRA’s tolling provision contained an implied requirement that a servicemember must show that his ability to comply with a statute of limitations was actually hindered by his military service. *Id.* at 512–13 (“The question presented is whether a member of the Armed Services must show that his military service prejudiced his ability to redeem title to property before he can qualify for the statutory suspension of time.”). The Court held there was no such implicit

⁵ Doe’s attempt to distinguish two of these cases, *Boone* and *Lazariski* (see Pet. for Cert. at 6–7), fails. The fact that *Boone* involved different facts than the case at bar does not alter the Federal Circuit’s conclusion in *Boone* and scores of other cases that the SCRA’s tolling provision applies only to periods of active duty service and to absences from service due to wounds, leave, or other lawful cause. Likewise, Doe’s attempt to distinguish *Lazariski* merely highlights the significant *similarities* between that case and Doe’s suit. Just like the plaintiff in *Lazariski*, Doe has “undisputed periods of inactive duty” and has “no factual support in the record” to support his claim that he was absent for lawful cause. *Lazariski*, 926 A.2d at 469.

⁶ That issue was irrelevant in *Conroy* because Mr. Conroy “was on active duty continuously from 1966 until the time of trial.” *Conroy*, 507 U.S. at 513.

requirement because the tolling provision's "unambiguous, unequivocal, and unlimited" language contained no such requirement. *Id.* at 514. Nothing in *Conroy* conflicts with the Court of Appeals ruling in Doe's suit.

In short, the Court of Appeals properly interpreted and applied the SCRA's language and did not err in ruling, like every other court to consider this issue, that the SCRA's tolling provision applied only during Doe's intermittent periods of active duty. The Court of Appeals correctly held Doe's suit is time barred. Certiorari must be denied.

II. The Court of Appeals correctly held Doe's failure to serve the City with a Summons and Complaint meant no civil action was ever commenced.

Doe argues the Court of Appeals erred by affirming the dismissal of his suit due to his failure to commence a civil action by serving the City with a Summons and Complaint. (*See* Pet. for Cert at 8–9.) Doe asserts his failure was excused by the SCRA or rectified by subsequent events. He raises four alleged errors of law, each of which is discussed below.

A. The City's appearance before the trial court to argue its 12(b) motions did not moot the lack of service or constitute a consent to jurisdiction.

Doe argues the Court of Appeals erred by failing to hold the City's appearance before the trial court to argue its Rule 12(b) motions mooted the lack of service and/or constituted a consent to the court's jurisdiction. (*See* Pet. for Cert. at 8.) Doe's argument is incorrect because the Rules of Civil Procedure expressly allow a defendant to do what the City did—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), SCRCPP.

During the City's appearance before the trial court, the City argued pursuant to Rule 12(b)(6) 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 (App. 126); see also Memo. in Supp. of Def.’s Mot. to Dismiss at 4–6 (App. 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 Memo. in Supp. of Def.’s Mot. to Dismiss at 1–3 (App. 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 or consenting to the court’s jurisdiction. See Rule 12(b)(g), SCRCPP (“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), SCRCPP (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, the City’s appearance before the trial court to argue the lack of jurisdiction did not moot the lack of service or consent to the court’s jurisdiction, and the Court of Appeals did not err in affirming the trial court’s ruling dismissing the suit.

B. The Court of Appeals’ opinion was not internally inconsistent in its view of the effect of the 2008 Complaint that was filed but never served.

Doe argues the Court of Appeals’ opinion was “inconsistent” in that it concluded no civil action was never commenced (due to Doe’s failure to serve the City) yet also concluded that Doe’s 2008 decision “to file suit” constituted “bringing a suit.” (See Pet. for Cert. at 8 (quoting Opinion at 5).) The law is clear that one can “bring suit” by filing a Complaint, but until the Summons and Complaint are served, no civil action has commenced. See, e.g., *Louden v. Moragne*, 3237 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997) (affirming trial court’s dismissal, noting that the plaintiff “brought this negligence action” but failed to serve the defendant and thus no civil action was ever commenced); see also *Zarlinsky v. Laudenslager*, 167 A.2d 317,

320 (Penn. 1961) (noting the SCRA’s tolling provision “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”) (emphasis added). The Court of Appeals properly held Doe filed a suit but failed to commence a civil action because the service of a Summons and Complaint is a mandatory prerequisite to commence a civil action, and the Rules of Civil Procedure require service of both documents before a civil action is commenced. *See* Rule 3(a), SCRCP; *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.”) (emphasis added). There is no internal contradiction in the Court of Appeals’ holding.

C. *The Court of Appeals did not contradict this Court’s precedent by holding Doe’s attempt in 2012 to amend his Complaint was futile because there was no civil action nor could there be because the statute of limitations had expired.*

Doe argues the Court of Appeals’ opinion contradicts *Mims v. Babcock Center, Inc.*, 399 S.C. 341, 732 S.E.2d 395 (2012), a case that, according to Doe, permitted his attempt to amend his Complaint in 2012, four years after he had filed—but failed to serve—his Complaint. (*See* Pet. for Cert. at 9.) The holding in *Mims*, however, is inapplicable to 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 *had 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.⁷ Accordingly, 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. The Court of Appeal’s ruling does not conflict with *Mims* and correctly held the SCRA’s tolling provision does not toll the time period for serving or amending a suit.

D. The Court of Appeals did not err or contradict the United States Supreme Court by ruling the SCRA’s tolling provision tolls only the time in which a servicemember must file a suit, not subsequent deadlines to serve the defendant.

Doe argues the Court of Appeals erred by holding the SCRA’s tolling provision applies only “to toll statutes of limitations for *bringing* a suit, not serving or amending a suit.” (*See* Pet. for Cert. at 9 (quoting Opinion at 4).) Doe argues this holding conflicts with *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993), and that the cases upon which the Court of Appeals relied are distinguishable from the case at bar. (*Id.*) As explained below, he is wrong on both counts.

The Court of Appeals’ opinion does not conflict with *Conroy*. As detailed above, the issue in *Conroy* was entirely unrelated to the issue in Doe’s appeal, and thus the holding in *Conroy*—that because the language of the SCRA’s tolling provision is “unambiguous, unequivocal, and unlimited,” a servicemember is not required to show that his military service actually *prevented* him from timely filing—is neither relevant to Doe’s appeal nor in conflict with the Court of Appeals’ holding. *See* Section I.D, *supra*.

⁷ As explained in detail in the City’s briefing and the Court of Appeals’ opinion, the applicable statute of limitations expired on February 11, 2012, at which point the window of time closed to serve the documents or to file a new suit arising from the now-untimely claims. *See* Brief of Resp. at 13–19 (App. 92–98).

Doe's attempt to distinguish the cases on which the Court of Appeals relied also misses the mark.⁸ He argues those cases are distinguishable because in them, the SCRA was asserted by the party *opposing* the servicemember, not the servicemember himself. This distinction makes no difference, however, because the legal analysis and its application is the same regardless of which party asserts the SCRA. *See In re A.H. Robins Co., Inc.*, 996 F.2d 716, 718 (4th Cir. 1993) ("The statute essentially tolls periods of limitation *both in favor of and against* 'persons in military service' to the extent that their 'period of military service' coincides with the limitations period.") (emphasis added); *Ricard v. Birch*, 529 F.2d 214, 216 (4th Cir.1975) ("[T]he parallel purpose of the Act is to protect the rights of individuals having causes of action *against* members of the armed forces.") (emphasis added). Stated differently, the dispositive factor in the cases Doe seeks to distinguish was not *which party* sought to assert the SCRA's tolling provision but *what procedural deadlines* were stayed by the provision (*i.e.*, only the deadline to file suit, not the deadlines for serving the complaint or prosecuting a case). The factual distinction Doe relies on does not diminish the persuasive value of those cases' holdings that the SCRA does not toll the time in which service of process must occur.

Commentators and legal encyclopedias agree that the SCRA's tolling provision 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 [] is not applicable to, and cannot prevent the running of, time limitations governing the service of process in, or the prosecution of,

⁸ The cases were *Zitomer v. Holdsworth*, 449 F.2d 724 (3d Cir. 1971) (affirming 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"); *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."); *Puchek v. Elledge*, 160 F. Supp. 286, 287 (N.D. Ind. 1958) (noting the SCRA had no relation to service of process).

actions already brought.”); Am. Bar Ass’n SCRA Judges’ Guide Checklist at 10, available at http://www.americanbar.org/content/dam/aba/publishing/family_law_enewsletter/Apr_SCRA.athcheckdam.pdf (noting the SCRA’s tolling provision 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 22, 2016).

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. The Court of Appeals did not err by holding that when 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.

III. The Court of Appeals correctly held Doe’s claim was subject to the two-year statute of limitations found in the South Carolina Tort Claims Act rather than the longer statute of limitations found in S.C. Code Ann. § 15-3-555.

Doe argues the Court of Appeals erred by holding his lawsuit against the City of Duncan was subject to the shorter statute of limitations contained in the South Carolina Tort Claims Act (“SCTCA”) rather than by the longer statute of limitations for sexual abuse generally. (*See* Pet. for Cert at 10–13.) He argues there is a “conflict” between the SCTCA’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* Pet. for Cert. at 10.) 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 of the SCTCA 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 non-governmental entity or person.

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);⁹ *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).

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 SCTCA, which applies only to suits (like this one) brought against the State, an agency, a political subdivision, or a governmental entity.

Doe also incorrectly argues it is not unusual to apply non-SCTCA statutes of limitations in suits against state government defendants. (*See* Pet. for Cert. at 13 (citing *Kerr v. Richland Mem'l Hosp.*, 383 S.C. 146, 678 S.E.2d 809 (2009).) The sole case he cites in support of this proposition, however, does not actually do so. *Kerr* was a medical malpractice case in which the medical procedure occurred in 1996, the injury was discovered in 2001, and the plaintiff filed suit against a government hospital in 2003 (*i.e.*, within two years after the discovery of the

⁹ Doe quotes at length from another South Carolina case that did not involve a governmental defendant, but rather private individuals and did not involve the issue of which statute of limitations applied, and which sheds no light on the issues presented in the case at bar. (*See* Pet. for Cert at 13 (quoting *Doe v. R.D.*, 308 S.C. 139, 417 S.E.2d 541 (1992).)

injury). The issue in *Kerr* was not which statute of limitations to apply but whether medical malpractice claims against state entities are *also* subject to the statute of repose that bars any medical malpractice action brought more than six years after the procedure. *See Kerr*, 383 S.C. at 147, 678 S.E.2d at 810 (“The threshold issue is whether the statute of repose affects actions against government entities under the Tort Claims Act. [] We hold the statute of repose applies.”). Accordingly, contrary to Doe’s assertion, there is no basis in case law to avoid the SCTCA’s two-year statute of limitations in his suit against a government entity, and the Court of Appeals correctly applied the SCTCA’s statute of limitations.

CONCLUSION

This Court should deny the Petition for Certiorari. The Court of Appeals' opinion involves no novel questions of law and is consistent with existing law.

Respectfully submitted,

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October 11, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 08-CP-42-00475
Appellate Case NO. 2016-001909

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S.C. SUPREME COURT

John Doe,

Petitioner,

v.

City of Duncan,

Respondent.

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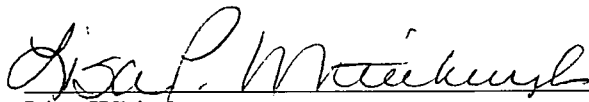
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail,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

Pleadings:

Respondent's Return to Petition for Certiorari

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October 11, 2016