Supreme Court No. 90640-8

Court of Appeals No. 43633-7-II

SUPREME COURT
OF THE STATE OF WASHINGTON

PAUL SHOEMAKER,

Petitioner-Petitioner,

v.

DAWN SHOEMAKER (NOW KNOWN AS DAWN HARRIS)

Respondent-Respondent

PETITIONER'S REPLY

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TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Secondary Authority

I. Harris has raised several new issues that confirm the need for this court to accept review in order to clear up confusion about the SCRA's application and to prevent deprivation of service members' due process.

Harris has raised several new issues that confirm the need for this court to accept review. First, Harris' response confuses who is covered by the SCRA. Second, she combines language from the former and current versions of the act and relies solely on the division one case *In re Marriage of Heridge*, which also confused the language of the former and current versions. 169 Wn. App. 290, 279 P.3d 956 (Ct. App. Div. I 2012). Third, she argues that a service member must be the defendant in an action in order to invoke the SCRA protections.

Most importantly, the confusion surrounding the applicability of the SCRA has ultimately led to a violation of due process. The SCRA was enacted to protect service members' due process afforded them by the United States and Washington Constitutions. U.S. Const. Amend. 5 and Amend. 14 §1; Wash. Const. Art. 1, § 3; 50, App. U.S.C. §502. At a bare minimum, procedural due process "requires notice and an opportunity to be heard." *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050 (1994).

Because the lower courts did not properly apply the SCRA, Shoemaker, and potentially hundreds or thousands of other Washington service members, was deprived of an opportunity to be heard.

a. A servicemember absent from active duty due to illness is still covered by the SCRA.

Harris argues the court of appeals correctly stated Shoemaker's absence was due to illness and not military service. Resp. to PFR at 5. But, a service member is still considered on active duty if they are absent because of sickness and are still afforded the protections of the act. 50, App. U.S.C. §511(2)(c); Mark E. Sullivan, A Judge's Guide to the Servicemembers Civil Relief Act, 1, available at http://apps.americanbar.org/family/military/scrajudgesguidecklist.pdf.

b. The former versus the current version of the SCRA

The former version of the SCRA provided:

> At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, ... unless in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

50, App. U.S.C.A. §521 (1940) (emphasis added).

However, the current version provides:

> (2) Conditions for stay

> An application for a stay under paragraph (1) shall include the following:
> (A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's *ability to appear* and stating a date when the servicemember will be available to appear.
> (B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.

50, App. U.S.C. §522(b)(2) (2003) (emphasis added).

The former statute gave the court ultimate discretion, but placed the burden on the court to show the service member's defense was not materially affected by his service. The new version not only eliminates that discretion, but incorporates a lesser burden on the service member into the application. Now the service member need only set forth facts showing the military duty requirements materially affect his ability to appear. There is no longer an inquiry about whether the prosecution or defense can proceed in their absence. The only inquiry is whether they can appear.

Harris' argument that 50, App. U.S.C. §522 requires Shoemaker to show his military service materially affected his ability to defend himself is incorrect. Resp. to PFR at 9. The judge's guide to the servicemembers civil relief act, which she quotes in the previous paragraph, requires a statement of how current military duties affect a service member's ability to appear not the ability to defend. Sullivan, A judge's guide to the

servicemembers civil relief act at 3. This mirrors the language in 50, App. U.S.C. §522(b)(2).

Shoemaker fulfilled this requirement when his mother notified the court on the first day of trial that he was unable to appear because he was in a military hospital. He fulfilled this requirement again on the second day of trial when the court confirmed with his commanding officer he was unable to appear because he had military orders not to leave his quarters. On both days, his service materially affected his ability to appear. Shoemaker also produced a Sick in Quarters order from the military doctor. CP 689, 691, 695.

His service also materially affected his ability to appear at the contempt hearing on February 11, 2011. He informed the court he could not get leave and then filed a letter from his commanding officer confirming his unavailability. CP 608. Being prohibited from attending materially affects his ability to appear because he cannot violate military orders.

It is important to note that Shoemaker was not allowed to cross-examine Harris, as Harris states in her response brief. Resp. to PFR at 5-6. When Shoemaker attempted to cross-examine her, the trial judge told him he "gave up" and "waived [his] opportunity to cross-examine" when he

did not appear on the first day of trial. That is the reason for this appeal. RP - 29, 61, 133-34.

c. A service member does not have to be a defendant to invoke the protections of the SCRA

Harris' focus on who initiated the proceedings is misplaced. Harris argues that Shoemaker is somehow barred from invoking the SCRA protections because he initiated an order reinstating the original dissolution, but cites no authority. Resp. to PFR at 9-10. Even *Herridge*, on which Harris extensively relies, acknowledges that the act covers a service member's ability to defend or prosecute. *Herridge*, 169 Wn. App. at 301.

Even if there was authority which required Shoemaker to be the defendant in order to invoke the act, he met that criteria. He was the respondent in the following actions in which orders were entered in default: (1) A contempt hearing initiated by Harris on February 11, 2011 and (2) A hearing on a motion to Compel Discovery on August 19, 2011. In addition, the Trial court's final rulings were based on previous orders entered in default. CP-708.

Neither the statute nor case law requires the court to review Shoemaker's availability as a whole. The relevant dates are the dates of his unavailability. Harris attempts to divert the court's attention by

painting Shoemaker as an intransigent madman who used the SCRA as a sword to delay the process.

In reality, the SCRA was repeatedly violated. Shoemaker attempted to remedy the situation with a motion for reconsideration, an appeal, even two collateral lawsuits, and an appeal of the trial court's decision. These are the "numerous actions, motions, appeals, etc." referred to in Harris' response. Resp. to PFR at 10.

These are all remedies legally available to him and, although he did not win, they were not found to be frivolous. It is true that it took Shoemaker a few attempts before his appeal to the court of appeals was accepted, but he was entitled to an appeal and he was unrepresented. Exercising his rights to appeal is irrelevant to the issue at hand and does not bar him from SCRA protections.

II. Instead of arguing that *Herridge* was correctly decided, Harris argued Shoemaker did not comply with *Herridge*. This court should grant review to determine whether strict compliance is actually required.

Harris alleges "Shoemaker failed to meet the strict requirement of properly invoking the protections of the [SCRA] which is fatal to his claim." Resp. to PFR at 8. This is the central issue. Shoemaker argues first that he did comply with the conditions for a stay, but most importantly, that strict compliance is not required. There is no conflict among the court

of appeals because, prior to this case, only Division I has ruled on this issue. Within the *Herridge* opinion, the court of appeals acknowledged that the SCRA should be liberally construed. *Herridge*, 169 App. at 297. Yet, it held strict compliance is required before a service member can invoke the Act's protections. *Id.* at 301.

Liberally Construe and *Strictly Comply* are conflicting principles. Liberal means "given or provided in a generous and openhanded way" or "not literal or strict." Webster's Dictionary Online, Definition of Liberal *available at* http://www.merriam-webster.com/dictionary/liberally. Strictly means "inflexibly maintained or adhered to" Webster's Dictionary Online, Definition of Strict *available at* http://www.merriam-webster.com/dictionary/strictly?show=0&t=1411152621.

In addition, the *Herridge* court's analysis was influenced by the type of case. Herridge filed a motion to vacate a final order to modify child support which is done by affidavits and worksheets, without oral testimony. Therefore, Herridge was not affected either way because he submitted an affidavit, from which the court made its decision. *Herridge*,169 Wn. App. at 300-02. Here, the violations implicate more than just financial responsibility, but Shoemaker's fundamental right to the care, custody and control of his child. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208 (1972).

Lastly, Harris failed to address whether section 50, App. U.S.C. §521, concerning a default judgment against a person in the military, requires a stay when the service member is unrepresented. These are issues this court needs to address because if Washington service members are required to strictly comply with the Act it may prevent them from having an opportunity to be heard especially when representing themselves. An even bigger concern is how service members and their commanding officers will be apprised of this requirement. If specific language is required then there should be a uniform document of which every service member should be made aware. This cannot happen practically unless it comes from the Department of Defense. Therefore, there is an imminent need for this court to instruct the lower courts.

Harris argues that the protections of the SCRA were met, but fails to show how. Resp. to PFR at 11.

III. Harris admitted Shoemaker may have a basis for meeting the conditions of a stay

Harris admits that if Shoemaker (1) had properly invoked the SCRA and (2) the military had not accommodated his ability to appear and defend himself and (3) his participation in this matter had been adversely materially affected and (4) the Court proceeded to hear the matter and

enter its ruling by default, then Shoemaker may have a basis for meeting this subsection. Resp. to PFR at 10. This is exactly what happened.

First, Shoemaker argues he properly invoked the SCRA in previous court hearing and on the first and second day of trial. Second, the military did not accommodate Shoemaker. Instead, pursuant to the warrant issued in default at the contempt hearing, they forcibly removed him from his station in Japan, brought him to Washington, and forced him to turn himself in. As a result, Shoemaker was arrested. PFR A-4. Third, his participation on the first and second day of trial was adversely materially affected (even though this is not the correct standard as argued above) because he would have had to violate military orders to attend. RP – 8, 28-29, 51; CP – 689-91; Ex. 48. Being absent materially affects one's participation. Fourth, the trial court did proceed to hear the matter and enter a ruling essentially by default when it allowed Harris to present her entire case in his absence, later disallowed any cross-examination, and based its decision in part on prior default judgments against Shoemaker. The first judgment was an order holding him in contempt. CP-597-602. The second was an order to compel discovery. PFR A-4.

IV. The waiver provisions of section 517 are inapplicable and not analogous.

50, App. U.S.C. §517 applies to contracts, leases, bailments, repossession, retention, foreclosure, sale, forfeiture, or taking possession

of property. These can be categorized as financial liabilities. Financial liabilities are not analogous to a dissolution, so section 517 is inapplicable because it is not at issue here.

In addition, this section requires any purported waiver to be executed as a separate instrument from the obligation or liability to which it applies. 50, App. U.S.C.A. §517 (a). It cannot be one section contained within a contract. It makes sense that this section would apply in situations such as where a service member, even though he is entitled to break a lease early if he is deployed, chooses not to. It does not make sense to apply it in this case where the service member's fundamental right to the care, custody and control of his child is at issue. *See Stanley*, 405 U.S. 645, 651. Simply filing a dissolution does not waive any further protection under the SCRA.

Harris' analogy falls far short. Finding a waiver in this situation would be more analogous to finding a service member waived his protections under the SCRA because he was the seller of a house or because he drafted the contract. Neither of those situations would pass muster under section 517 and this situation does not either.

Shoemaker did not invoke these protections "only after losing custody and losing appeals in Washington" as Harris stated. Resp. to PFR at 16. Shoemaker first invoked the SCRA prior to the February 11, 2011 contempt hearing. In fact, as Harris recalls in her statement of facts,

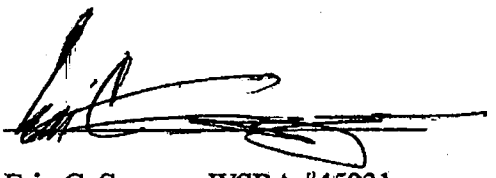
Shoemaker filed suit in Federal Court for the Western District of Washington complaining about the SCRA violations. Resp. to PFR at 4. Shoemaker did not waive any protections under the act, but did everything in his power to preserve them.

V. Conclusion

It is apparent from the court of appeals decision in *Herridge*, the court of appeals decision in this case and from Harris' response that there is much confusion surrounding the SCRA and how it should be applied in Washington. The first confusion is whether a service member is still afforded protection under the Act when they are absent from military duties because of sickness. The second confusion is whether the act should be liberally construed or the service member should strictly comply. The third confusion is whether section 521 applies to a default judgment when the service member had actual notice, but was unrepresented. The fourth confusion is whether the service member is required to show his or her defense and/or prosecution is materially adversely affected or whether they only have to show their ability to appear is affected. Because these confusions have led to a deprivation of due process, the issue is ripe for review by this court.

DATED this 24th day of September, 2014

ERIN SPERGER, PLLC

By 

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Attorney for Petitioner Paul Shoemaker

Paul Shoemaker

CERTIFICATE OF SERVICE

I certify under penalty of perjury and the laws of the state of Washington that I e-filed a copy of this REPLY to the Washington State Supreme Court Clerk by emailing it to the following email address: Supreme@courts.wa.gov.

SIGNED at Seattle, WA, this 24th day of September, 2014.

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CERTIFICATE OF SERVICE ON OPOSSING COUNSEL

I certify that I mailed a copy of Paul Shoemaker's REPLY postage prepaid, via U.S. mail on September 24, 2014, to the following counsel of record at the following address:

Cameron J. Fleury Attorney for Dawn Harris
McGavick Graves
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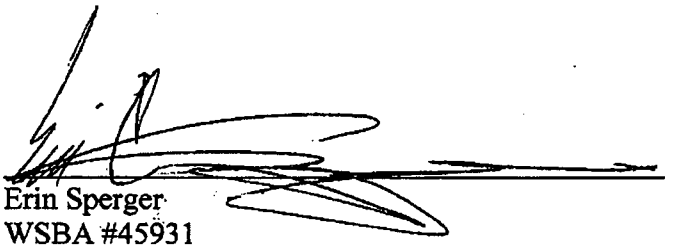
I further certify that I emailed a copy of Paul Shoemaker's REPLY to both Cameron J. Fleury at cjf@mcgavick.com and his paralegal Jess Buckley at jmb@mcgavick.com.

SIGNED at Seattle, Washington, this 24th day of September, 2014.



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Subject: Petitioner's Reply for case number 90640-8

Attached please find Petitioner's Reply for case number 90640-8. Thank you very much.

Sincerely,

Erin Sperger

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