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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
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Poinsett Plaza, Suite 900
104 South Main Street
Greenville SC 29601
864-250-2222

Attorneys for Respondents

WILLSON JONES CARTER & BAXLEY, P.A.

Charles F. Turner, Jr.
872 S. Pleasantburg Drive
Greenville, SC 29607

Charles Franklin Turner, Jr., Esquire

Allen Mattison Bogan, Esquire

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Exhibits attached to the Motion to Dismiss Appeal are not repeated here as they appear elsewhere in the record in the following locations:

- 01-28-2008 Summons and Complaint, appears in the Record starting at p. 7
- 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
- 05-16-2012 Memorandum in Support of Motion to Dismiss appears in the Record starting at p. 18

11-1-2012 Order granting Motion to Dismiss, appears in the Record starting at p. 1

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19. April 18, 2013 Motion for Summary Judgment in Doe v. Frost, 2009-CP-42-2662 p. 67

Certificate

20. Certificate of counsel p. 68

153

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 John Doe,)
)
 Plaintiff,)
)
 v.)
)
 City of Duncan,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

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.

1 of 3

R. App. 000001

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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 (Ct. 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

CLERK OF COURT
STATE OF SOUTH CAROLINA
2012 NOV - 1 AM 10:12
M. HOPE

The South Carolina Court of Appeals

John Doe, Appellant,

v.

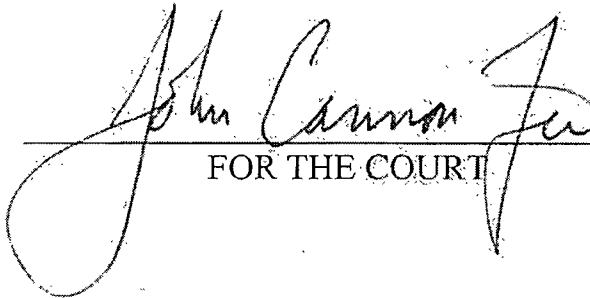
City of Duncan, Respondent.

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

FILED
8/16/13

ML

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 John Doe,)
)
 Plaintiff,)
)
 v.)
)
 Barry Frost,)
)
 Defendant.)
 _____)

IN THE COURT OF COMMON PLEAS
 C.A. NO.: 2009-CP-42-2662


CONSENT ORDER OF DISMISSAL
 PURSUANT TO RULE 40(j)

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.

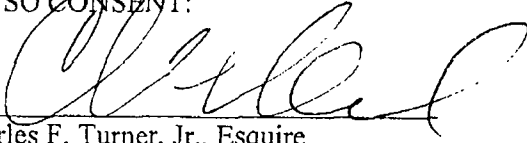
IT IS SO ORDERED.

8/30/13
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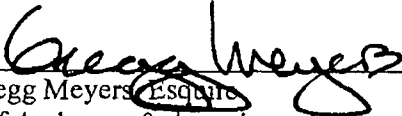

 Presiding Judge, Seventh Judicial Circuit

FILED
 CLERK OF COURT
 2013 SEP -9 AM 11:27
 M. HOPE BLACKLEY

WE SO CONSENT:



Charles F. Turner, Jr., Esquire
Turner Padgett 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

FILED
CLERK OF COURT
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
) No. 07-CP-42-0475
2008-CP-42

2008 JAN 20 PM 3:05
JAMES C. MEYERS
CLERK OF COURT

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 28 PM 3:05
FAXED TO 843/720-8704

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

2000 JUN 28 PM 3-06
MAIL ROOM

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

FILED
CLERK OF COURT
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
2022 FEB 21 AM 10:50
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.

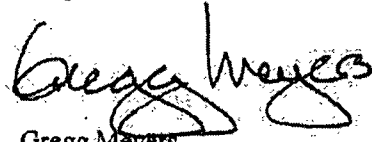
14. Defendant's negligence is the proximate cause of plaintiff's sexual abuse, and entitles the plaintiff to actual damages as a result.

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 Danvers
Defendant

AFFIDAVIT OF SERVICE

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

- () Complaint with Summons and Responses *Amended Complaint*
- () Certified Rule to Show Cause *CASE # 08-CP-42-475*
- () Temporary Restraining Order

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 Danvers
~~His~~her place of employment and present at ~~his~~her place of employment 2:34 at time Town Hall
of service. *pm*

And leaving with ^{her}him certified copies of the same at 153 W. Main St Danvers S.C
at 2:34 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.

Rog. Swine
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:

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 SPARTANBURG COUNTY
 2017 MAR 5 AM 8:46
 M. BOPE BLANKLEY

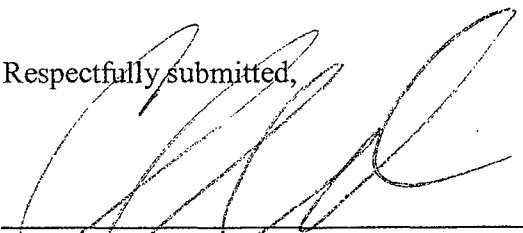
1. Plaintiff filed his Summons and Complaint in January of 2008. Plaintiff failed to serve the Defendant with said Summons and Complaint. The Plaintiff failed to commence this action in 2008 as required by Rule 3 of the South Carolina Rules of Civil Procedure.
2. Plaintiff's January 2008 Summons and 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 & LAHEY, 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

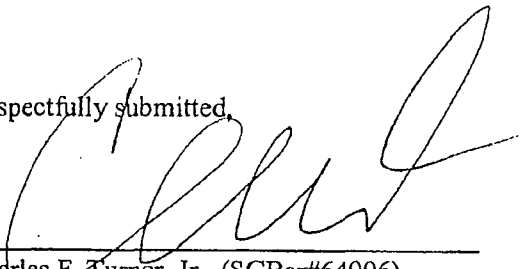
elements to the present case, the Plaintiff is judicially estopped from asserting that the Defendant City of Duncan is liable in this matter.

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} him 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.

[Signature]
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

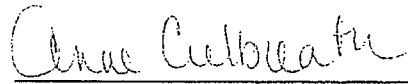
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF SPARTANBURG	)	C.A. NO.: 2008-CP-42-0475
)	
John Doe,)	
)	
Plaintiff,	)	DEFENDANT'S NOTICE OF MOTION
	)	AND MOTION TO DISMISS
v.)	
)	
City of Duncan,)	
)	
Defendant.)	
_____)	

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

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(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 Fassett 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 Fassett*, 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.

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Attorneys for Respondents

Greenville, South Carolina
May 29, 2013

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COMMON PLEAS COURT

John Doe,)
Plaintiff,)
-vs-)
City of Duncan Fire,)
Department,)
Defendant.)

TRANSCRIPT OF RECORD
2008-CP-42-475

May 16, 2012
Spartanburg, South Carolina

B E F O R E :

HONORABLE J. DERHAM COLE, JUDGE

A P P E A R A N C E S :

J. DAVID FLOWERS, ESQUIRE
GREGG E. MEYERS, ESQUIRE
Attorneys for the Plaintiff

CHARLES FRANKLIN TURNER, JR., ESQUIRE
Attorney for the Defendant

Linda D. Moffitt
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.

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MR. TURNER: It's ground No. 1.

THE COURT: All right. Anything -- I will read the memo. Anything else? I've got the file.

MR. MEYERS: I don't think so, Your Honor.

MR. TURNER: Nothing, Your Honor.

THE COURT: Okay. I'll issue an order.

END OF REQUESTED TRANSCRIPT OF RECORD

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.

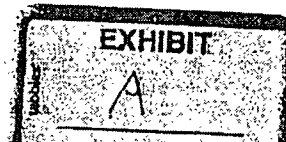
Gregg Meyers, PO Box 1297, Charleston SC 29402 843-720-8714, 720-8704 facsimile.

-----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.

Camations 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

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 IN COURT
 2009 MAY -7 PM 1:50
 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.

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CLERK OF COURT
MARIETTA, GEORGIA

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

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OF COUNTY
2009 MAY -7 PM 1:50
MARC 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 reiterates 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 Plaintiff's claims under South Carolina law and are barred by §15-78-120(b) of the South Carolina Code of Laws Annotated; therefore, the Plaintiff's 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(i) 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.

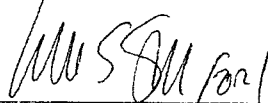
FOR A TWENTY-FOURTH DEFENSE

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

MAJOR ROBERTS
JUL 2 2 PM 1:51
2009

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
C.A. NO.: 2008-CP-42-475

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

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:

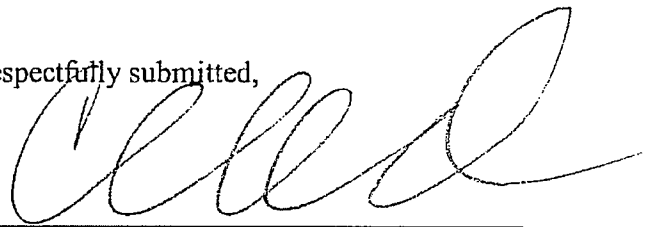
1. Plaintiff filed his Summons and Complaint in January of 2008. Plaintiff failed to serve the Defendant with said Summons and Complaint. The Plaintiff failed to commence this action in 2008 as required by Rule 3 of the South Carolina Rules of Civil Procedure.
2. Plaintiff's January 2008 Summons and 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 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 ACTNAME: RedactedBRANCH OF SERVICE AND SERIAL/SERVICE NUMBER(S):
United States Army / United States Army Reserve / Army National GuardDATES 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, 2011DUTY STATUS:
DischargedRANK/GRADE:
PrivateSALARY:
N/ASOURCE OF COMMISSION:
N/APROMOTION SEQUENCE NUMBER:
N/AASSIGNMENTS AND GEOGRAPHICAL LOCATIONS:
Ft. Leonard Wood, MO
Ft. Bragg, NC
Ft. Jackson, SC
Ft. Sill, OK
Ft. Richardson, AKMILITARY EDUCATION:
Combat Engineer Course//Combat Lifesaver Course//Airborne CourseDECORATIONS 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 MedalTRANSCRIPT OF COURT-MARTIAL TRIAL:
Not in filePHOTOGRAPH:
N/APLACE OF ENTRY:
Wellford, SCPLACE 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)

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

IN THE COURT OF COMMON PLEAS
C.A. NO.: 2009-CP-42-2662

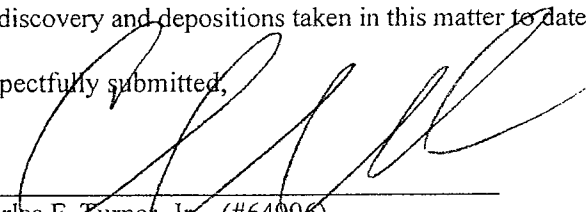
DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

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,



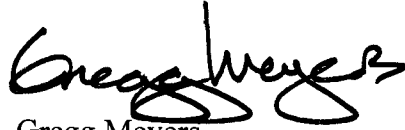
Charles F. Turner, Jr. (#64996)
TURNER, PADGET, GRAHAM & LANEY, P.A.
P. O. Box 1509
Greenville, SC 29602
Phone: (864) 552-4600; Fax: (864) 552-4620
Attorney for Defendant

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2013 APR 18 PM 2:24
M. HOPEBLACKLEY

April 17, 2013

Certificate of Counsel

I hereby certify that the enclosed Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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

Attorney for Appellant

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

RECEIVED
DEC 23 2013
SC Court of Appeals

Case No. 2012-213499

John Doe, Appellant
v.
City of Duncan Respondent

Proof of Service

I hereby affirm that pursuant to SCACR 210 I have served upon counsel for the Respondents a copy of the

Record on Appeal

by delivering a copy of the Record to counsel for the Respondents both electronically and by United States mail, first-class postage prepaid, addressed to:

William H. Foster, bill.foster@nelsonmullins.com
Miles Coleman, miles.coleman@nelsonmullins.com
Nelson, Mullins, Riley & Scarborough
Poinsett Plaza, Suite 900
104 South Main Street
Greenville SC 29601

Done December 16, 2013, from St. Paul, MN



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