Serial: 202662

IN THE SUPREME COURT OF MISSISSIPPI

No. 2013-CT-01205-SCT

JEREMY MOSELEY

v.

TIFFINY (MOSELEY) SMITH

EN BANC ORDER

This matter is before the Court on the Court's own motion. The Petition for Writ of Certiorari filed by Jeremy Moseley was granted by order of this Court entered on August 13, 2015. Upon further consideration, the Courts finds that there is no need for further review and the writ of certiorari should be dismissed.

IT IS THEREFORE ORDERED, pursuant to Mississippi Rule of Appellant Procedure 17(f), that the Writ of Certiorari is dismissed.

SO ORDERED, this the 16th day of December, 2015.

/s/ Jess H. Dickinson

JESS H. DICKINSON, PRESIDING JUSTICE
FOR THE COURT

TO DISMISS: DICKINSON AND RANDOLPH, P.JJ., LAMAR, PIERCE AND COLEMAN, JJ.

KITCHENS, J., OBJECTS WITH SEPARATE WRITTEN STATEMENT JOINED BY WALLER, C.J., AND KING, J.

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KITCHENS, JUSTICE, OBJECTING TO THE ORDER WITH SEPARATE WRITTEN STATEMENT:

¶1. Because the law of this case and the law of Mississippi would be served best by deciding this case with an opinion rather than an order, I respectfully object to dismissal of the writ of *certiorari*.

¶2. First, this case presents a significant legal question of first impression, which has caused confusion in trial courts and in the Mississippi Court of Appeals: whether the seven-year statute of limitations articulated in Mississippi Code Section 15-1-43,[1] which applies to judgments, or the three-year statute of limitations contained in Mississippi Code Section 15-1-29,[2] which applies to breach of contract actions, applies to non-alimony provisions of

[1]Section 15-1-43 of the Mississippi Code, in pertinent part, provides: "All actions founded on any judgment or decree rendered by any court of record in this state, shall be brought within seven (7) years next after the rendition of such judgment or decree, or last renewal of judgment or decree, whichever is later." Miss. Code Ann. § 15-1-43 (Rev. 2012).

[2]Section 15-1-29 of the Mississippi Code provides:

> Except as otherwise provided in the Uniform Commercial Code, actions on an open account or account stated not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied, shall be commenced

property settlement agreements. This Court has not previously addressed this issue. However, in ***D'Avignon v. D'Avignon***, 945 So. 2d 401 (Miss. Ct. App. 2006), the Mississippi Court of Appeals held that there was a distinction between a claim to recover past-due alimony and a claim related to a non-alimony provision of the property settlement agreement. In ***D'Avignon***, the Court of Appeals addressed the statute of limitations applicable to a contempt action for a party's failure to perform pursuant to the terms of his alimony escalation clause. ***Id.*** at 408. The Court of Appeals held that Section 15-1-29's three-year of statute of limitations applied because "'[a] true and genuine property settlement agreement is no different from any other contract, and the mere fact that it is between a divorcing husband and wife, and incorporated in a divorce decree, does not change its character.'" ***Id.*** (quoting ***West v. West***, 891 So. 2d 203, 210 (¶ 13) (Miss. 2004)).

¶3. However, in its consideration of this case, the Court of Appeals overruled ***D'Avignon*** and found that "what makes a property-settlement agreement enforceable is not that it is a contract, but rather that it is a 'court-approved contract'—one that 'become[s] a part of the decree and enforceable as such as though entered by the court following contested proceedings.'" ***Moseley v. Smith***, 2014 WL 6756280,*5 (Miss. Ct. App. Dec. 2, 2014)

> within three (3) years next after the cause of such action accrued, and not after, except that an action based on an unwritten contract of employment shall be commenced within one (1) year next after the cause of such action accrued, and not after.

Miss. Code. Ann. § 15-1-29 (Rev. 2012).

(quoting ***Bell v. Bell***, 572 So. 2d 841, 844 (Miss. 1990)). The Court of Appeals further held that "[t]hough property-settlement provisions differ from alimony and child-support provisions in the sense they are non-modifiable, they are nonetheless enforceable as part of the divorce judgment." ***Moseley***, 2014 WL 6756280, at *6. Thus, the Court of Appeals determined that Section 15-1-43's seven-year statute of limitations should apply to every provision of a property settlement agreement incorporated into a final judgment, not just those provisions that pertain to alimony and child support. ***Id.***

¶4. Although I agree with the Court of Appeals decision that every provision of a property settlement agreement which is incorporated into a final divorce judgment is subject to Section 15-1-43's seven-year statute of limitations, a precedential opinion from this Court would provide trial courts much-needed clarification about the significant issue of which statute of limitations applies to non-alimony and non-child-support-related provisions of a divorce decree.

¶5. Further, the Court of Appeals erred in its determination that, under Mississippi's law concerning indemnity, the statute of limitations in this case started running no earlier than September 2006. *See* ***M'Lean v. Ragsdale***, 2 George 701, 704 (Miss. 1856) ("The conditions amount to nothing more in legal effect, than a contract to indemnify against damage arising from the payment of money; and in such cases, it is well settled, that the statute begins to run from the time the party indemnified actually pays the money, and not from the time when he becomes liable to pay it."). Instead, the statute of limitations started to run on October 4,

2007, when Trustmark National Bank obtained judgment against Tiffiny Smith for the debt on the Chevrolet Camaro automobile. At the time of her divorce from Jeremy Moseley, Tiffiny Smith did not have a vested right to sue him for indemnification. That right accrued in October 2007, when Smith was held liable for the Camaro debt.

¶6. However, even Mississippi indemnification law does not provide a clear answer for when the statute of limitations began to run in this case, because evidence in the record indicates that Tiffiny Smith has been in active military service with the United States Air Force for various periods of time after her divorce from Jeremy Moseley. *See* 50 U.S.C.§ 3936 (2012). The Servicemembers Civil Relief Act serves two important purposes: (1) "to provide for, strengthen, and expedite the national defense through protection extended by this Act to service members of the United States to enable such persons to devote their entire energy to the defense needs of the Nation;" and (2) "to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service." 50 U.S.C.§ 3902 (1)-(2). Particularly, the Servicemembers Civil Relief Act provides:

> The period of a servicemember's military service *may not* be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns.

50 U.S.C.§ 3936(a) (emphasis added). The Act tolls statutes of limitations both in favor of and against "person[s] in military service" to the extent that their "period of military service"

coincides with the limitations period. *See* ***Ricard v. Birch***, 529 F.2d 214, 216 (4th Cir. 1975); ***Bickford v. United States***, 228 Ct. Cl. 321, 656 F.2d 636, 639 (1981); ***Mason v. Texaco, Inc.***, 862 F.2d 242, 245 (10th Cir. 1988); ***Detroit Harbor Terminals v. Kuschinski***, 181 F.2d 541, 542-43 (6th Cir. 1950). The broad, unqualified, and mandatory language of Section 3936 leaves little room, if any, for judicial interpretation or discretion in its application; indeed, quite plainly, the tolling statute is unconditional. *See* ***In re A.H. Robins Co.***, 996 F.2d 716, 718 (4th Cir. 1993) (interpreting a prior version of Section 3936(a)); *see also* ***Bickford***, 656 F.2d at 639 ("There is not ambiguity in the language of [a prior version of Section 3936(a)] and no justification for the court to depart from the plain meaning of its words."); *see generally* ***Cronin v. United States***, 363 Fed. Appx. 29, 29 n.1 (Fed. Cir. 2010) (tolling provision in Section 3936(a) "was not substantially changed" from prior version). Indeed, "while there may be some ambiguity when a legislature uses the term 'may' to authorize some action (as opposed to the term 'shall'), there is no grammatical ambiguity created when the legislature provides that something 'may not' be done. In a statute, the phrase 'may not' has exactly the same meaning as 'shall not.'" ***Richardson v. Wells Fargo Home Mortg., Inc. (In re Brandt)***, 421 B.R. 426, 430 (Bankr. W.D. Mich. 2009), *see also* ***Stringer v. Realty Unlimited, Inc.***, 97 S.W.3d 446, 448 (Ky. 2002) ("'[W]here other words are used in connection with 'shall,' 'must,' 'may' or 'might,' which clearly indicate mandatory or directory construction, as the case may be, we have never ignored the force of the descriptive or qualifying language.' . . . Courts that have construed 'may not' have

consistently held that the phrase is mandatory and not permissive or discretionary.") (quoting ***Clark v. Riehl***, 313 Ky. 142, 230 S.W.2d 626, 627 (1950)). Indeed, "[c]ourts addressing the scope of SCRA § [3936](a) have uniformly concluded that 'may not' is mandatory, not permissive, offers no room for discretion, and that the provision tolls any statute of limitations, general or special, for the period of the service member's active duty." ***In re Brandt***, 437 B.R. 294 (Bankr. M.D. Tenn. 2010).

¶7. In applying this Act, the only critical factor is military service; once that circumstance is proved, the period of limitations is automatically tolled for the duration of a servicemember's military service. *See* ***Conroy v. Aniskoff***, 507 U.S. 511, 113 S. Ct. 1562, 123 L. Ed. 2d 229 (1993); *accord* ***In re A.H. Robins Co.,*** 996 F. 2d at 718; ***Ricard***, 529 F.2d at 217. The Servicemembers Civil Relief Act defines "military service"as: "(A) in the case of a servicemember who is a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard—(i) active duty, as defined in section 101(d)(1) of Title 10, United States Code . . . . " 50 U.S.C.§ 3911(2)(A)(i). In turn, Section 101(d)(1) defines "active duty" as "full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned." 10 U.S.C. § 101(d)(1).

¶8. In the trial court, Tiffiny Smith argued:

> In September 2003 Trustmark filed an action against Ms. Smith attempting to collect their unpaid debt from the Camaro, though she was no longer

> associated with the vehicle and its debt. *Ms. Smith was in the United States Air Force at the time* and therefore accessible, but Trustmark continued its matter until it served her with summons in March 2006.

(Emphasis added.) Thus, the amount of time that the statute of limitations should be tolled to allow for Tiffiny Smith's military service is dispositive regarding the point in time that the statute of limitations began to run for Tiffiny Smith to file her contempt action against Jeremy Moseley. Moreover, it is the obligation of the trial court *sua sponte* to apply the Servicemembers Civil Relief Act's tolling provision if any party to the litigation introduces facts related to his or her active duty military service. ***Ricard***, 529 F. 2d at 216 ("The statute is couched in mandatory terms, and it has been said that an exception to the general rule of non-reviewability exists when a pertinent statute has been overlooked in the trial court."): ***Campbell v. Rockefeller***, 134 Conn. 585, 588-589, 59 A.2d 524 (1948) (allowing a servicemember to raise the statute for the first time on appeal because "[w]hile ordinarily questions not raised at the trial will not be considered on appeal, an exception is made when a pertinent statute has been overlooked. . . . A further claim is that the facts necessary to the application of the federal statute were not pleaded."). The importance of the Servicemembers Civil Relief Act in determining when the statute of limitations began to run in this case provides another reason why it would be more appropriate to render a written opinion in this case, rather than dismiss it by order.

¶9. Ultimately, because this case presents an issue of first impression that should be addressed by this Court, because the Court of Appeals erred in its determination that the

statute of limitations began to run in September 2006 instead of October 4, 2007, when Smith first was held liable for the debt to Trustmark for the Camaro, and because this case affords us an opportunity to clarify a trial court's obligation to toll statutes of limitations for active-duty military-service members, I respectfully object to the Court's dismissing this case after granting *certiorari*.

WALLER, C.J., AND KING, J., JOIN THIS SEPARATE WRITTEN STATEMENT.