

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable William A. McKinnon, Circuit Court Judge

Case No. 2023-001424

Wanda Whetstone

Appellant,

v.

State of South Carolina,
Office of the Governor

Respondent.

INITIAL BRIEF OF APPELLANT

Mitchell J. Williams
HARRIS, GRAVES & WILLIAMS, LLC
2725 Devine Street
PO Box 11566 (29211)
Columbia, SC 29205
(803) 799-2911
Attorney for Appellant

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STATEMENT OF THE ISSUE ON APPEAL

- I. DID THE CIRCUIT COURT ERR IN DETERMINING THAT SUMMARY JUDGMENT WAS PROPER FOR A GOVERNMENTAL ENTITY IN A CLAIM BROUGHT PURSUANT TO THE SOUTH CAROLINA TORT CLAIMS ACT WHEN THE APPELLANT HAD PREVIOUSLY ENTERED INTO A COVENANT NOT TO EXECUTE WITH THE INDIVIDUAL EMPLOYEE OF THE GOVERNMENTAL ENTITY FOR THE SAME OCCURRENCE?

STATEMENT OF THE CASE

Suit was filed in the Richland County Court of Common Pleas on March 18, 2021 against Respondent pursuant to the South Carolina Tort Claims Act, hereinafter “SCTCA”, for the tortious acts of its employee, Karen Campbell. Respondent filed a Motion to Dismiss on April 16, 2021 claiming Campbell was not acting within the course and scope of her employment at the time of the wreck. After reviewing affidavits and hearing arguments on the Motion to Dismiss the Circuit Court ruled that a factual dispute existed and denied respondent’s Motion to Dismiss.

Respondent then filed a Motion for Summary Judgment (Motion of January 18, 2023) and Memorandum In Support (Memorandum of January 18, 2023), on January 18, 2023, claiming that the Covenant Not to Execute entered between Appellant, Karen Campbell and USAA extinguishes any claim against Respondent based on a theory of vicarious liability (Motion of January 18, 2023). On July 20, 2023, Appellant filed a Memorandum of Law in Opposition to Respondent’s Motion for Summary Judgment (Memorandum of July 20, 2023).

On July 25, 2023, Respondent’s Motion for Summary Judgment was heard before the Honorable William A. McKinnon (Transcript of Hearing). Judge McKinnon granted Respondent’s Motion for Summary Judgment finding that based on South Carolina common law, the executed Covenant Not To Execute, Policy Release, and Settlement Agreement Appellant entered into with the employee Ms. Campbell, operates as a release of the employer, the Office of the Governor, who is only derivatively liable. On July 26, 2023, the Order granting Respondent’s Motion for Summary Judgment (Order of July 26, 2023) was filed with the Richland County Clerk of Court.

On August 2, 2023, Appellant timely filed a Motion for Reconsideration (Motion for Reconsideration). Appellant's Motion for Reconsideration was denied on a Form 4 Order filed August 8, 2023 (Form 4 Order). Appellant filed a Notice of Appeal on August 30, 2023 and served the Notice upon Respondent on September 1, 2023. The Appellant hereby files this brief in support of that Appeal.

STANDARD OF REVIEW

“An appellate court reviews a motion for summary judgment using the same standard employed by the circuit court.” Progressive Direct Ins. Co. v. Groves, 438 S.C. 26, 31, 882 S. E. 2d 464 (S.C. 2022) citing Trynum v. Scavens, 416 S.C. 197, 201, 786 S.E. 2d 115, 117 (2016). “Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Montgomery v. CSX Transport, Inc. 376 S.C. 37, 47 656 S.E. 2d 20, 25 (2008).

STATEMENT OF THE FACTS

On April 23, 2019 Appellant, Wanda Whetstone, was involved in a vehicle collision in the 5000 Block of Trenholm Road in Richland County, SC. Appellant was traveling southbound on Trenholm Rd. when Karen Campbell, an employee of Respondent, failed to yield the right of way while turning left onto Trenholm Rd. out of a business driveway and collided with Appellant. This collision caused injuries and damages to Appellant.

Appellant filed a claim with USAA, the insurance carrier of Respondent's employee, Karen Campbell. Ms. Campbell's carrier offered the policy limits of \$100,000 which was accepted by Appellant through a document entitled "STATE OF SOUTH CAROLINA COVENANT NOT TO EXECUTE, POLICY RELEASE, AND SETTLEMENT AGREEMENT". (Covenant) The Covenant Not to Execute specifically reads in part, "This Covenant is not intended to and does not release any claim that the undersigned may have against any other parties or that might be due from any other insurance company." (Covenant, ¶2). Appellant also collected an additional \$50,000 of underinsured coverage from two first party policies of insurance.

Appellant believes that at the time and place in question, Karen Campbell was acting within the course and scope of her employment with the Office of the Governor. Pursuant to the "SCTCA", S.C. Code of Laws §15-78-10 et. seq., Respondent is responsible for the tortious acts of Ms. Campbell. As a result, this action was instituted on March 18, 2021 against Respondent, Office of the Governor, seeking recovery for injuries sustained in the April 23, 2019 collision.

ARGUMENT

I. DID THE CIRCUIT COURT ERR IN DETERMINING THAT SUMMARY JUDGMENT WAS PROPER FOR A GOVERNMENTAL ENTITY IN A CLAIM BROUGHT PURSUANT TO THE SOUTH CAROLINA TORT CLAIMS ACT WHEN THE APPELLANT HAD PREVIOUSLY ENTERED INTO A COVENANT NOT TO EXECUTE WITH THE INDIVIDUAL EMPLOYEE OF THE GOVERNMENTAL ENTITY FOR THE SAME OCCURRENCE?

Appellant made a claim, and resolved the claim, against Karen Campbell, an employee of Respondent, Office of Governor, by and through the employee's personal automobile insurance carrier, USAA. Respondent claims this extinguishes the Appellant's claim against Respondent. However, because this claim is brought pursuant to the "SCTCA" this claim is governed by the case law and statutes of the "SCTCA" which allows Appellant's claim to proceed. Therefore, the Court erred in granting Respondent's Motion for Summary Judgment.

The Court entered an Order granting Summary Judgment on July 26, 2023. The basis of the Courts decision was *Andrade v. Johnson*, 345 S.C. 216, 546 S.E.2nd 665 (Ct. App. 2001) and a finding that the common law, created in *Andrade*, controlled. The Order distinguishes *Wade v. Berkeley County*, 348 S.C. 224, 559 S.E. 2d 586 (2002) by pointing to Respondent's argument that its Motion is based on the common law and not the "SCTCA". The Court notes; "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." Order, P.8, ¶2. However, without the "SCTCA" there is no liability for any governmental entity and the "SCTCA" sets forth the liability, limitations and exclusions of the state and its political subdivisions. S.C Code Ann. §15-78-20(a) states: "It 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.” The “SCTCA” controls all actions brought pursuant to the Act and all decisions interpreting the act apply including the decision in *Wade*.

One of the principles established within the “SCTCA” is that claims be brought against a governmental entity for a tortious act of its employee. In addition, the “SCTCA” states the agency or political subdivision must be substituted as the party defendant if the employee is individually named. S.C. Code Ann. §15-78-70(c). The “SCTCA” is devoid of any language allowing the state or its political subdivisions to pursue any indemnity from its employees or agents as found in *Andrade*.

Respondent claims, and the Court found, that Appellant’s resolution of a claim against an employee of Respondent extinguishes the vicarious liability claim against Respondent as employer. The Court found that the authority for the extinguishment of Respondent’s vicarious liability is *Andrade*. However, *Andrade* was not a case involving the “SCTCA”. *Andrade* was a case brought against a contractor who was not an employee of South Carolina Electric & Gas, hereinafter “SCE&G”, but had a tenuous connection with “SCE&G” through a promotional campaign. After signing a covenant not to sue with the contractor, the Plaintiff pursued a case against “SCE&G” for its vicarious liability through the contractor. The Court of Appeals ruled that the covenant not to sue entered into with the contractor also operated as a release of the principal when the principal is only derivatively liable.

In deciding *Andrade*, the Court pointed to common law that “in South Carolina, a master or principal only vicariously liable does not have an aliquot or proportional portion he or she ought to pay, but rather may shift the entire loss to the servant or agent actively responsible, and may recover in full from the servant” *Id.* at 225. As a result, the Court further points out that if the covenant released the servant, but not the master or principal, it would necessarily follow the

master or principal could seek indemnification from the servant/agent which would mean the covenant would “effectively strip the covenant not to sue of any real meaning”. *Id.* at 226.

Andrade is a case decided on the principle of indemnity and interpretation of the South Carolina Uniform Contribution Among Tortfeasors Act (hereinafter, “UCATA”) S.C. Code Ann. §15-38-10 to 70 (Supp. 2000). *Andrade* was not a case involving the “SCTCA”. It is important to note that neither indemnity nor the “UCATA” are applicable to the “SCTCA”.

The common law provided tort immunity to all governmental entities. It is only through the “SCTCA” that any right of claim exists in tort against governmental entities. The “SCTCA” is explicit in SC Code Ann. §15-78-70(c) that claims may be brought against the governmental entity for liability of an act of its employee. Further, the act does not provide for any indemnity for the governmental entity from their employees. This is a profound distinction from the one in *Andrade* relied upon by the Court.

Andrade also points to the “UCATA” in its decision by refusing to extend the “UCATA” to parties who are only vicariously liable. In addition, the “UCATA” expressly does not apply to governmental entities.

§15-38-65 Uniform Contribution Among Tortfeasors Act not applicable to governmental entities:

No payment shall be made from state appropriated funds or other public funds to satisfy claims or judgments against governmental entities or governmental employees acting within the scope of their official duties arising under the Uniform Contribution Among Tortfeasors Act. The South Carolina Tort Claims Act is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of his official duty. The Uniform Contribution Among Tortfeasors Act shall not apply to governmental entities.

In other words, the “UCATA”, which was a significant basis of the *Andrade* decision, does not apply to the facts of the present case. As a result, the findings in *Andrade*, which is the bedrock of Respondent’s argument and the Court’s Order, do not apply to the facts in the present case. It is apparent that “SCTCA” claims are different with the mechanisms for dealing with claims, indemnity and vicarious liability compared to the common law controlling cases of private individuals and entities.

The present case is one where there is conflict between the holding in *Andrade* and that of *Wade*. The Court decided *Andrade* applied to Appellants claim against the Respondent as a result of the covenant not to execute entered between Appellant and Respondent’s employee. The proper decision is that *Wade* is controlling based upon the application of the “SCTCA” and that *Andrade* does not apply since it is not a decision based upon the unique framework of the “SCTCA”.

Wade, decided by our Supreme Court in 2002, is a case very similar to the facts in this matter. It should also be noted that *Wade* was decided subsequent to *Andrade* without mention of the *Andrade* decision or the vicarious liability holding in *Andrade*. In *Wade*, a claim was brought against a driver in an automobile wreck and the case against the driver was settled by way of a “Covenant Not to Execute”. The driver was then deleted as a Defendant and his employer, County of Berkeley, was named as a party Defendant claiming the County was liable under the provisions of the “SCTCA”. The County filed a Motion for Summary Judgment claiming the Covenant Not to Execute barred the tort action against the County. The Supreme Court found the Covenant was not a settlement within the “SCTCA”. The Court in *Wade* pointed to the “SCTCA”, S.C. Code §15-78-70(d) which provides:

A settlement or judgement in an action or 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. [emphasis added]

The Court determined that “under this chapter” applied to either a “settlement or judgment in an action” and a “settlement of a claim” brought pursuant to the “SCTCA”. The Court stated, “to invoke the provision of §15-78-70(d), there must be a settlement or judgment in an action under the Act or a settlement of a claim under the Act.” *Id.* at 230.

The Court further reasons:

Even though Wade was aware he might have an action against County under the Act when he and Pierce (driver/employee) executed the covenant not to execute, no action had been initiated, nor had any claim been filed, against County. At the time of the settlement, Wade had only initiated an action against Pierce in his individual capacity, not against County as Pierce’s employer. Accordingly, at the time Wade and Pierce executed the settlement documents, there were no actions “under this chapter”. Wade and Pierce’s settlement did not invoke the provisions of 15-78-70(d) barring Wade from further action against the County.

Id. at 230.

As in *Wade*, the Appellant in this action was aware she may have a claim against Respondent when she executed the covenant with the Respondent’s employee, no action had been initiated against Respondent, nor had any claim been filed against Respondent. Appellant had only initiated a claim against employee and employee’s insurer in employee’s individual capacity, not against Respondent. Therefore, given the holding in *Wade*, Appellant’s covenant and settlement with USAA did not invoke the provisions of §15-78-70(d) thereby allowing Appellant’s claim against Respondent to proceed.

The Court in *Wade* went further to note the construction of §15-78-70(d) and its legislative history may not follow the intended policy of the “SCTCA”, but the Court is clear in ruling that:

As illustrated by the facts of this case, § 15-78-70(d) permits a plaintiff to maintain an action against a governmental employee in his individual capacity,

settle, and then pursue an action against the governmental employer for the tort of his employee allegedly committed while in the scope of employment. This result circumvents that policy of the Act which is to protect employees from personal liability for torts committed while acting within the scope of employment. Section 15-78-20(b) (Act is exclusive civil remedy available for tort committed by governmental employees). Nevertheless, our construction of the statute is limited by its legislative history.

Id. at 230-231

The basis of the Court's Order Granting Summary Judgment, Respondent's Motion for Summary Judgment, and argument supporting the Motion is not based on the "SCTCA" which controls all aspects of claims against a governmental entity. Based upon the "SCTCA" and the rulings of the Courts interpreting the "SCTCA", the Court erred in granting the Respondent's Motion for Summary Judgment.

CONCLUSION

When Appellant signed the covenant with USAA and Karen Campbell, employee of Office of Governor, it did not constitute a settlement under the "SCTCA". Given the case and statutory law, Respondent's Motion for Summary Judgment should have been denied.

Respectfully Submitted,

HARRIS, GRAVES & WILLIAMS, LLC



MITCHELL J. WILLIAMS

Attorney for Appellant

P.O. Box 11566

Columbia, SC 29211

(803) 799-2911

mjw@harrisgraves.com

Columbia, South Carolina
Dated: November 1, 2023

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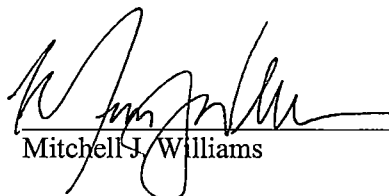
State of South Carolina,
Office of the Governor

Respondent.

CERTIFICATE OF SERVICE

Mitchell J. Williams says that he is the Attorney for the Appellant, with offices at 2725 Devine Street, Columbia, SC, and that on November 1, 2023, he hand delivered in a sealed envelope, a copy of Appellant's Initial Brief and Designation of Matter to be Included in the Record of Appeal to:

David A. Anderson, Esq.
Richardson, Plowden, Carpenter & Robinson, P.A.
1900 Barnwell Street
Columbia, SC 29201



Mitchell J. Williams