



Plaintiff alleges that Campbell was an agent and servant of Defendant and was in the course and scope of her employment at the time the accident occurred. *Id.* at ¶ 7. Plaintiff therefore asserts Defendant is vicariously liable under the doctrine of *respondeat superior* and the South Carolina Tort Claims Act (S.C. CODE ANN. § 15-78-10 *et. seq.*) for the alleged tortious conduct of Campbell. *Id.* Plaintiff makes no allegation that Defendant was independently negligent outside of its vicarious liability for the alleged tortious acts of Campbell.

Prior to initiating this suit, Plaintiff asserted claims under Campbell's liability insurance coverage and two separate underinsured motorist policies. USAA, Campbell's liability carrier, paid Plaintiff its policy limits of \$100,000, and, pursuant to the payment, Plaintiff executed a document entitled "State of South Carolina Covenant Not to Execute, Policy Release, and Settlement Agreement" on July 2, 2020. Plaintiff likewise received two separate payments of \$25,000 of the respective policy limits of the two UIM carriers: Progressive Insurance Company and Root Insurance Company. Each of the three payments were tendered prior to Plaintiff initiating the instant action.

Despite having settled her claim arising out of the motor vehicular accident with Campbell, Plaintiff filed her Complaint against Defendants State of South Carolina and Office of the Governor on March 18, 2021 asserting the theory of vicarious liability. Defendants filed a motion to dismiss the complaint on April 16, 2021, arguing the State of South Carolina was an improperly named entity under the Tort Claims Act and further that Campbell was not acting within the course and scope of employment at the time of the incident. Plaintiff agreed to dismiss the State of South Carolina as a defendant and proceed solely against the Office of the Governor where Campbell serves as Special Assistant to the First Lady and Governor's Mansion Director. Opposing affidavits were submitted regarding whether Campbell was acting within the course and scope of

her employment during the accident, and this Court ruled that the resulting factual dispute precluded dismissal of the Complaint. Of particular note, the affidavit submitted by Plaintiff to this Court on September 22, 2021 specifically averred that, at the scene of the accident, Campbell allegedly informed Plaintiff that Campbell was employed by Defendant and was out purchasing decorations for an upcoming event at Defendant's office when the accident occurred. Therefore, at the time Plaintiff settled her claim arising out of the motor vehicular accident with Campbell, Plaintiff was aware of her potential vicarious liability claim against Defendant.

Defendant now moves for summary judgment on the grounds that Plaintiff's settlement and release of her claim against alleged tortfeasor Campbell extinguished Defendant's derivative liability based upon Campbell's allegedly tortious conduct.

#### **STANDARD OF REVIEW**

Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 42, 747 S.E.2d 178, 181 (2013). "In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment." *Id.*; *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 425, 746 S.E.2d 35, 38 (2013).

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (citations omitted). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply

rest on mere allegations or denials contained in the pleadings. . . . Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial.” *Ellis v. Davidson*, 358 S.C. 509, 518-19, 595 S.E.2d 817, 822 (Ct. App. 2004). “[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” *Id.* at 518, 595 S.E.2d at 822.

### **ORDER**

Prior to initiating the present suit, Plaintiff made a claim arising out of the motor vehicular accident directly against Campbell under her automobile liability policy and settled the claim with Campbell under a covenant not to execute. As a result of Plaintiff’s settlement with Campbell, Defendant’s potential vicarious liability for Campbell’s alleged tortious conduct was extinguished as a matter of law.

Under South Carolina law, settlement of a claim against an employee “operates as an acquittal of the employer who is only derivatively liable.” *Andrade v. Johnson*, 345 S.C. 216, 226, 546 S.E.2d 665, 670 (Ct. App. 2001), *reversed on other grounds* 356 S.C. 238, 588 S.E.2d 588 (2003). The question of the effect of a settlement with an employee/agent on an employer/principal’s derivative liability was squarely before the court in *Andrade*.

In *Andrade*, the plaintiff consumer sued a heating contractor and SCE&G, alleging (amongst other claims) the contractor negligently installed HVAC systems in the plaintiff’s home while working as an agent of SCE&G. The plaintiff executed a covenant not to sue with the agent contractor whereby she agreed not to bring suit against the contractor, but specifically reserved the right to pursue a suit against SCE&G as the contractor’s principal. *Id.* at 221-22, 546 S.E.2d at 667-68. SCE&G as the principal moved for summary judgment on the plaintiff’s vicarious liability claims asserted against it arguing, as Defendant does here, its vicarious liability was extinguished

upon the plaintiff's executed settlement with the agent contractor. *Id.* The trial court granted the motion, and the plaintiff appealed the decision to the Court of Appeals which held the trial court properly granted SCE&G's motion for summary judgment. *Id.* at 221, 546 S.E.2d at 668.

At the outset, the Court of Appeals noted the question had not been answered in South Carolina. *Id.* at 223, 546 S.E.2d at 668-69. Critically, the court first held that form of the settlement i.e. a full release, covenant not to sue, or covenant not to execute, is not dispositive of the issue. *Id.* at 224, 546 S.E.2d at 669. Rather, the court observed "[t]he most important factor is the type of liability and the relationship *inter se* of the various allegedly liable parties rather than the type of document used to discharge liability." *Id.* Thus, Plaintiff cannot distinguish *Andrade* from the present case by arguing the covenant not to execute here somehow alters the analysis. Instead, as emphasized by the Court of Appeals, the key question is "whether the liability arises *only* vicariously because of the negligence of another party or whether the parties are true joint tortfeasors, both being independently negligent toward the third party." *Id.* (emphasis in original).

The Court of Appeals concluded that, when the plaintiff executed the covenant not to sue with the agent, her claims against the agent were terminated, and, therefore, the derivative liability of the principal was extinguished. *Id.* at 226-27, 546 S.E.2d at 670. The court noted that this conclusion is bolstered by the fact vicariously liable employers/principals have full rights of indemnity against a tortfeasor employee/agent. *Id.* at 226, 546 S.E.2d at 670 (internal citations omitted). The court reasoned that if the employer/principal's vicarious liability was not terminated, then the employer/principal could seek full compensation from the employee/agent who had settled, which would strip the covenant not to sue of any real meaning. *Id.* Stated another way, extinguishing the employer/principal's derivative liability protects the settling employee/agent from an indemnity claim.

The Court of Appeals therefore held that South Carolina common law was clear that a covenant in favor of an agent released a principal: “[A] covenant not to sue, which ordinarily does not release another joint-tortfeasor from liability, does operate as a release of the master, liable only under *respondeat superior*, if given to the servant responsible.” *Id.* (quoting *Seaboard Air Line R.R. v. Coastal Distrib.*, 273 F. Supp. 340, 343 (D.S.C.1967)).

Here, the holding in *Andrade* mandates that Defendant’s derivative liability was extinguished as a matter of law when Plaintiff settled her claim with Campbell. As noted in *Andrade*, the fact a covenant not to execute was utilized is of no moment – even when the covenant specifically provides that claims against Defendant were preserved. Again, as the Court of Appeals noted, the type of document used to effectuate the settlement is not dispositive, but rather the relationship of the parties and whether the employer’s liability is solely vicarious. Thus, regardless of the fact that Plaintiff’s settlement with Campbell was under a covenant not to execute, summary judgment on Plaintiff’s vicarious liability claim against Defendant is proper because Plaintiff has alleged that Defendant’s liability arises only vicariously because of the purported negligence of Campbell. *See also Oyuela-martinez v. Kuhn & Kuhn, LLC*, No. 2019-CP-10-00341, 2020 WL 12932358, at \*2 (S.C.Com.Pl. May 28, 2020) (Judge Bentley Price holding that an employer’s derivative liability was extinguished when the alleged tortfeasor employee executed a covenant not to execute with the employee) *aff’d Oyuela-Martinez v. Kuhn & Kuhn, LLC*, No. 2020-000932, 2022 WL 2826358 (S.C. Ct. App. July 20, 2022).

Counsel for the Plaintiff argued that the case of *Wade v. Berkeley Cty.*, 348 S.C. 224, 559 S.E.2d 586 (2002) should be controlling however that case is distinguishable. There, the Supreme Court held that the plaintiff’s execution of a covenant not to execute with a tortfeasor employee was not a “settlement” within the meaning of S.C. CODE ANN. § 15-78-70(d) of the Tort Claims

Act such that a later claim against the employer Berkeley County was not statutorily barred. *Id.* In *Wade*, the plaintiff settled with a tortfeasor employee under a covenant not to execute and later sued the employer, Berkeley County, under a vicarious liability theory. *Id.* Berkeley County moved for summary judgment under § 15-78-70(d) of the Tort Claims Act which provides:

A settlement or judgment in an action or a settlement of a claim under this chapter constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence.

*Id.*

In applying the statute, the Supreme Court held that the settlement between the plaintiff and the tortfeasor employee was not made “under the act” within the meaning of the statute since no claim had been made against the County at the time of the settlement. *Id.* at 230, 559 S.E.2d at 588-89.

The *Wade* decision only considered the effect of S.C. CODE ANN. § 15-78-70(d) and did not address the separate common law principle that a settlement of a claim against an employee operates to extinguish the liability of the employer who is only derivatively liable. Defendant is not moving for summary judgment here pursuant to the provisions of § 15-78-70(d), but is instead moving for summary judgment based upon the common law principles applicable to employers and employees. The statutory provisions of the Tort Claims Act are threshold requirements which a plaintiff must satisfy in order for sovereign immunity to be waived and liability asserted against a State entity. *See* S.C. CODE ANN. § 15-78-20(a) (“ [I]t is declared to be the public policy of the State of South Carolina that the State, and its political subdivisions, are only liable for torts within the limitations of this chapter and in accordance with the principles established herein.”) Defendant did not argue it is entitled to sovereign immunity as a state entity under the terms of the Tort Claims Act. Rather, Defendant argued that, as an employer, its vicarious liability was extinguished upon

the settlement between Plaintiff and Campbell based on common law principles. Defendant's argument is not rooted in the provisions of the Tort Claims Act, but rather under principles of common law governing derivative liability recognized in *Andrade*. Defendant's status as an arm of the State is immaterial to its argument that its derivative liability as an *employer* was extinguished by the covenant not to execute signed by its employee.

Again, notwithstanding any public policy argument, it is the common law principles recognized in *Andrade* and not the statutory requirements of the Tort Claims Act that Defendant relies upon in its Motion. Thus, *Wade* is distinguishable from the present suit, and any potential argument by Plaintiff which relies upon *Wade* is without merit. As such, summary judgment is appropriate as explained above.

### **CONCLUSION**

As such, according to longstanding South Carolina common law and the principles adhered to in *Andrade*, the executed Covenant Not To Execute, Policy Release, and Settlement Agreement Plaintiff entered into with the employee Ms. Campbell, operates as a release of the employer, the Office of the Governor's Office who is only derivatively liable. The Office of the Governor's Office motion for summary judgment is hereby **GRANTED**.

**IT IS SO ORDERED.**

July \_\_\_\_, 2023

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William A. McKinnon  
Circuit Court Judge



Richland Common Pleas

**Case Caption:** Wanda Whetstone vs State Of South Carolina Office Of The Governor  
**Case Number:** 2021CP4001276  
**Type:** Order/Summary Judgment

So Ordered

/s William A. McKinnon, #2761, Resident Circuit  
Judge and Chief Admin. Judge for CP, 16th Cir.

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