

The State of South Carolina
In The Supreme Court

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

OCT 25 2016

S.C. SUPREME COURT

Appellate Case No. 2012-213499

John Doe, Appellant-Petitioner

v.

City of Duncan Respondent

Reply of Petitioner for Writ of *Certiorari*
to the Court of Appeals

Gregg Meyers, S.C. Bar No. 9908
Of Counsel
Pierce Hems Sloan & Wilson LLC
321 East Bay Street
Charleston SC 29401
Attorney for Appellant-Petitioner

Other Counsel of Record:

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

Allen Mattison Bogan
Miles Edward Coleman
Nelson Mullins Riley & Scarborough, LLP
PO Box 11070
Columbia SC 29201

Charles F. Turner, Jr.
Wilson Jones Carter & Baxley
872 South Pleasantburg Drive

Argument in Reply

The plaintiff makes only these three points in Reply.

1. The issues are of first impression.

The Defendant maintains (opposition at 1) that “there is no novel question of law,” yet cites to no controlling precedent. Each issue presented in the Petition is of first impression in South Carolina.

2. The plaintiff’s reserve service included his combat duty.

The defendant maintains (Opposition at 7) that the plaintiff’s reserve service was the wrong “type” of service to be credited under the SCRA. A similar argument is made in the Opposition at p. 8. But the standard of review for a motion to dismiss is to accept the facts alleged and inferences as true, *Bergstrom v. Palmetto Health Alliance*, 596 S.E.2d 42, 45 (S.C. 2004). The standard of review for a motion for summary judgment, if the trial court order is construed as a decision on summary judgment, is to construe the record in the light most favorable to the party opposing the motion. E.g., *Hancock v Mid-South Management Co.*, 673 S.E.2d 801, 802 (S.C. 2009); *Koester v. Carolina Rental Ctr.*, 443 S.E.2d 392, 394 (S.C. 1994). Where the preponderance standard applies, as it does here, the non-moving party “is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v Mid-South Management Co.*, 673 S.E.2d 801, 803 (S.C. 2009).

The Court of Appeals ignored the plaintiff’s reserve service entirely, but the plaintiff is properly entitled to the inference that his reserve service qualifies under the SCRA. In fact, two

of the plaintiff's three combat tours was during his reserve service, any one of which if properly credited to him would resolve the SCRA issue as "active duty" by any calculation under 50 U.S.C. § 3911(2)(a)(ii) and 50 U.S.C. § 3911(3)¹, and moot the other issues in the Petition.

The plaintiff's reserve service is in the record. R.App. 66. Among his "Decorations and Awards" on that same page is the "Army Reserve Components Achievement Medal," which is awarded for exemplary service while serving as a member of an Army Reserve Troop Programme Unit for a period of not less than three years. He also received the Armed Forces Reserve Medal, indicating his reserve status was not passive service but encompassed his combat tours in Afghanistan.

State law provides benefits to publicly employed service members in the reserves, and extra benefits for those who serve in combat. S.C. Code § 8-7-90. On this Record, and for purposes of this Petition, the plaintiff is entitled to the inference that his reserve service qualifies under the SCRA, particularly since the Defendant is well aware that two of the plaintiff's three 12-month combat tours occurred while he was in the reserves.

All of the time and service issues in the appeal depend, under federal law, on the plaintiff not being properly credited for his two combat tours while serving in the reserve, yet those tours qualify as active duty for purposes of the SCRA.

3. The state's tort liability is to mirror private entity liability, so the time limits of S.C. Code § 15-3-555 should apply.

S.C. Code § 15-78-40 states:

¹ "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."

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.

Emphasis added. S.C. Code § 15-78-50(b) provides a mirror image of that concept, protecting the state in the same manner as protections available to a private entity:

In no case is a governmental entity liable for a tort of an employee where that employee, if a private person, would not be liable under the laws of this State.

In 2009, when the Supreme Court decided *Kerr*, and applied the medical malpractice repose provision to protect a state hospital in the same manner as it protected a private hospital, the Court did so (a) consistent with the legislative intent embodied in S.C. Code § 15-78-50(b), to protect the state as much as a private entity, and (b) because the Tort Claims Act (enacted 1986) was enacted *after* the repose provision (enacted 1962). *Kerr v. Richland Memorial Hospital*, 678 S.E.2d 809, 811 (“when the Legislature enacted the Tort Claims Act, the Legislature knew of the absolute time limit imposed by the statute of repose.”)

The legislative intent embodied in S.C. Code § 15-78-40 is to treat the state “in the same manner and to the same extent as a private individual under like circumstances.” Fifteen years after enacting the Tort Claims Act, the legislature responded to the unique problems posed by childhood sexual abuse and modified the limitations period for claims which arise from an act of sexual abuse.

Although *Kerr* supports the plaintiff’s position that a later enacted statute, S.C. Code § 15-3-555, should control the prior enacted statute, the Defendant contends, Opposition at 16-18, that the principle of *Kerr* should not be applied, arguing that if *Kerr* did apply, then a series of

eleven other limitation statutes (cited by the Defendant at p. 17 of its Opposition), would each pose conflicts with the Tort Claims Act similar to S.C. Code § 15-3-555.

The Defendants' argument is factually incorrect. Each of the eleven other limitations statutes cited by the Defendant was enacted in 1962, *before* the 1986 Tort Claims Act. The principle of *Kerr* would apply to none of those statutes. "A basic presumption exists that the legislature has knowledge of previous legislation when later statutes are passed on a related subject." *Berkebile v. Outen*, 426 S.E.2d 760, 762 (S.C. 1993).

If the state law issue is properly resolved it moots the other issues in this appeal.

Conclusion

The City of Duncan has expended considerable effort to deprive the plaintiff of his day in court to hold it accountable, a freedom the plaintiff risked his life in combat to preserve. Properly construing any of the issues moots the other issues and would provide the plaintiff relief. The Petition should be granted to review the Court of Appeals decision, so either (or both) areas of law can be properly construed, or the Court of Appeals opinion vacated to the extent necessary so as to not perpetuate any of its confused holdings.

Respectfully submitted,



Gregg Meyers
Of Counsel
Pierce Hems Sloan Wilson LLC
321 East Bay Street
Charleston SC 29401
843-722-7733, 722-7732 facsimile
greggmeyers@phswlaw.com

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Proof of Service

I hereby affirm that on October 21, 2016, I served upon counsel for the defendant/respondent a copy of the

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

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

Allen Mattison Bogan
Miles Edward Coleman
Nelson Mullins Riley & Scarborough, LLP
PO Box 11070
Columbia SC 29201

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

A handwritten signature in black ink, reading "Gregg Meyers". The signature is fluid and cursive, with the first name "Gregg" and last name "Meyers" clearly legible.

Gregg Meyers
Of Counsel
Pierce Hems Sloan & Wilson, LLC
321 East Bay Street
Charleston SC 29401
843-722-7733

Attorney for Petitioner

Gregg Meyers
Pierce Herms Sloan & Wilson LLC
321 East Bay Street
Charleston SC 29401

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