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By Marks & Harrison Attorneys

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Limiting the *Hanger* Jury Instruction in Future Cases

By Roger T. Creager and Steven G. Friedman

The *Marks & Harrison Points of Law* previously published an article regarding the decision of the Supreme Court of Virginia in *Emergency Physicians of Tidewater, PLC v. Hanger,* 303 Va. 77, 899 S.E.2d 413 (2024). *See Roger T. Creager,* "Multiple Cause Cases and the Hanger Jury Instruction," *Marks & Harrison Points of Law* Vol. 2 No. 2 (Summer 2024). The article can be viewed and downloaded on the Marks & Harrison website www.marksandharrison.com (select "Resources" and scroll down to "Points of Law")

The two above-named Marks & Harrison attorneys recently published another article regarding the *Hanger* opinion. *See* Roger T. Creager & Steven G. Friedman, "The Effect of the Hanger Jury Instruction Should Be Limited in Future Cases," *The Journal of the Virginia Trial Lawyers Association,* Vol. 31 No. 1, pp. 2-7 (2025). The new article discusses numerous reasons

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why the jury instruction ("Instruction D") involved in *Hanger* should be used rarely (if at all) in future cases and, if given, should be modified or given with a companion instruction.

The *Journal* article identifies numerous problems with Instruction D that can be raised in future cases. None of those problems were raised in the *Hanger* case. Thus, none of those problems were before the Supreme Court and none of them were considered or addressed in its *Hanger* opinion. Notably, the *stare decisis* effect of a judicial opinion is limited to the issues raised by the parties and addressed by the court. *See Forest Lakes Cmty. Ass'n v. United Land Corp. of Am.*, 293 Va. 113, 123, 795 S.E.2d 875, 880 (2017).

As discussed in the *Journal* article, only two narrow issues were raised by the parties and addressed by the Supreme Court in its *Hanger* opinion:

- whether the defense arguments regarding the evidence that supported Instruction D were preserved for appeal and not abandoned; and
- whether the trial court should have given Instruction D under the particular circumstances of that case.

Accordingly, the *stare decisis* effect of the Supreme Court's opinion in *Hanger* is limited to those two issues, meaning that other issues may be raised in future cases.

In *Hanger,* no issues or concerns were raised or addressed regarding the particular language used in Instruction D. The problems with the particular language used in Instruction D that will likely be raised if that instruction is requested verbatim in future cases include:

- **Instruction D could potentially cause jurors to misunderstand the law of multiple proximate causes.**

The language of Instruction D told jurors that "if you are unable to determine which of the two causes occasioned the injury complained of, then the plaintiff cannot recover." 303 Va. at 86, 899 S.E.2d at 418 (emphasis added). Apparently, both parties were satisfied with the unusual language of Instruction D which structured the case as involving an "either-or" choice on causation. In fact, however, in many cases the plaintiff can and should prevail even though the jury is ultimately "unable to determine" "which" of two possible causes (or which of several possible causes) caused the injury. *See* 1 *Virginia Model Jury Instructions* - Civil Instruction No. 5.005 (2025) ("There may be more than one proximate cause of [a collision; an injury; damages; death]").

- **Instruction D could confuse the jurors regarding the applicable proof standards.**

The language used in Instruction D also could potentially cause jurors to believe that a plaintiff cannot recover unless the jurors are able to "determine" "which" cause "occasioned the injury." The language and structure of Instruction D, combined with its lack of any reference to the standard of proof, could cause the jurors to erroneously think that the plaintiff cannot recover unless the evidence enables them to decide with a high level of confidence what was "the cause" of the plaintiff's injury. The very first definition of "determine" in a dictionary regularly relied upon by the Supreme Court of Virginia defines "determine" as "to fix conclusively or authoritatively." *Webster's Third New International Dictionary* at 616 (2002) (definition 1a of "determine"). But the applicable standard of proof does not require the jurors to definitely, conclusively, or authoritatively "determine" the causation issues in the case. There are many cases where a plaintiff can and should recover even if the jurors are unable to authoritatively determine "the cause" of an injury. All that is required is proof establishing that it is probable that the defendant's negligence was a proximate cause.

- **Instruction D could cause the jurors to give undue emphasis to possibilities.**

The language used in Instruction D directed the jurors' attention to things that "might" have caused the plaintiff's injury. Under the law, however, what

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matters is not possibilities concerning what "might" have caused the injury but instead what cause or causes of the injury are proved by the greater weight of the evidence. Unsupported speculations regarding possible causes of an injury, condition, or death are inadmissible as evidence and, even if admitted without objection, they clearly should not control the jury's deliberations. *See, e.g., Fairfax Hosp. Sys. v. Curtis,* 249 Va. 531, 536, 457 S.E.2d 66, 69 (1995) ("[T]he law in this area deals with probabilities, not possibilities."). As a result, the type of evidence that supported Instruction D in *Hanger* was unusual and consisted of evidence which, if objected to, should be excluded as inadmissible in future cases.

> Instruction D gives compulsory direction in favor of only one party.

The hallmark of a good jury instruction is one that is "simple, impartial, clear, [and] concise." *Bryant v. Commonwealth,* 216 Va. 390, 392, 219 S.E.2d 669, 671 (1975) (emphasis added). The most impartial and fair manner of providing compulsory directions in a jury instruction is to do so is in a balanced way. *See Virginia Model Jury Instructions.*–Civil Instruction No. 3.050 (the instruction includes a compulsory direction in favor of the plaintiff and a compulsory direction in favor of the defendant). Instruction D given in the *Hanger* case gave a compulsory direction only in favor of the defendant. If a version of Instruction D is given in a future case, the court should also give a compulsory direction in favor of the plaintiff.

> Instruction D emphasizes a particular view of the evidence.

A jury instruction which emphasizes a particular view of the case is objectionable. *See* 10A *Michie's Jurisprudence of Virginia and West Virginia*, "Instructions," §25 (2024). The "either-or" structure and language of Instruction D addressed only one view of the evidence under which the jurors had to determine whether Dr. Raines' negligence was "the cause" of the injury or some other cause (for which he was not responsible) was "the cause." But that was only one way that the jurors could view the case. Under the law of proximate cause (set forth in the other jury instructions), the jury could have found that the defendant's negligence was "a" proximate cause of Hanger's injuries and, as a result, the jury had no need to "determine" whether there was also another cause.

Even if an instruction similar to Instruction D is deemed necessary, the language of Instruction D should be modified. Immediately below is a suggested modified version of Instruction D that the authors contend eliminates all of the problems that would be posed by reusing the language of Instruction D verbatim:

> If you believe the plaintiff's injury might have resulted from a cause for which the defendant might have been responsible and if you also believe the plaintiff's injury might have resulted from some other cause or causes for which the defendant was not responsible, you will need to decide whether the plaintiff has proved by the greater weight of the evidence that a negligent act or omission of the defendant was a proximate cause of the plaintiff's injury. If you find that has been proved, then the plaintiff can recover even if you believe there were also other causes that might have constituted or did constitute a proximate cause of the plaintiff's injury. If you find that the plaintiff has failed to prove by the greater weight of the evidence that a negligent act or omission of the defendant was a proximate cause of the plaintiff's injuries, then the plaintiff cannot recover.

Alternatively, if a court deems it necessary and appropriate to reuse the language of Instruction D verbatim, here is an additional instruction which should also be given to address the problems posed by the language of Instruction D:

If you find that the greater weight of the evidence proves that negligence of the defendant was a proximate cause of the plaintiff's injuries then the plaintiff can recover even if you believe that there might have been or were also other causes of the plaintiff's injury.


Joel R. McClellan

Defense Abuse of the Demurrer Standards

By Joel R. McClellan

In Virginia, the demurrer is a responsive pleading used by defendants to challenge the legal sufficiency of the plaintiff's complaint. *Pendleton v. Newsome,* 290 Va. 162, 171, 772 S.E.2d 759, 763 (2015). The demurrer permits the defendant to challenge a plaintiff's complaint on the grounds that the complaint "does not state a cause of action or fails to state facts upon which the relief demanded can be granted." *Dean v. Dearing,* 263 Va. 485, 490, 561 S.E.2d 686, 689 (2002). In other words, a demurrer can make either or both of the following arguments: a) even if all of the allegations of the plaintiff's complaint are accepted as true, Virginia law does not recognize any theory of liability based upon those allegations; b) the complaint makes insufficient allegations of facts to support liability under Virginia law.

The demurrer plays a well-recognized and important role in Virginia litigation. There is no point in the parties and the Court litigating a claim which asserts a theory of liability which is not recognized under Virginia law. So too, a lawsuit should not proceed if the factual allegations of the complaint are not even sufficient to give the defendant notice of the nature of the claim against it. When a demurrer is granted, the plaintiff's complaint will be dismissed unless the plaintiff amends the complaint to address its deficiencies.

Demurrers are governed by clear and restrictive standards.

The legal standards that govern whether a demurrer should be granted or denied are very well-established and quite restrictive. Few principles are more clearly established than the principle that on a demurrer a court must consider only the allegations of the complaint and any exhibits attached to the complaint. In ruling on a demurrer, the court must be "confined to those facts that are expressly alleged, impliedly alleged, and which can be inferred from the facts alleged." *Harris v. Kreutzer,* 271 Va. 188, 195, 624 S.E.2d 24, 28 (2006). All such factual allegations are admitted as true in ruling on a demurrer. *See, e.g., Rosillo v. Winters,* 235 Va. 268, 270, 367 S.E.2d 717, 717 (1988).

"A demurrer, unlike a motion for summary judgment, does not allow the court to evaluate and decide the merits of a claim[.]" *Fun v. Va. Military Inst.,* 245 Va. 249, 252, 427 S.E.2d 181, 183 (1993). Nor can a demurrer be used to "incorrectly . . . short-circuit[] litigation pretrial and . . . decide[] the dispute without permitting the parties to reach a trial on the merits." *Assurance Data, Inc. v. Malyevac,* 286 Va. 137, 139, 747 S.E.2d 804, 805 (2013) (citations omitted).

Indeed, the very limited nature of the matters which can be properly relied upon in a demurrer and its supporting brief is expressly set forth by statute.

> In any suit in equity or action at law, the contention that a pleading does not state a cause of action or that such pleading fails to state facts upon which the relief demanded can be granted may be made by demurrer. *All demurrers shall be in writing and shall state specifically the grounds on which the demurrant concludes that the pleading is insufficient at law. No grounds other than those stated specifically in the demurrer shall be considered by the court.* A demurrer may be amended as other pleadings are amended.

Va. Code § 8.01-273(A) *(emphasis added).*

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Demurrers which fail to comport with these standards are improper.

Despite these very clear standards, defendants and their counsel all too often choose to file demurrers and supporting submissions which violate the governing law by making assertions which go beyond the allegations of the complaint. This is a plainly improper practice which undermines the demurrer process which is intended to involve a purely legal inquiry into the sufficiency of the plaintiff's complaint and its allegations. Instead of focusing on whether the allegations of the complaint are sufficient to state a cause of action, defense counsel may improperly use the demurrer as a vehicle for presenting extraneous facts or matters that are outside the scope of the pleadings.

A defendant corporation might file a demurrer, for example, which argues that the plaintiff's claim should be dismissed because the driver that the complaint alleges negligently drove the corporation's truck at the time of the collision was not an employee but instead was an independent contractor. The defendant corporation might support its demurrer by attaching an independent contractor agreement to the demurrer or the supporting brief. This is plainly improper since the demurrer must be decided solely on the basis of the allegations of the complaint[1] (and any exhibits which are attached to the complaint). If the complaint alleges that the driver was an employee or agent of the defendant corporation who was acting in the course and scope of his employment or agency at the time of the collision, those allegations must be accepted as true on demurrer. Any assertions and any submissions by the defendant which go outside of the allegations of the complaint cannot properly be considered by the trial court in ruling on the demurrer.

Another example of abusive demurrer practice can arise in a premises liability case. The plaintiff's complaint alleges that the plaintiff was injured because the defendant, who owned and operated an apartment complex where the plaintiff tripped on an obstruction in a common area, breached its duty to use reasonable care to have its property in a safe condition. Defense counsel representing the owner of the property might with its demurrer submit a photograph which the defendant contends shows that the area involved was in safe condition. This is clearly improper on demurrer.

Any defense submissions or contentions on demurrer which go beyond the complaint and any exhibits thereto must not be considered on demurrer. *See* 1 *Bryson on Virginia Civil Procedure* § 6.03[5][a] (5th ed. 2025) ("[T]he defendant may not assert new matter in his or her demurrer; a demurrer that alleges new facts is a 'speaking demurrer' and will be stricken from the record."); *City of Chesapeake v. Culpepper,* 106 Va. Cir. 212, 213 (Chesapeake Cir. Ct. 2020) ("[A] demurrer cannot introduce new facts in support of itself; this is an impermissible 'speaking demurrer.'"); *Williams Trading LLC v. Manaster,* 111 Va. Cir. 240, 245 (City of Richmond Cir. Ct. 2023) ("A demurrer that introduces new facts is an impermissible 'speaking demurrer,' and the Court must strike such facts from the record."); *e.g., Culpepper,* 106 Va. Cir. at 213-14 ("In the instant case, the defendant's demurrer appears to factually challenge the allegations set forth in the complaint, but does not provide a legal basis for why the complaint fails to state a valid cause of action. Taking the factual allegations in the complaint as true, as required on demurrer, the Court is of the opinion that the complaint sufficiently states a cause of action . . . [and thus] the defendant's demurrer is overruled.").

Despite these clear limitations, defense counsel may abuse the demurrer standards and base some or all of a demurrer and a supporting brief on facts, matters, evidence that are found nowhere in the complaint. Likewise, defense counsel may rely on an exhibit that did not accompany the complaint (and that was never made part of the complaint by means of a successful

[1] Even if the contract could be considered it would not be controlling in a tort action on the issue of employment/agency. The determination of that issue would depend upon the jury's consideration of all the facts proved by all of the evidence presented at trial.

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motion craving oyer). *Cf. Williams Trading LLC v. Manaster,* 111 Va. Cir. 240, 245 (City of Richmond Cir. Ct. 2023) ("Although documents incorporated through oyer may supplement a pleading's factual assertions, parties may not advance new issues at the demurrer stage.").

This type of improper and abusive practice can be damaging. An able judge ruling on a demurrer will hopefully recognize that she cannot consider facts, matters, etc. outside of the complaint and cannot base her ruling on them. The judge may focus on the allegations of the complaint and deny the "speaking demurrer."

But there is the very real possibility that the trial court, after reading the demurrer and its supporting memorandum that refers to extraneous factual assertions and other matters, will be incurably prejudiced going forward. The judge can never be returned to a state when she was not exposed to this improper material. The introduction of these improper matters by defense counsel by means of a demurrer creates the very real danger that the trial court may be, whether consciously or unconsciously, influenced and have its view of the plaintiff's claims affected. As the saying goes, "one cannot unring the bell."

Suggestions for how plaintiff's counsel can respond to this abusive practice

Plaintiffs' counsel are often fairly tolerant of "speaking demurrers" and confine their response to submitting a brief which sets forth the proper demurrer standards and demonstrates that under those standards the defense demurrer must be denied. Given the prevalence of "speaking demurrers," however, plaintiffs' counsel should consider whether more assertive steps must be taken to put a stop to abusive demurrers. Something seemingly needs to be done to end this improper practice. Despite the clear law against "speaking demurrers," and despite pervasive briefing by plaintiffs' counsel which demonstrates that they are improper, defendants and their counsel continue to file them.

Given the serious consequences of "speaking demurrers" and the clarity of their impropriety, leniency is probably not warranted. Even when the trial court follows the demurrer standards and rules properly, the trial court has still been exposed to assertions, materials, and arguments which never should have been made or considered. Moreover, every "speaking demurrer" improperly forces plaintiff's counsel and the trial court to incur time, trouble, and expense to determine what part of the defendant's submissions can be considered and what parts cannot be considered. Since there is no good faith basis for filing a "speaking demurrer," and since it seems that they serve no proper purpose and can only serve improper purposes (influencing the trial court with improper matters, wasting resources of the courts and the opposing party, etc.), trial courts should perhaps be urged to consider imposing sanctions upon a defendant and defense counsel who have filed a "speaking demurrer." Sanctions may be especially appropriate against defense attorneys who are repeat offenders.

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Although each case is different, shortly after receiving an improper "speaking demurrer" plaintiff's counsel should send defense counsel a letter reminding counsel that the demurrer and supporting submissions violate Virginia law since they contain factual assertions and attachments which the court must not consider on demurrer and which cannot properly have any bearing on the trial court's ruling. The letter should ask defense counsel to file an additional copy of the demurrer and supporting submissions on which every improper assertion, argument, and supporting document is blacked out so they are illegible. If defense counsel fails to do this, plaintiff's counsel could ask the trial court to order the defendant and defense counsel to do so.[2]

The letter should also request defense counsel to refrain from making such filings in the future. In this regard, it would be helpful for plaintiff's counsel to keep an ongoing firmwide log of each defense counsel who has filed a "speaking demurrer." The log should include each case where this has occurred as well as a copy of the plaintiff's brief and letter which plainly reminded defense counsel of the impropriety of "speaking demurrers." This data could then be used later to support a filing with the court, and perhaps even a motion for sanctions.

The Virginia good-faith pleading statute provides in pertinent part:

> The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Va. Code § 8.01-271.1.

When a defendant or defense counsel files a demurrer and a brief in support which make assertions and submit materials which cannot have any proper bearing on the trial court's decision, can only improperly influence the trial court's decision, and will cause waste of judicial and litigant resources, it would seem that those submissions are not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law" and cannot serve any purpose other than an improper purpose.

Perhaps it will be suggested that seeking sanctions in response to "speaking demurrers" is uncivil or too harsh. **But the goal of civility among counsel surely does not require litigants or the courts to accept blatant violations of clear law.** And "speaking demurrers" which constitute blatant violations of clear law are deserving of a stern response for the reasons outlined above. Indeed, in some (perhaps many) situations, the defense attorney who has filed a "speaking demurrer" has done so before and will continue to do so unless some serious consequence is imposed to stop this improper practice. A request for sanctions should be considered, especially in cases involving a defense attorney who repeatedly has filed "speaking demurrers."

[2] It is unclear whether the trial court could strike the improper portions of the demurrer and supporting submissions. *But see Williams Trading LLC v. Manaster,* 111 Va. Cir. 240, 245 (City of Richmond Cir. Ct. 2023) ("A demurrer that introduces new facts is an impermissible 'speaking demurrer,' and the Court must strike such facts from the record."). The better course would probably be for the trial court to order the defendant and defense counsel to file marked up submissions which remove or at least black out the improper facts, arguments, and materials. Surely, the trial court has the authority to order the defendant and its counsel to file submissions which comply with the governing legal standards.


Heidi M. Wolff-Stanton

For Whom The SOL Tolls ... and other aspects of the Servicemembers Civil Relief Act

By Heidi M. Wolff-Stanton

The Servicemembers Civil Relief Act ("SCRA"), 50 U.S.C. §§ 3901 et seq. (initially enacted in 1940 as the Soldiers and Sailors Civil Relief Act, 50 U.S.C. App. §§ 501, et seq.) "relieve[s] servicemembers of many civil burdens while they serve" in the military. *Espin v. Citibank, N.A.,* 126 F.4th 1010, __ [LEXIS *10] (4th Cir. 2025) (citing *Gordon v. Pete's Auto Serv. of Denbigh, Inc.,* 637 F.3d 454, 457-58 (4th Cir. 2011)). Specifically, the SCRA is intended 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(2).

Of particular significance to legal proceedings, "[t]he 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 . . . by or against the servicemember[.]" 50 U.S.C. § 3936(a).

This article will explore what this statute means and how it applies in various situations regarding the tolling of legal deadlines, with particular focus on the statute of limitations.

Relevant statutory definitions

"The term 'servicemember' means a member of the uniformed services, as that term is defined in section 101(a)(5) of title 10, United States Code." 50 U.S.C. § 3911(1). "The term 'uniformed services'" includes "the armed forces," 10 U.S.C. § 101(a)(5)(A),[1] which in turn is defined as "the Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard." 10 U.S.C. § 101(a)(4).

For members of the armed forces, the term "military service" means "active duty." 50 U.S.C. § 3911(2)(A)(i),[2] including "any period during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause." 50 U.S.C. § 3911(2)(C). "The term 'active duty' means full-time duty in the active military service of the United States," including "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) (emphasis added).[3]

[1] The term "uniformed services" also includes "the commissioned corps of the National Oceanic and Atmospheric Administration" as well as "the commissioned corps of the Public Health Service." 10 U.S.C. § 101(a)(5)(B) & (C), respectively.

[2] "[I]n the case of a servicemember who is a commissioned officer of the Public Health Service or the National Oceanic and Atmospheric Administration," "military service" means "active service." 50 U.S.C. § 3911(2)(B).

[3] "[I]n the case of a member of the National Guard," the term "active duty" "includes service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days . . . for purposes of responding to a national emergency declared by the President and supported by Federal funds." 50 U.S.C. § 3911(2)(A)(ii).

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"The term 'period of military service' means the period beginning on the date on which a servicemember enters military service and ending on the date on which the servicemember is released from military service or dies while in military service." 50 U.S.C. § 3911(3). "Nothing in either the SCRA or the incorporated portions of 10 U.S.C. § 101 suggests that a servicemember must be deployed or stationed abroad for the SCRA to apply." *Warta v. Porter, McGuire, & Kiakona, LLP,* 622 F. Supp. 3d 971, 982 (D. Haw. 2022); *accord Cabrera v. Perceptive Software, LLC,* 147 F. Supp. 3d 1247, 1250 (D. Kan. 2015) ("Courts have not treated 'military service' under the SCRA as the equivalent of deployment; rather, it is... defined more broadly than deployment.").

The SCRA applies to servicemembers as defendants and as plaintiffs

Significantly, given the statutory phrase "by or against the servicemember," 50 U.S.C. § 3936(a), the SCRA tolling provision can benefit both servicemembers who are plaintiffs and servicemembers who are defendants.

For example, defendants can invoke the SCRA to shield their legal interests with respect to default judgments, mortgage foreclosures, tenant evictions, and redeeming property at tax sales, among other things. *See Espin,* 126 F.4th at __ [LEXIS *10] (citing *Gordon,* 637 F.3d at 457-58).

Similarly, plaintiffs can invoke the SCRA to shield their claims from assertions of the statute of limitations. *See, e.g., Sedler v. Select Props., Inc.,* 67 Va. Cir. 515, 516 (Loudoun County Cir. Ct. 2004) (overruling defense's plea in bar because plaintiff's "military service tolls the statute of limitations" in his breach of fiduciary duty action); *The West Point,* 71 F. Supp. 206, 208-09 (E.D.Va. 1947) (the Act applied to statutory requirement for filing of notice of claim for personal injury against municipality such that period in military service was not included in computing time within which such notice could be filed); *Cabrera v. Perceptive Software, LLC,* 147 F. Supp. 3d 1247, 1250 (D. Kan. 2015) (servicemember's employment discrimination claims were not time-barred due to his active military service); *Murphree v. Communications Techs., Inc.,* 460 F. Supp. 2d 702, 711 (E.D. La. 2006) (limitations period on servicemember's state law tort claims did not run during his period of active military service); *Cruz v. General Motors Corp.,* 308 F. Supp. 1052 (S.D.N.Y. 1970) (statutes of limitations for state law tort actions were tolled until plaintiff retired from the Navy).

Servicemembers need not show prejudice to claim the benefits of the SCRA

The servicemember is not required to show that military service prejudiced his/her ability to participate in the legal proceedings in order for the SCRA to toll the statute of limitations. *See Conroy v. Aniskoff,* 507 U.S. 511, 514 (1993) ("The statutory command in [the Act] is unambiguous, unequivocal, and unlimited" and nothing "justif[ied] a departure from the unambiguous statutory text."); *Warta v. Porter, McGuire, & Kiakona, LLP,* 622 F. Supp. 3d 971, 983 (D. Haw. 2022) ("Because tolling under the SCRA is unconditional and mandatory, the statute of limitations is still tolled even if the servicemember had actual notice of the claim during his military service.").

"[T]he servicemember need not show prejudice. The only relevant factor is military service. Once it is shown, the period of limitations is automatically

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tolled for the duration of military service." *Sedler v. Select Props., Inc.,* 67 Va. Cir. 515, 516 (Loudoun County Cir. Ct. 2004) (*citing In re A. H. Robins Co.,* 996 F.2d 716 (4th Cir. 1993); *Ricard v. Birch,* 529 F.2d 214 (4th Cir. 1975)).

Thus, if the plaintiff qualifies as a servicemember under the Act, then the personal injury limitations period is automatically tolled. *See Kilfoile v. Sherman,* 535 S.W.2d 69 (Ky. 1975) (reversing dismissal of servicemember's personal injury action as time barred); *Card v. American Brands Corp.,* 401 F. Supp. 1186 (S.D.N.Y. 1975) (denying motion to dismiss servicemember's personal injury action as time barred); *Lopez v. Waldrum Estate,* 249 Ark. 558, 563-64, 460 S.W.2d 61, 65 (Ark. 1970) (personal injury statute of limitations was tolled during the period of plaintiff's military service).

Likewise, if the defendant is serving in the military, the statute is also tolled. *See Ray v. Porter,* 464 F.2d 452, 455-56 (6th Cir. 1972) (reversing dismissal of personal injury action against a servicemember as time barred); *Henderson v. Miller,* 477 S.W.2d 197 (Tenn. 1972) (reversing dismissal of personal injury action against a servicemember as time barred); *Bowles v. Dixie Cab Ass'n,* 113 F. Supp. 324 (D.D.C. 1953) (denying defendant servicemember's motion for summary judgment based on the statute of limitations in a personal injury action against him); *Kenney v. Churchill Truck Lines, Inc.,* 6 Ill. App. 3d 983, 992-93, 286 N.E.2d 619, 626 (Ill. Ct. App. 1972) (plaintiff's wrongful death claim was timely because defendant's military service tolled limitations period).

As a practical matter, the statute of limitations is paused during military service and resumes running upon cessation of service. *See, e.g., Smith v. Sikorsky Aircraft Corp.,* 41 F. Supp. 3d 564, 571 (S.D. Tex. 2014) ("Plaintiff's injury occurred on January 12, 2009. As of his entry on federal active military duty on July 26, 2009, 194 days of the 730-day statute of limitations had expired. When he separated from active military duty on March 10, 2012, there were 536 days remaining before the statute of limitations expired. That time period expired on August 28, 2013[.]"). Stated otherwise, the time which is tolled is simply not counted (and is omitted from) the running of the limitation period. *See DeTemple v. Leica Geosystems, Inc.,* 576 F. App'x 889, 893 (11th Cir. 2014).

In effect, then, active military members get an extended limitations period. *See Van Heest v. Veech,* 58 N.J. Super. 427, 431, 156 A.2d 301, 303 (N.J. Law Div. 1959) ("its purpose is merely to extend the time in which an action may be brought by or against a person in military service"); *Harris v. Stem,* 30 So. 2d 889, 892 (La. Ct. App. 1947) (The applicable one-year limitations period "was plainly interrupted during the services of Harris in the Armed Forces of the United States and his right to bring this suit continued in existence until one year from his [military] discharge.").

The SCRA merely pauses proceedings; it does not immunize servicemembers

"That a statute of limitations is tolled during a servicemember's active duty does not mean that an action cannot be commenced by or against the servicemember." *Brandt v. Weyant (In re Brandt),* 437 B.R. 294, 305 (Bankr. M.D. Tenn. 2010). "A party on active duty in the armed forces is entitled to a stay of proceedings . . . but there is no immunity from suit. The . . . period of limitations is automatically tolled for the duration of the [military] service, though an adverse [party] may file sooner if service of process may be had." *Ricard v. Birch,* 529 F.2d 214, 217 (4th Cir. 1975).

Furthermore, "[t]he SCRA does not prevent laches from barring a servicemember's claims, as laches is a limitation on stale claims entirely independent of any applicable statutes of limitations." *Warta v. Porter, McGuire, & Kiakona, LLP,* 622 F. Supp. 3d 971, 983 (D. Haw. 2022) (internal quotation marks omitted); *accord Cornetta v. United States,* 851 F.2d 1372, 1378 (Fed. Cir. 1988); *e.g., Taylor v. N.C. Dep't of Transp.,* 86 N.C. App. 299, 357 S.E.2d 439 (1987) (plaintiff brought a claim against defendant North Carolina Department

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of Transportation regarding the taking of rights of way in 1974 as part of a highway project; plaintiff was a servicemember from 1957 until 1983; plaintiff learned of the project in 1976 but failed to bring suit until 1985; the court held that the plaintiff's claim was not barred by the applicable statute of limitations because it was tolled until plaintiff's retirement from military service in June 1983; but the court held that the plaintiff's claim was barred by the doctrine of laches).

Being "servicemember-adjacent" does not qualify for protection

Although a servicemember's family members may also be disrupted by the family member's military service, "the SCRA has been held to be inapplicable to immediate family members." *Spratt v. Bishop,* 2016 Tenn. App. LEXIS 502, at *5 (Tenn. App. 2016) (citing *Card v. Am. Brands Corp.,* 401 F. Supp. 1186, 1187 (S.D.N.Y. 1975) (holding that the benefits of the tolling protection of the SCRA "are afforded only to members of the Army, Navy, Marines, Coast Guard and certain public health officers, and no others.")); *accord Lopez v. Waldrum Estate,* 249 Ark. 558, 563-64, 460 S.W.2d 61, 63-65 (Ark. 1970) (servicemember's wife and child do not get the benefit of the SCRA).

Likewise, persons working alongside or similarly to servicemembers do not get the benefits of the Act. For example, an employee of a private defense contractor that provides services to the United States military is not covered by the Act. *See Verhey v. Stewart,* 82 Va. Cir. 482, 484 (Fairfax Cir. Ct. 2011); *In re Gaddy,* 2004 Bankr. LEXIS 1392, 2004 WL 2044107, *3 (Bankr. D. Kan. 2004) (unpublished decision) ("[The Act] clearly does not apply to someone who is simply a civilian employee of a private contractor doing work for the uniformed services of the United States.").

What if the servicemember is merely a stand-in representative for another?

There is a split of authority regarding whether the Act applies to servicemembers when pursuing claims in a representative capacity. *See Dowling v. A.R.T. Inst. of Wash., Inc.,* 372 F. Supp. 3d 274, 293 (D. Md. 2019) ("where . . . the servicemember brings claims in a representative capacity, the SCRA's applicability is not as straightforward."); *compare Kerstetter v. United States,* 57 F.3d 362, 366 (4th Cir. 1995) (holding that the SCRA did not toll the servicemember's claims for medical expenses arising from the injuries sustained by his minor daughter in connection with a medical malpractice action) *with Wilcox v. Les Schwab Tire Ctrs. of Or., Inc.,* 293 Ore. App. 452, 457, 428 P.3d 900, 903 (2018) ("[T]he SCRA did toll the statute of limitation for plaintiff's wrongful-death action for the period in which plaintiff was on active duty with the Air Force. As noted, the text of the SCRA does not distinguish between actions brought by servicemembers in an individual capacity and those brought in a representative capacity."); *compare Stutz v. Guardian Cab Corp.,* 273 A.D. 4, 8, 74 N.Y.S.2d 818, 822 (1st Dep't 1947) ("Viewing the [wrongful death] action in the present complaint as one to compensate the plaintiff individually as sole next of kin . . . it logically follows that his rights as the real party in interest are protected by the [SCRA] and . . . serve[s] to toll the Statute of Limitations with respect to the cause of action for wrongful death during the time of his military service.") *with McCoy v. Atlantic Coast Line R.R. Co.,* 229 N.C. 57, 61, 47 S.E.2d 532, 535 (1948) (the plaintiff administrator of the estate, in bringing a claim of wrongful death on behalf of the decedent's estate, cannot benefit from the tolling provisions of the SCRA).

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