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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable William A. McKinnon, Circuit Court Judge

Appellate Case No. 2023-001424

Case No. 2021-CP-40-01276

WANDA WHETSTONE, ... Appellant,

v.

STATE OF SOUTH CAROLINA, OFFICE OF THE GOVERNOR, ... Respondent.

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STATEMENT OF THE ISSUE

Whether the circuit court correctly granted summary judgment to the Office of the Governor under the common-law rule that a settlement with an employee bars recovery against an employer under a *respondeat superior* theory, when the Tort Claims Act does not preclude a public entity from asserting that common-law defense.

INTRODUCTION

Wanda Whetstone was in a car accident with Karen Campbell, an employee in the Office of the Governor. Whetstone settled with Campbell's personal insurer for $100,000 and executed a covenant not to execute, policy release, and settlement agreement in exchange for that money.

Apparently not satisfied with that sum, Whetstone sued the Office, asserting a single claim and alleging that the Office was liable under a *respondeat superior* theory. But Whetstone's settlement with Campbell defeats her claim against the Office. The common law is well established that the release of claims against an employee also acts as a release of claims against the employer under a vicarious liability theory. The circuit court here recognized as much, granting summary judgment for the Office.

Whetstone doesn't argue that the circuit court misinterpreted the common law. Instead, Whetstone challenges that the common-law rule applies by insisting that her claim is under the Tort Claims Act, so section 15-78-70(d) governs, rather than the common-law rule on which the circuit court relied. Whetstone's argument, however, suffers from two primary flaws. One, it relies exclusively on a decision from the Supreme Court that never addressed the relationship of the common law and the Tort Claims Act. *See Wade v. Berkeley County*, 348 S.C. 224, 559 S.E.2d 586 (2002). Because *Wade* didn't address (or even allude to) the issue raised here, it provides Whetstone no help.

And two, Whetstone's argument is inconsistent with the plain language of the Tort Claims Act. It disregards that a public entity's liability is "subject to the limitations upon liability and damages, and exemptions from liability and damages" that private defendants enjoy, S.C. Code Ann. § 15-78-40, which confirms that the General Assembly did not "intend government liability to exceed that of a private entity." *Kerr v. Richland Mem'l Hosp.*, 383 S.C. 146, 149, 678 S.E.2d 809, 811 (2009). Thus, the Office gets the benefit of the common-law defense that the circuit court applied. Additionally, Whetstone's argument does not account for the fact that (excluding exceptions not relevant here) if an employee "commits a tort while acting within the scope of his official duty," that employee "is not liable therefor." S.C. Code Ann. § 15-78-70(a). Yet Whetstone has already accepted $100,000 from Campbell's personal insurer. Whetstone cannot now double dip against the Office to obtain more damages from the same injury by imputing Campbell's negligence to the Office.

This Court therefore should affirm.

STATEMENT OF THE CASE

A. Whetstone settles with Karen Campbell after a car accident.

Wanda Whetstone was driving on Trenholm Road near Forest Drive in Columbia in April 2019, when Karen Campbell pulled out of a parking lot onto Trenholm Road and collided with Whetstone. R. p. __ (Compl. 1). Whetstone accused Campbell of being negligent and injuring her in various ways. R. pp. __–__ (Compl. 2–3).

Whetstone filed a claim with Campbell's insurance company, USAA. That claim was resolved for $100,000.[1] R. p. __ (Opp'n to Mot. for Summ. J., Ex. A). That resolution came in a

[1] This was in addition to another $50,000 Whetstone recovered from underinsurance coverage on other policies. *See* Br. of Appellant 4.

Covenant Not to Execute, Policy Release, and Settlement Agreement that Whetstone signed with USAA. *Id.* In that document, Whetstone "discharge[d]" Campbell "from any and all claims" and "agree[d] and covenant[ed] that [Whetstone] will never seek to execute any judgment obtained against the releasees and will not seek to collect any such judgment from the personal assets of the releasees." *Id.*

B. Whetstone sues the Office after settling with Campbell, but the circuit court grants summary judgment for the Office.

Not satisfied with this recovery, Whetstone sued the Office of the Governor in March 2021. *See* R. p. __ (Comp. 1). At the time of the accident, Campbell served as the Special Assistant to the First Lady and Governor's Mansion Director, within the Office. *See* R. p. __ (K. Campbell Aff. dated Apr. 7, 2021). Whetstone alleged that Campbell was acting in the scope of her employment at the time of the accident in April 2019. *See* R. p. __ (Compl. 2). And Whetstone alleged that the Office was "jointly and severally liable" for her injuries, asserting a single claim under the doctrine of *respondeat superior* and the Tort Claims Act. *See* R. p. __–__ (Compl. 2–3).

The Office denied any liability, *see* R. pp. __–__ (Answer), and eventually moved for summary judgment based on the fact that Whetstone had settled with Campbell, *see* R. pp. __–__ (Mot. for Summ. J.). The circuit court granted that motion. It explained that under this Court's decision in *Andrade v. Johnson*, the "settlement of a claim against an employee 'operates as an acquittal of the employer who is only derivatively liable.'" R. p. __ (Order 4) (quoting 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 circuit court distinguished *Wade*, explaining why that case did not control given the specific basis on which the Office had moved for summary judgment. *See* R. pp. __–__ (Order 6–8). The circuit court denied Whetstone's motion to reconsider. *See* R. p. __ (Order).

Whetstone appealed. R. p. __ (Notice of Appeal).

STANDARD OF REVIEW

The Court reviews a grant of summary judgment under "the same standard as the circuit court." *Braden's Folly, LLC v. City of Folly Beach*, 439 S.C. 171, 190, 886 S.E.2d 674, 684 (2023). Summary judgment is appropriate whenever "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 a judgment as a matter of law." *Id.* (quoting Rule 56(c), SCRCP).

ARGUMENT

I. Whetstone's settlement with Campbell means Whetstone cannot sue the Office under a *respondeat superior* theory.

At the outset, it's important to be clear what this case is about—and what this case is not about. Whetstone's sole claim against the Office is based on *respondeat superior* and vicarious liability. *See* R. pp. __–__ (Compl.). In short, she claims that Campbell, who was employed by the Office and acting in the scope of her employment, was negligent, so the Office, as her principal, is liable for Campbell's negligence. Whetstone does not allege that the Office was somehow independently negligent, such as for being negligent in supervising Campbell. *See, e.g.*, *Brockington v. Pee Dee Mental Health Ctr.*, 315 S.C. 214, 217, 433 S.E.2d 16, 17 (Ct. App. 1993) (claims "based on *respondeat superior*" and "negligent supervision" are different).

With the scope of Whetstone's claim in mind, turn next to what Whetstone does not argue on appeal: That the circuit court was wrong that the common-law rule is that the "settlement of a claim against an employee operates as an acquittal of the employer who is only derivatively liable." R. p. __ (Order 4) (internal quotation mark omitted). For good reason Whetstone does not go down this path. That rule is well established.

This Court has invoked and applied this rule. In *Andrade*, the Court recognized that the

"common law of this state provides that a covenant not to sue an employee operates as an acquittal of the employer who is only derivatively liable." 345 S.C. at 226, 546 S.E.2d at 670. There, Andrade contracted with Johnson to install a new HVAC system in her home, after he had promoted being part of SCE&G's quality-dealer program. *Id.* at 219–21, 546 S.E.2d at 667. Andrade settled with Johnson prior to trial and executed a covenant not to sue. *Id.* at 221, 546 S.E.2d at 667. The trial court granted SCE&G summary judgment on Johnson's vicarious-liability claims. *Id.*, 546 S.E.2d at 668.

This Court affirmed. It explained that the "type of document used to discharge liability" was not the critical question. *Id.* at 224, 546 S.E.2d at 669. Rather, the inquiry had to focus on "the type of liability and the relationship *inter se* of the various allegedly liable parties." *Id.* Was one party liable "*only* vicariously because of the negligence of another party" or was that party a "true joint tortfeasor[]" and thus "independently negligent toward the third party? *Id.* This distinction went to the difference between indemnity (which is the right to shift an entire loss from one who is passively at fault to someone who is actively at fault) and contribution (which is the right to recover part of a loss from someone else who is actively at fault). *Id.* at 225, 546 S.E.2d at 670.

Under South Carolina law, the Court continued, a "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.* In Andrade's case, if she could still sue SCE&G for derivative liability, SCE&G could subsequently seek indemnification from Johnson, which would "strip the covenant not to sue of any real meaning and result in . . . a corrosive circle of indemnity."[2] *Id.* at 226, 546 S.E.2d at 670 (internal quotation

[2] Though the Supreme Court reversed *Andrade*, it did so on the distinct issue of whether SCE&G owed an independent duty to Andrade to ensure that Johnson properly installed the HVAC system. *See* 356 S.C. at 245–46, 588 S.E.2d at 592.

mark omitted).

Andrade is instructive in three ways here. *First*, this case is on all fours with *Andrade*. Like Andrade, Whetstone settled her claim against the primary tortfeasor. *See* R. p. __ (Opp'n to Mot. for Summ. J., Ex. A). Like Andrade, Whetstone asserted a claim against the primary tortfeasor's principal under a vicarious liability theory. *See* R. pp. __–__ (Compl.). So like Andrade, Whetstone's settlement with the primary tortfeasor should "release[]" "the vicariously liable principal." *Andrade*, 345 S.C. at 227, 546 S.E.2d at 670.

Second, *Andrade* represents a logically sound rule. Although *Andrade* recognized that there was some split of authority on this issue, *see* 345 S.C. at 223, 546 S.E.2d at 669, the weight of the authority is with the common-law rule that *Andrade* applied, *see, e.g.*, *Gilbert v. Sycamore Mun. Hosp.*, 622 N.E.2d 788, 797 (Ill. 1993) ("any settlement between the agent and the plaintiff must also extinguish the principal's vicarious liability"); *Theophelis v. Lansing Gen. Hosp.*, 424 N.W.2d 478, 481 (Mich. 1988) ("At common law a valid release of an agent for tortious conduct operates to bar recovery against the principal on a theory of vicarious liability"); *Booth v. Gades*, 788 N.W.2d 701, 707 (Minn. 2010) ("The well-established common law rule is that the release of the agent releases the principal from vicarious liability."); *J&J Timber Co. v. Broome*, 932 So. 2d 1, 7 (Miss. 2006) ("A majority of states have adopted the position that the release of a tortfeasor thereby releases the tortfeasor's principal for all claims of vicarious liability"); *Dickey v. Meier's Est.*, 197 N.W.2d 385, 388 (Neb. 1972) ("in a tort action based exclusively on the alleged negligence of an employee or agent, a valid release of that employee-agent releases the employer or principal from liability"); *L.C. v. R.P.*, 563 N.W.2d 799, 801 (N.D. 1997) ("the release of a servant for tortious acts also released the master from vicarious liability"); *Burke v. Webb Boats, Inc.*, 37 P.3d 811, 813 (Okla. 2001) ("where the servant was released, the plaintiff was not entitled

to recover from the master”); *Est. of Williams ex rel. Williams v. Vandeberg*, 620 N.W.2d 187, 191 (S.D. 2000) (“a release of an agent is a release of the principal even when the release contains an express reservation and where the claim is premised on the single act of the agent”); *see also Seaboard Air Line R. Co. v. Coastal Distrib. Co.*, 273 F. Supp. 340, 343 (D.S.C. 1967) (“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”). Courts have consistently reached this conclusion because, as the *Andrade* Court reasoned, this conclusion ensures that a covenant not to sue (or a release, depending on its language) actually has an effect and the primary tortfeasor doesn’t end up having to pay for a judgment against the vicariously liable master as the result of indemnity.

Third, *Andrade* is much more than a case about the Uniform Contribution Among Tortfeasors Act, as Whetstone strains to portray it. *See* Br. of Appellant 7–8. The rule that this Court applied in *Andrade* was *not* any part of the UCATA. Rather, this Court carefully showed how the UCATA did not apply when a plaintiff settled with an agent but still had a vicarious-liability claim against the principal. *See* 345 S.C. at 224–27, 456 S.E.2d at 669–70. Thus, Whetstone cannot brush *Andrade* aside by calling it a UCATA case but this a Tort Claims Act case. *Andrade*, in fact, controls this case, and it confirms that the circuit court properly granted summary judgment to the Office.

II. Whetstone’s reliance on *Wade* is misplaced and her argument on the Tort Claims Act is mistaken.

Rather than attack the common-law rule on indemnity that served as the basis for the circuit court’s decision, Whetstone instead tries to shift the focus, insisting that she has brought this case under the Tort Claims Act, which does permit her to sue the Office for Campbell’s accident.

A. *Wade* does not control here.

Whetstone relies heavily on the Supreme Court's decision in *Wade* on this front. *See* Br. of Appellant 8–10. At first glance, there may be a superficial appeal to that argument, given the factual similarities with *Wade* and this case. *Wade* involved a county employee who caused a car wreck, after which the plaintiff settled with the employee (and executed a covenant not to execute judgment) and then sued the county. *See* 348 S.C. at 226, 559 S.E.2d at 586–87.

The Supreme Court held that the circuit court erred in granting summary judgment to the county under section 15-78-70(d) of the Tort Claims Act because the settlement with the employee happened when no claim or action was pending against the county. *See id.* at 230, 559 S.E.2d at 589. Thus, the Court concluded, there was no settlement "under this chapter" to which section 15-78-70(d) could have been a "complete bar." S.C. Code Ann. § 15-78-70(d) ("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.").

But a more careful analysis reveals why *Wade* doesn't apply. That case examined whether section 15-78-70(d) barred a plaintiff's claim against a public entity. But the Office did not move for summary judgment here under that section (or, for that matter, under any part of the Tort Claims Act). Instead, the Office sought summary judgment based on a common-law rule—a point that the circuit court aptly recognized. *See* R. p. __ (Order 8). Thus, for whatever factual similarities *Wade* offers to this case, *Wade*'s legal analysis is irrelevant. There is not, as Whetstone posits, a "conflict between the holding[s]" in *Andrade* and *Wade*. Br. of Appellant 8. Nothing in the Supreme Court's opinion in *Wade* even hints at, much less discusses, the common-law rule at issue here. And when an issue is "not . . . raised in briefs or argument nor discussed in the opinion of the Court," the

"case is not a binding precedent on this point." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). *Wade* therefore does not answer whether the common-law rule in *Andrade* applies in a case brought under the Tort Claims Act.

To think about it another way, *Wade* does not address the common-law rule at issue in this case because the common-law rule was not the basis on which the county in *Wade* had moved for summary judgment. Thus, the Supreme Court had no reason to address the common-law rule because the "[a]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 331 n.4, 730 S.E.2d 282, 286 n.4 (2012). Had the county moved for summary judgment under the common-law rule, perhaps the county would have prevailed.

B. The Tort Claims Act does not abrogate the common-law rule from *Andrade*.

The Tort Claims Act waives sovereign immunity in certain circumstances. S.C. Code Ann. § 15-78-20(b); *see also id.* § 15-78-40 (providing the scope of the waiver); *id.* § 15-78-60 (listing exceptions to the waiver). The Act provides "the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents." *Id.* § 15-78-20(b).

For at least two reasons, the Tort Claims Act does not preclude a government entity from asserting *Andrade*'s common-law rule. *First*, notably missing from the Tort Claims Act is any specific discussion of *respondeat superior* or vicarious liability. The Act simply states that a government entity is "liable for [its] torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." *Id.* § 15-78-40. The Tort Claims Act therefore gives a government entity the same benefit of "limitations upon liability and damages" and "exemptions from liability and damages" as any private plaintiff. A private plaintiff has the

benefit of the common-law rule that a settlement between the agent and the plaintiff also extinguishes the principal's vicarious liability. Thus, the Office can invoke that rule as well.

Confirming this result is the fact that "statutes in derogation of the common law are to be strictly construed." *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012). The waiver in the Tort Claims Act "is limited," *Proctor v. Dep't of Health & Env't Control*, 368 S.C. 279, 291, 628 S.E.2d 496, 502 (Ct. App. 2006), as that waiver "must be liberally construed in favor of limiting the liability of the State," S.C. Code Ann. § 15-78-20(f). This background principle and statutory directive preclude expanding the Tort Claims Act to encompass some abrogation of common-law doctrines that are not even mentioned in the Act. As this Court has succinctly put it, "the Legislature clearly intended to limit government liability through the Tort Claims Act, and at no time did the Legislature intend government liability to exceed that of a private entity." *Kerr*, 383 S.C. at 149, 678 S.E.2d at 811. The Tort Claims Act therefore does not, as Whetstone would have it, turn the State into a secondary or excess insurer with state funds allowed to be stacked on top of private insurance or serve as some sort of umbrella coverage for state employees.

Second, other provisions of the Tort Claim Act belie Whetstone's attempt to hold both Campbell and the Office liable for the car accident. Under the Act, only one defendant—the public entity or the employee—may be liable. When an employee "commits a tort while acting within the scope of his official duty," that employee "is not liable therefor except" when the employee's conduct "constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-70(a), (b). Other than these narrow circumstances, the public entity is liable, and the Act "constitutes the *exclusive* remedy for any tort committed by an employee of a governmental entity." *Id.* § 15-78-70(a) (emphasis added). Indeed, the fact that only

one—the employee or the public entity—party can be liable is the only possible conclusion from reading these two subsections. *Cf. Smith v. Tiffany*, 419 S.C. 548, 555, 799 S.E.2d 479, 483 (2017) ("It is axiomatic that statutory interpretation begins (and often ends) with the text of the statute in question."); *Senate by & through Leatherman v. McMaster*, 425 S.C. 315, 322, 821 S.E.2d 908, 912 (2018) (statutes must be read harmoniously and to avoid having superfluous terms). And this is why the District of South Carolina has recognized that "[t]he doctrine of *respondeat superior* therefore is inapplicable to claims against South Carolina governmental entities or their employees. Governmental entities are vicariously liable for their employees' torts only as provided by the statute; governmental entities are not additionally or alternatively liable under common-law vicarious liability doctrines." *See Newkirk v. Enzor*, 240 F. Supp. 3d 426, 436 (D.S.C. 2017).

In this case, Whetstone never even hints that her accident with Campbell involved actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. Understandably so, given that it was just that—an accident. By settling for $100,000 with Campbell's insurer, Whetstone effectively closed the door on a claim against the Office. That settlement is an implicit admission (at least for litigation purposes) that Campbell wasn't acting within the scope of her employment (regardless of what Campbell's purpose of the trip was when the accident occurred). After all, if Campbell was both negligent and within the scope of her employment, Whetstone could not possibly have recovered any judgment against Campbell because her "exclusive remedy" was under the Tort Claims Act.[3] S.C. Code Ann. § 15-78-70(a).

To let Whetstone turn around now and insist that she can sue the Office under the Tort

[3] This is why the language from the Covenant Not to Execute, Policy Release, and Settlement Agreement that Whetstone did "not release any claim that [she] may have against any other parties" cannot save her claim. R. p. __ (Opp'n to Mot. for Summ. J., Ex. A). The Tort Claims Act does not give Whetstone a *respondeat superior* claim against the Office.

Claims Act is both inconsistent with the plain language of the Act and with basic principles of fairness. *Cf. Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997) (adopting judicial estoppel for inconsistent positions of fact). In fact, Whetstone's admission on appeal that she "was aware that she may have a claim against" the Office "when she executed the covenant with" Campbell's insurer is effectively an acknowledgment that Whetstone was plotting to obtain a double recovery and circumvent the plain language of the Act. Br. of Appellant 9. The Court should not condone that scheme.

The Act's prohibition on a recovery from both the employee and public entity under these circumstances makes sense. It prevents a double recovery from the public fisc for the same injury and the same alleged conduct. Recall that Whetstone did not allege that the Office was in any way independently negligent, and she had already agreed to settle her claims against Campbell for $100,000. If $100,000 was not, in her mind, a sufficient sum for her injuries, her solution was to refuse to settle and to go court, rather than to take that guaranteed money and then bring a *respondeat superior* lawsuit against the Office.

CONCLUSION

The Court should affirm the circuit court's judgment.

Respectfully submitted,
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