

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

William A. McKinnon, Circuit Court Judge

Case No. 2023-001424

RECEIVED
DEC 15 2023
SC Court of Appeals

Wanda Whetstone,Appellant,

v.

State of South Carolina, Office of the Governor,Respondent.

RECORD ON APPEAL

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INDEX

Orders.....	2-14
Order Granting Respondent’s Motion for Summary Judgment dated July 26, 2023	2-10
Form 4 Order Denying Appellant’s Motion for Reconsideration- August 8, 2023.....	11-14
Pleadings.....	15-46
Complaint.....	15-17
Answer	18-21
Respondent’s Motion for Summary Judgment of January 18, 2023	22-23
Respondent’s Memo of Law of January 18, 2023	24-33
Appellant’s Memo of Law In Opposition of July 20, 2023	34-39
Appellant’s Motion for Reconsideration of August 2, 2023.....	40-46
Trial Court Transcript of Hearing, July 25, 2023, pp. 9-12, pp. 15-20.....	47-57
Exhibits & Other Documents.....	46, 58-62
Covenant-South Carolina Covenant Not to Execute, Policy Release and Settlement Agreement (Opposition to Motion for Summary Judgment, Exhibit A).....	46, 58
Karen Campbell Affidavit (dated April 7, 2021).....	59-60
Notice of Appeal.....	61
Certificate of Counsel	62

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Wanda Whetstone,)
)
Plaintiff,)

Civil Action No. 2021-CP-40-1276

v.)

ORDER GRANTING SUMMARY
JUDGMENT

State of South Carolina, Office of the)
Governor,)
)
Defendants.)

RECEIVED
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SC Court of Appeals

This matter came before me on the Defendant's Office of the Governor ("Defendant") motion for summary judgment. Oral argument was heard on July 25th 2023 and supporting case law and memorandums considered by both parties. For the following reasons, the Defendant's motion is hereby GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises out of a motor vehicle accident which took place on or about April 23, 2019 at the 5000 block of Trenholm Road in Richland County, South Carolina. Compl. ¶ 3. Plaintiff alleges that as she was traveling southbound on Trenholm Road, Karen Campbell ("Campbell") pulled out in front of Plaintiff while attempting to make a left turn onto Trenholm Road. *Id.* At the time of the accident, Campbell was on her lunch break and was making a personal stop at Bank of America for a personal errand. The accident occurred as Campbell was leaving the bank. Plaintiff claims Campbell's negligence caused the accident and that she suffered injuries and damages as a result. *Id.* at ¶ 6.

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

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.

Electronically signed on 2023-07-26 10:32:11 page 9 of 9

ELECTRONICALLY FILED - 2023 JUL 26 10:43 AM - RICHLAND - COMMON PLEAS - CASE#2021CP4001276

***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2021CP4001276

Official File Stamp: 08-08-2023 04:14:27 PM

Court: CIRCUIT COURT

Common Pleas

Richland

Case Caption: Wanda Whetstone vs State Of South Carolina
Office Of The Governor

Document(s) Submitted: Form 4 Plaintiff's Motion to Reconsider is
DENIED for the re Form 4 Plaintiff's Motion to
Reconsider is DENIED for the reasons set forth in
the hearing.

Filed by or on behalf of: William A. Mckinnon

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

David Allen Anderson for State Of South Carolina
Office Of The Governor

Mitchell Jerry Williams for Wanda Whetstone

The following people have not been served electronically by the Court. Therefore, they must
be served by traditional means:

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ELECTRONICALLY FILED - 2023 Aug 30 4:09 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4001276

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Richland
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP4001276

Wanda Whetstone
PLAINTIFF(S)

State Of South Carolina Office Of The Governor
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Plaintiff's Motion to Reconsider is DENIED for the reasons set forth in the hearing.

ORDER INFORMATION

This order ends does not end the case. See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 08/08/2023 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

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Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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Richland Common Pleas

Case Caption: Wanda Whetstone vs State Of South Carolina Office Of The Governor
Case Number: 2021CP4001276
Type: Order/Electronic Form 4

So Ordered

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

Electronically signed on 2023-08-08 15:17:23 page 3 of 3

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Wanda Whetstone,
Plaintiff(s),

Civil Action No. _____

vs.

COMPLAINT

State of South Carolina, Office of the Governor,
Defendant(s).

Jury Trial Requested

The Plaintiff would respectfully show unto the Court that:

1. The Plaintiff is a citizen and resident of Richland County, South Carolina.
2. The Plaintiff is informed and believes that the "State of South Carolina, Office of the Governor" (hereinafter "Governor") is an agency, political subdivision or governmental entity as defined by S.C. Code of Laws §15-78-10 et. seq.
3. On or about April 23, 2021, Plaintiff was traveling southbound in the 5000 Block of Trenholm Road in Richland County, SC when Karen Campbell, an employee of the "Governor", failed to yield the right of way when turning left into traffic out of a private drive and collided with plaintiff. This collision caused injuries and damages to Plaintiff.
4. Karen Campbell was under a duty to operate her vehicle on the streets and highways of Richland County in a safe and careful manner, keeping a proper lookout for all other vehicles and persons lawfully traveling the roadway.
5. The Plaintiff believes that at the time and place in question Karen Campbell was within the scope of her employment with the Office of the Governor whereby Defendant "Governor" is called to answer for its agent and servant's actions under the doctrine of respondeat superior and pursuant to S.C. Tort Claims Act, S.C. Code of Laws §15-78-10 et. seq.
6. As a result of the collision, the Plaintiff sustained the following injuries and damages:
 - a. extensive pain, anguish, soreness, immobility and discomfort;

- b. disability for a period of time;
- c. money spent for medical care and treatment;
- d. inability to carry on normal activities;
- e. loss of enjoyment of life;
- f. time and wages from Plaintiff's job;
- g. permanent scarring;
- h. permanent disability/impairment; and
- i. future pain, anguish, soreness, immobility and discomfort;

7. The Plaintiff believes that at the time and place in question, Karen Campbell, was operating her vehicle while in the scope of her employment, as an agent and servant of Defendant "Governor", whereby Defendant, "Governor", should be called to answer for its agent and servant's actions under the doctrine of respondeat superior and pursuant to the S.C. Tort Claims Act, S.C. Code of Laws §15-78-10 et. seq.

8. The injuries and damages incurred by the Plaintiff were directly and proximately caused by the careless, negligent, grossly negligent, willful, wanton, reckless and unlawful acts of Defendant's agent and servant, Karen Campbell, in one or more of the following particulars:

- a. In failing to yield the right of way;
- b. In failing to apply the brakes of the vehicle and/or maintain them in proper working condition;
- c. In making an improper and unlawful turning movement;
- d. In failing to keep a proper lookout;
- e. In entering the roadway laned for traffic improperly;
- f. In failing to steer the vehicle or take other evasive action so as to avoid the collision;
- g. In failing to use the degree of due care that a reasonable and prudent person should have exercised under the existing conditions; and

h. In operating the vehicle in such a manner as to indicate unlawful or wanton disregard for the safety of other persons or property.

9. The careless, negligent, grossly negligent, willful, wanton, reckless and unlawful acts of Defendant's employee, Karen Campbell, were the direct and proximate cause of the accident and resulting injuries and damage.

10. The Plaintiff is informed and believes that she is entitled to judgment against the Defendant, jointly and severally, for actual damages in an appropriate amount.

WHEREFORE, the Plaintiff prays judgment against the Defendant, jointly and severally, for actual damages in an appropriate amount, the costs of this action, and for such other and further relief as the Court may deem just and proper.

HARRIS AND GRAVES, P.A.

s/ Mitchell J. Williams
MITCHELL J. WILLIAMS
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Columbia, South Carolina

Dated: March 18, 2021

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)	
Wanda Whetstone,)	
)	
Plaintiff,)	Civil Action No. 2021-CP-40-1276
)	
v.)	
)	ANSWER
State of South Carolina, Office of the)	(Jury Trial Demanded)
Governor,)	
)	
Defendants.)	
_____)	

The Defendants, not waiving but expressly reserving all rights in their notice of motion and motion to dismiss filed contemporaneously herewith, answer the Complaint of the Plaintiff as follows:

FOR A FIRST DEFENSE

1. The Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action against the Defendants, and therefore, the Defendants must be dismissed pursuant to Rule 12(b)(6), SCRPC.

FOR A SECOND DEFENSE

2. Karen Campbell was not acting in the scope of her official duty with the Office of the Governor at the time of this incident, and therefore, the Office of the Governor is not a proper Defendant pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-70. As a result, this action must be dismissed.

FOR A THIRD DEFENSE

3. The Defendant State of South Carolina is not a proper party, pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-70, and therefore, must be dismissed.

FOR A FOURTH DEFENSE

4. The Defendants deny each and every allegation of the Plaintiff's Complaint not hereinafter specifically admitted, qualified, or explained.

5. As to paragraph 1 of the Plaintiff's Complaint, the Defendants lack information upon which to form a belief as to the truth of these allegations, and therefore, deny these allegations.

6. The Defendants deny paragraphs 2 and 3 of the Plaintiff's Complaint.

7. As to paragraph 4 of the Plaintiff's Complaint, this paragraph sets forth legal conclusions which can neither be admitted or denied. However, to the extent this paragraph asserts any actions, inactions, wrongdoing or liability on the part of the Defendants, those allegations are specifically denied.

8. The Defendants deny paragraphs 5, 6, 7, 8, 9, and 10 of the Plaintiff's Complaint.

9. The Defendants deny the Plaintiff is entitled to the relief requested in the Complaint, or any other relief against the Defendants.

FOR A FIFTH DEFENSE

10. The Defendants assert any recovery by the Plaintiff must be reduced or offset by amounts Plaintiff has received or will recover from others for the same injuries and/or damages claimed in this suit.

FOR A SIXTH DEFENSE

11. The Defendants allege, upon information and belief, that any injuries or damages allegedly suffered by the Plaintiff, without admitting that to be true, were due to and caused by the sole negligence, recklessness, willfulness, wantonness, carelessness, and gross negligence of

the Plaintiff and were not caused by the Defendants, which sole negligence of the Plaintiff is a complete bar to the Plaintiff's attempt to recover from the Defendants.

FOR A SEVENTH DEFENSE

12. The Defendants allege, upon information and belief, that any injuries or damages allegedly suffered by the Plaintiff, without admitting that to be true, were due to and caused entirely by the negligence of the Plaintiff or his negligence which is more than the Defendants' negligence, and that such is a complete bar to the Plaintiff's recovery herein. Further, the Defendants allege that if the Plaintiff's negligence was less than the Defendants' negligence, that such negligence should be compared to that negligence of the Defendants, so as to apportion the relative fault as to each party.

FOR AN EIGHTH DEFENSE

13. The Defendants are the alter ego of the State of South Carolina, and therefore, are entitled to sovereign immunity from suit, including but not limited to the statutory caps on damages pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-120(a).

FOR A NINTH DEFENSE

14. The Defendants allege, upon information and belief, that any injury or damages alleged in the Plaintiff's Complaint were due to, occasioned by, or caused by intervening acts of omission or commission on the part of someone other than these Defendants, without which acts and/or omissions the Plaintiff would not have sustained any injuries or damages as are set forth in the Plaintiff's Complaint, all of which these Defendants plead as a bar to this action.

FOR A TENTH DEFENSE

15. The Defendants allege, upon information and belief, that any injuries or damages alleged suffered by the Plaintiff, without admitting them to be true, were due to and caused by

the Plaintiff's knowing and voluntary assumption of the risk, and the Defendants therefore plead Plaintiff's assumption of the risk as a complete bar to this action.

FOR AN ELEVENTH DEFENSE

16. The Defendants deny there is joint and several liability under the South Carolina Tort Claims Act and therefore move to strike all claims for joint and several liability.

FOR A TWELFTH DEFENSE

17. The Defendants allege that the Plaintiff has failed to join an indispensable party to this action, pursuant to Rule 19, SCRPC, and therefore, this action must be dismissed against these Defendants.

FOR A THIRTEENTH DEFENSE

18. The Plaintiff has failed to state a claim against the Defendants pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-30, and therefore, this action must be dismissed.

WHEREFORE, having fully answered the Complaint of the Plaintiff, the Defendants pray that the Complaint be dismissed with prejudice, for the costs of this action, and for such other and further relief as the Court deems just and proper.

LINDEMANN & DAVIS, P.A.

BY: s/ James M. Davis, Jr.
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Counsel for Defendants

April 16, 2021

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2021-CP-40-1276

Wanda Whetstone,)
)
Plaintiff,)

DEFENDANT OFFICE OF THE
GOVERNOR'S
MOTION FOR SUMMARY JUDGMENT

v.)

State of South Carolina, Office of the
Governor,)

Defendants.)
_____)

YOU WILL PLEASE TAKE NOTICE that Defendant Office of the Governor (“Defendant”) will move for an Order pursuant to South Carolina Rule of Civil Procedure 56 granting summary judgment as a matter of law as to the claims asserted by Plaintiff Wanda Whetstone (“Plaintiff”) against Defendant. In support of that Motion, Defendant states as follows:

- Plaintiff alleges she was involved in an automobile accident with Karen Campbell on or about April 23, 2019, which resulted in Plaintiff allegedly suffering injuries and damages. Compl. ¶ 3.
- Prior to filing this suit, Plaintiff settled her claims against alleged tortfeasor Campbell. *Id.* ¶ 7. On July 2, 2020, Plaintiff resolved her claims against Campbell for \$100,000 and in consideration for a release and covenant not to execute. (Exhibit A).
- Despite her previous settlement with Campbell’s personal insurance company, Plaintiff now alleges Campbell, while driving her personal vehicle, was acting in the course and scope of her employment with Defendant at the time of the accident. *Id.* ¶ 7.
- Plaintiff’s Complaint does not assert a specific cause of action against Defendant but simply contends Defendant “should be called to answer for its agent and servant’s actions

under the doctrine of respondeat superior and pursuant to the South Carolina Tort Claims Act,” *id.*, and should be liable “jointly and severally” for actual damages, *id.* ¶ 6.

- By settling her claim with Campbell, Defendant’s potential vicarious liability for Campbell’s alleged tortious conduct was released and extinguished as a matter of law. *Andrade v. Johnson*, 345 S.C. 216, 226–27, 546 S.E.2d 665, 670 (Ct. App. 2001) (“When [plaintiff] issued a covenant not to sue in [agent’s] favor, any claims she had against [agent] were terminated. Thus, [principal’s] derivative liability based upon [agent’s] conduct was extinguished. . . . We hold the covenant not to sue issued in favor of . . . the agent, released . . . the vicariously liable principal.”), *rev’d on other grounds by* 356 S.C. 238, 588 S.E.2d 588 (2003); *see also Seaboard Air Line R.R. v. Coastal Distrib.*, 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.”); S.C. Law of Torts, at 630 (2d ed. 1997) (“[A] covenant not to sue the employee would also release the employer who was liable solely because of the doctrine of respondeat superior.”).

This Motion is based upon the pleadings, any discovery that has been conducted in this case, the applicable statutory and case law, and the South Carolina Rules of Civil Procedure. A Memorandum of Law, affidavits, and exhibits may be submitted in support of the Motion.

s/David A. Anderson
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ATTORNEYS FOR DEFENDANT OFFICE OF THE
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January 18, 2023

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

Wanda Whetstone,)
)
Plaintiff,)
)
v.)
)
State of South Carolina, Office of the)
Governor,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2021-CP-40-1276

**DEFENDANT OFFICE OF THE
GOVERNOR'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

Defendant Office of the Governor ("Defendant"), by and through undersigned counsel, hereby submits this Memorandum of Law in Support of its Motion for Summary Judgment. For the reasons detailed further below, Defendant is entitled to judgment as a matter of law because Plaintiff's sole claim that Defendant, as a principal, is vicariously liable for the acts of its agent is legally foreclosed by Plaintiff's prior release of, settlement with, and covenant not to execute against Defendant's agent.

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual background

This case arises out of a motor vehicle accident which took place on or about April 23, 2019, in or near the 5000 block of Trenholm Road in Richland County, South Carolina. Compl. ¶ 3. Plaintiff alleges that as she was traveling southbound on Trenholm Road, Karen Campbell pulled out in front of Plaintiff while attempting to make a left turn onto Trenholm Road. *Id.* Plaintiff claims Campbell's negligence caused the accident and that she suffered injuries and damages as a result. *Id.* ¶ 6.

Prior to filing 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, in exchange for the payment, Plaintiff executed a release, settlement agreement, covenant not to execute on July 2, 2020. (**Exhibit A**). The release and covenant provides that Plaintiff agreed, in pertinent part, to:

forever discharge Karen P. Campbell . . . from any and all claims, demands, damages, actions, and causes of action, or suits of any kind or nature whatsoever, and more particularly on account of all injuries and damages, known or unknown, both to person and property of the undersigned which have resulted or may in the future develop from an automobile accident on April 23, 2019 in Columbia South Carolina.

Id. (emphasis in original). 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 filing this lawsuit.

Despite settling her claim arising out of the motor vehicle accident with Campbell and signing a release and covenant not to execute, Plaintiff now alleges that Campbell was an agent and servant of Defendant and was acting in the course and scope of her employment at the time the accident occurred. *Id.* ¶ 7. Plaintiff curiously 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 does not contend that Defendant was independently negligent or owed any duty to Plaintiff outside of asserting that Defendant is vicariously liable for the alleged tortious acts of Campbell.

B. Procedural history

Nearly two years after the motor vehicle accident with Campbell and over eight months after signing the release and covenant not to execute, Plaintiff filed a Complaint against Defendants State of South Carolina and Office of the Governor on March 18, 2021, asserting a single claim

premised on a theory of vicarious liability. Defendants moved 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 that Campbell was not acting within the course and scope of employment at the time of the accident. Plaintiff agreed to dismiss the State of South Carolina as a defendant and to 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 at that preliminary stage.

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 when the accident occurred. Although Defendant disputes this characterization and relies on Campbell's earlier April 7, 2021 affidavit, which notes that she was "running a personal errand to [her] personal bank" "during [her] lunch break," Campbell Aff. ¶ 4, the Court need not reach or resolve any factual dispute over whether Campbell was acting in the course and scope of her employment at the time of the accident. Even assuming, *arguendo*, Campbell was acting in the scope of her employment, Defendant is entitled to judgment as a matter of law based on the release and covenant executed by Plaintiff. Thus, any such factual disputes are immaterial and irrelevant. Nevertheless, Plaintiff's affidavit indicates that when she settled her claim arising out of the motor vehicle accident with Campbell, Plaintiff was aware of a 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 any derivative liability based upon Campbell's allegedly tortious conduct and thus forecloses Plaintiff's sole claim against Defendant.

LEGAL STANDARD

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." Rule 56(c), SCRCP; *see also 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." *Progressive Max Ins. Co.*, 405 S.C. at 42, 747 S.E.2d at 181; *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. When the "success of the proposed actions is a question of

law,” deciding that question on summary judgment “is appropriate.” *Manning v. Quinn*, 294 S.C. 383, 386, 365 S.E.2d 24, 25 (1988).

ARGUMENT

Prior to filing this suit, Plaintiff made a claim arising out of the motor vehicle accident directly against Campbell under her automobile liability policy and settled the claim with Campbell, with Plaintiff providing a release and 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 because 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), *rev’d on other grounds* 356 S.C. 238, 588 S.E.2d 588 (2003).

In *Andrade*, the plaintiff sued a heating contractor and SCE&G, alleging (among 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 in which 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. After that plaintiff sued SCE&G, SCE&G moved for summary judgment on the plaintiff’s vicarious-liability claims asserted against it arguing its vicarious liability was extinguished by the the plaintiff’s executed settlement with the agent contractor. *Id.* The trial court granted the motion, and the plaintiff appealed. The Court of Appeals 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

(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.* 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, *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 reserves the option to assert other claims. Again, as the Court of Appeals noted, the type of document used to effectuate the settlement is not dispositive, but rather the analysis turns on the relationship between the parties and whether the employer’s liability, if any, is solely vicarious. Thus, because Plaintiff’s settlement with Campbell was accompanied by, and in consideration for, a covenant not to execute, summary judgment on Plaintiff’s vicarious liability claim against Defendant is proper where Plaintiff has alleged that Defendant’s liability arises only vicariously because of the purported negligence of Campbell. *See id.* at 226–27, 546 S.E.2d at 670 (“When [plaintiff] issued a covenant not to sue in [agent’s] favor, any claims she had against [agent] were terminated. Thus, [principal’s] derivative liability based upon [agent’s] conduct was extinguished. . . . We hold the covenant not to sue issued in favor of . . . the agent, released . . . the vicariously liable principal.”); *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); S.C. Law of Torts, at 630 (2d ed. 1997) (“[A] covenant not to sue the employee would also release the employer who was liable solely because of the doctrine of respondeat superior.”).

To the extent Plaintiff may cite to *Wade v. Berkeley County*, 348 S.C. 224, 559 S.E.2d 586 (2002),¹ in opposition to the instant Motion. There, the Supreme Court held that the plaintiff’s

¹ It should be noted that *Andrade* was decided March 19, 2001. The *Andrade* decision came between the Court of Appeals’ decision in *Wade* on April 3, 2000, and the Supreme Court’s affirmance of *Wade* on February 4, 2002. Thus, it appears possible that the holding of *Andrade* may not have been available as a ground for summary judgment to Berkeley County at the time the *Wade* decisions were made.

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), 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.

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.

Wade is distinguishable. That case considered only the effect of S.C. CODE ANN. § 15-78-70(d) and did not address vicarious liability, the doctrine of respondeat superior, or 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.”).

Here, Defendant argues that, as an employer, any 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 in the doctrine of respondeat superior and the 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 any derivative liability as an *employer* was extinguished by Plaintiff's release of, and covenant not to execute against, Defendant's employee. Nothing in the Tort Claims Act changes this fact. The Act does not abrogate this common-law rule. *Cf. O'Laughlin v. Windham*, 330 S.C. 379, 384, 498 S.E.2d 689, 691 (Ct. App. 1998) ("A strong presumption . . . exists that the General Assembly does not intend to supplant common law principles when enacting legislation."). On top of this presumption, the Act requires that "[t]he provisions of this chapter . . . must be liberally construed in favor of limiting the liability of the governmental entity," which further supports the conclusion that this common-law rule protects Defendant here. S.C. CODE ANN. § 15-78-200. Finally, if Plaintiff is allowed to both settle with Campbell personally and proceed against Defendant, the intent of the Tort Claims Act would be entirely defeated since the Act was meant to insulate employees acting within the scope of their employment from liability and protect government entities from being liable when their employees act outside of the scope of their employment. Plaintiff is, however, trying to pursue both of these avenues of recovery, which should not be permitted. Plaintiff chose to pursue a claim against Campbell outside of the Tort Claims Act and should be bound by that decision. Plaintiff cannot release Campbell of liability and then later seek to recover from Defendant solely under a theory of derivative liability.

CONCLUSION

When Plaintiff signed the release and covenant not to execute in favor of Campbell, Defendant's derivative liability, if any, was extinguished as a matter of law. Defendant therefore respectfully requests this Court enter summary judgment in its favor.

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ATTORNEYS FOR DEFENDANT OFFICE OF THE
GOVERNOR

January 18, 2023

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Wanda Whetstone,

Plaintiff(s),

vs.

State of South Carolina, Office of the Governor,

Defendant(s).

Civil Action No. 2021CP4001276

**PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

Plaintiff, Wanda Whetstone, by and through her undersigned counsel, submits this Memorandum of Law in Opposition to Defendant's, Office of Governor (hereinafter "Governor"), Motion for Summary Judgment. The reasons for said opposition are that the provisions of the South Carolina Tort Claims Act, hereinafter "SCTCA", and the case law allow Plaintiff's claim to proceed and demand the denial of Defendant's Motion for Summary Judgment.

STATEMENT OF FACTS

This case arises subsequent to a car wreck occurring in the 5000 Block of Trenholm Road in Richland County, SC on April 23, 2021. Plaintiff was traveling southbound when Karen Campbell, an employee of "Governor", failed to yield the right of way when turning left into traffic out of a private drive and collided with plaintiff. This collision caused injuries and damages to Plaintiff.

Plaintiff filed a claim with USAA, the insurance carrier of employee of Defendant, Karen Campbell. Ms. Campbell's carrier offered the policy limits of \$100,000 which was accepted by Plaintiff through a document entitled "STATE OF SOUTH CAROLINA COVENANT NOT TO EXECUTE, POLICY RELEASE, AND SETTLEMENT AGREEMENT". (EXHIBIT A) Defendant refers to the document as a release and covenant in Defendant's Memorandum, but the release portion of the title only refers to a "Policy Release" of USAA and not a release of any parties. 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.”
(Exhibit A, ¶2)

The Plaintiff 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 whereby Defendant “Governor” is called to answer for its agent and servant’s actions pursuant to S.C. Tort Claims Act, S.C. Code of Laws §15-78-10 et. seq. As a result, this action was instituted on March 18, 2021 against Defendant, Office of the Governor.

Defendant has filed the subject Motion for Summary Judgment claiming that the Covenant Not to Execute entered between Plaintiff, Karen Campbell and USAA extinguishes any claim against Defendant based on a theory of vicarious liability.

SUMMARY JUDGMENT STANDARD

Summary Judgment Motions are controlled by SCRCP, Rule 56. Specifically Rule 56(c) states “The judgment sought shall be rendered forthwith 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 a judgment as a matter of law.”

Summary judgment should not be granted unless there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Summary judgment should not be granted even where there is no dispute as to evidentiary facts if there is dispute as to the conclusions to be drawn from such facts. *Dowling v. Home Buyers Warranty Corporation*, 400 S.E.2d 143, 303 S.C. 295 (1991); *Baugus v. Wessinger*, 401 S.E.2d 169, 303 S.C. 412 (1991). “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 the summary judgment.” *Progressive Max Ins. Co. v Floating Caps, Inc.*, 404 S.C. 35, 42, 747 S.E. 2d 178, 181.

ARGUMENT

Plaintiff made a claim, and resolved the claim, against Karen Campbell, an employee of Defendant, Office of Governor, by and through the employee's personal automobile insurance carrier, USAA. Defendant claims this extinguishes the Plaintiff's claim against Defendant. 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 Plaintiff's claim to proceed. Therefore, Plaintiff believes a denial of Defendant's Summary Judgment Motion should be entered by the Court.

Defendant claims that Plaintiff's resolution of a claim against employee of Defendant extinguishes the vicarious liability claim against Defendant as employer. Defendant's authority for the proposition is the case of *Andrade v. Johnson*, 345 S.C. 216, 546 S.E.2nd 665 (Ct. App. 2001). However, that case was not a case involving the "SCTCA". It is a case brought against a contractor who had a tenuous connection with SCE&G through a promotional campaign. The contractor was not an employee of SCE&G. 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 Tortfeasers Act (hereinafter, "UCATA") S.C. Code Ann. §15-38-10 to 70 (Supp.2000). It is important to note that neither indemnity nor the UCATA are applicable to the SCTCA and its application.

The common law provided tort immunity to all governmental entities. It is only through the SCTCA that any right of claim is given 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* cited by Defendant.

Andrade uses the “UCATA” in its decision by refusing to extend the UCATA to parties who are only vicariously liable. However, 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 Defendant’s argument, 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 contained within the Act itself.

Our Supreme Court decided a case very similar to the facts in the subject case in the 2002 case of *Wade v. Berkeley County*, 348 S.C. 224, 559 S.E. 2d 586 (2002). It should 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 judgment 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". 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 Plaintiff in this action was aware she may have a claim against the Office of Governor when she executed the covenant with the Defendant's employee, no action had been initiated against Defendant, nor had any claim been filed against Defendant. Plaintiff had only initiated a claim against employee and employee's insurer in employee's individual capacity. Therefore, given the holding in *Wade*, Plaintiff's covenant and settlement with USAA did not invoke the provisions of §15-78-70(d) thereby allowing Plaintiff's claim against Defendant 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:

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...Nevertheless, our construction of the statute is limited by its legislature history.

Id. at 230-231

The basis of Defendant'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, Defendant's Motion should be denied.

CONCLUSION

When Plaintiff 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, Defendant's Motion for Summary Judgment should be denied.

HARRIS, GRAVES & WILLIAMS, LLC

/s/Mitchell J. Williams

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Dated: July 20, 2023

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Wanda Whetstone,
Plaintiff(s),

Civil Action No. 2021CP4001276

vs.

MOTION FOR RECONSIDERATION

State of South Carolina, Office of the Governor,
Defendant(s).

TO: **THE HONORABLE WILLIAM A. MCKINNON, CIRCUIT COURT JUDGE**, Sixteenth Judicial Circuit, Moss Justice Center, 1675-1J York Highway, York, South Carolina 29745; and

DAVID A. ANDERSON, ESQ., RICHARDSON, PLOWDEN, CARPENTER & ROBINSON, P.A., PO Drawer 7788, Columbia, SC 29202

COMES NOW the Plaintiff, Wanda Whetstone, and, pursuant to the South Carolina Rules of Civil Procedure, Rule 59(e), makes her Motion to Reconsider as follows:

PROCEDURAL HISTORY

This matter came before this Honorable Court on July 25, 2023 pursuant to a Motion for Summary Judgment filed by Defendant on January 18, 2023. The action originated with the filing of a Summons and Complaint alleging Defendant, Office of the Governor, hereinafter "Governor", was responsible for the negligent acts of its employee, Karen Campbell, which occurred on April 23, 2019. This action was brought pursuant to the provisions of the S.C. Tort Claims Act (SCTCA), SC Code of Laws §15-78-10 et.seq.

This Court granted Defendant's Motion for Summary Judgment by way of an Order executed on July 26, 2023. This Motion is filed within 10 days of that Order pursuant to SCRCP, Rule 59(e).

QUESTIONS PRESENTED

- I. Did the 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 plaintiff has previously entered into a Covenant Not to Execute with the individual employee of the governmental entity for the same occurrence?

FACTUAL STATEMENT OF THE CASE

This case arises subsequent to a car wreck occurring in the 5000 Block of Trenholm Road in Richland County, SC on April 23, 2021. Plaintiff was traveling southbound when Karen Campbell, an employee of "Governor", failed to yield the right of way when turning left into traffic out of a private drive and collided with plaintiff. This collision caused injuries and damages to Plaintiff.

Plaintiff filed a claim with USAA, the insurance carrier of employee of Defendant, Karen Campbell. Ms. Campbell's carrier offered the policy limits of \$100,000 which was accepted by Plaintiff through a document entitled "COVENANT NOT TO EXECUTE, POLICY RELEASE, AND SETTLEMENT AGREEMENT". (Exhibit A) 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." (Exhibit A ¶2)

The Plaintiff 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 whereby Defendant "Governor" is called to answer for its agent and servant's actions pursuant to S.C. Tort Claims Act, S.C. Code of Laws §15-78-10 et. seq. As a result, this action was instituted on March 18, 2021 against Defendant, Office of the Governor.

Defendant filed the subject Motion for Summary Judgment claiming that the Covenant Not to Execute entered between Plaintiff, Karen Campbell and USAA extinguishes any claim against Defendant based on a theory of vicarious liability. The Court ruled on August 26, 2023 for defendant on the Motion for Summary Judgment by way of entry of an Order.

ARGUMENT

- I. **Did the 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 plaintiff has previously entered into a Covenant Not to Execute with the individual employee of the governmental entity for the same occurrence?**

The facts in the present case are very similar to the facts in the case of Wade v. Berkeley County, 348 S.C. 224, 559 S.E. 2d 586 (2002) to allow a case to proceed against a governmental entity. In Wade, a claim was brought by a plaintiff in an automobile wreck and the case against the opposing driver was settled by way of a "Covenant Not to Execute" with the opposing driver's insurance carrier. The opposing 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 provision of 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". 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 Plaintiff in this action was aware she may have a claim against the Office of Governor when she executed the covenant with the Defendant's employee, no action had been initiated against Defendant, nor had any claim been filed against Defendant. Plaintiff had only initiated a claim against employee and employee's insurer in employee's individual capacity. Therefore, given the holding

in *Wade*, Plaintiff's covenant and settlement with USAA did not invoke the provisions of §15-78-70(d) thereby allowing Plaintiff's claim against Defendant 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:

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...Nevertheless, our construction of the statute is limited by its legislature history.

Id. at 230-231

Defendant's Motion for Summary Judgment, argument supporting the Motion and the Court's Order is not based on the SCTCA. It instead relies on the Common Law finding of the Court of Appeals in the case of *Andrade v. Johnson*, 345 S.C. 216, 546 S.E.2nd 665 (Ct. App. 2001) which was not a SCTCA case. *Andrade* was a case where a consumer settled with a contractor by way of a "Covenant Not to Execute". The consumer then filed an action against SCE&G which had a very tenuous connection with the contractor through a preferred network of contractors.

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" (emphasis in original) *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 Tortfeasers Act (hereinafter, "UCATA") S.C. Code Ann. §15-38-10 to 70

(Supp.2000). It is important to note that neither indemnity nor the UCATA are applicable to the SCTCA and its application.

The common law provided tort immunity to all governmental entities. It is only through the SCTCA that any right of claim is given 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* cited by Defendant.

Andrade uses the "UCATA" in its decision by refusing to extend the UCATA to parties who are only vicariously liable. However, 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 Defendant'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 contained within the Act itself.

This Court ultimately granted Defendant "Governors" Motion for Summary Judgment finding the *Andrade* case to be applicable. Plaintiff respectfully requests the Court to reconsider the granting of Defendant's Motion for Summary Judgment in that:

- 1) SCTCA is the controlling statutory law in determining cases brought within the act, and
- 2) The case of *Wade v. Berkeley County* is the controlling authority in the present case; and

3) *Andrade* does not apply in the present action as it is decided based on indemnity and the UCATA which are both inapplicable in SCATA cases.

WHEREFORE, the Plaintiffs pray that the Court reconsider its judgment in the above matter as requested above and amend and reissue the Order in this matter accordingly.

HARRIS, GRAVES & WILLIAMS, LLC

/s/ Mitchell J. Williams
MITCHELL J. WILLIAMS
Attorney for Plaintiff
SC Bar No. 8002
P.O. Box 11566
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(803) 799-2911
mjw@harrisgraves.com

Columbia, South Carolina

Dated: August 2, 2023



USAA Casualty Insurance Company

STATE OF SOUTH CAROLINA COVENANT NOT TO EXECUTE, POLICY RELEASE, AND SETTLEMENT AGREEMENT COUNTY OF RICHLAND

Karen P Campbell	008345106 - 018	04/23/2019
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In consideration of the total sum of (\$100,000.00) dollars, sufficiency of which is hereby acknowledged, the undersigned, hereby covenant and forever discharge Karen P Campbell and their property agents, servants, employees, heirs, successors, and assigns, none of whom admits any liability to the undersigned, but expressly deny such liability, from any and all claims, demands, damages, actions, and causes of actions, or suits of any kind or nature whatsoever, and more particularly on account of all injuries and damages, known or unknown, both to person and property of the undersigned which have resulted or may in the future develop from an automobile accident on April 23, 2019 in Columbia South Carolina

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. The undersigned expressly reserves the right to prosecute a legal action in tort against Karen P Campbell solely for the purpose of establishing a claim for any such benefits due from any other party or insurance company for the purpose of establishing a claim for such benefits under such policy or policies. For the consideration recited above, the undersigned specifically agree and covenant that they 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. If any judgment is obtained against the releasees, the undersigned agree to seek to collect such judgment only from another party or carriers.

The undersigned further agree and covenant that if a verdict is returned against the releasees, they will take such steps as are necessary to mark the judgment paid and satisfied as soon as is legally practicable without making any effort to collect any amount from the releasees.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 20th day of July, 2020

Signed, sealed, and delivered in the presence of: [Signature]

[Signature] Wanda Whetstone 07/02/2020

EXHIBIT "A"

ELECTRONICALLY FILED - 2023 Aug 02 2:57 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4001276

State of South Carolina)
)
County of Richland)
)

Circuit Court
2021CP4001276

Wanda Whetstone)

v.)

Transcript of Record

State of South Carolina,)
Office of the Governor)

July 25, 2023
Richland, South Carolina

B E F O R E:

The Honorable William A. McKinnon, Judge.

A P P E A R A N C E S (All present by video or telephone):

Mitchell J. Williams
Attorney for the Plaintiff

David Anderson
Attorney for the Defendant

Debra Price, CER-985
Transcriber



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1 THE COURT: Mr. Anderson, we got a busy morning. So let
2 me stop you. I think I've got a pretty good handle on your
3 argument, if that's okay.

4 Let me turn to Mr. Williams.

5 MR. ANDERSON: Thank you, Your Honor.

6 THE COURT: Mr. Williams, in the memo, you tell me I
7 should look at the release language. The release language is
8 definitely a release. It's not a -- I mean, it says, in
9 consideration of a hundred thousand dollars, the undersigned
10 forever discharges Karen P. Campbell and the property from any
11 and all claims. I mean, that's a full release, isn't it?

12 MR. WILLIAMS: I'm sorry, it's a covenant not to execute
13 and it's a fairly standard covenant.

14 THE COURT: Well, it says discharge. What does fully
15 discharge mean?

16 MR. WILLIAMS: Well, I think that as far as she is
17 concerned, there is a discharge, but the additional language
18 makes it very clear that she, the plaintiff, would have a
19 right to bring a claim against any other parties and to
20 initiate a suit against Ms. Campbell for the purpose of
21 recovering from any additional insurance coverages. So the
22 release is -- if you look at the title of it, it's a little
23 confusing because it has release on one line, but it's a
24 policy release is what's found actually in the language that's
25 there.

1 The thing to understand here I think that's important is
2 that this is different because it's under the South Carolina
3 Tort Claims Act. And the Tort Claims Act is different in the
4 way that it handles and deals with vicarious liability. The
5 Andrade or Andre (phonetic) case, it's not a Tort Claims Act
6 case. It's a case dealing with a contractor who has SCEG that
7 sort of promotes them through this program that they have.

8 THE COURT: Well, right. But unless there's a provision
9 in the Tort Claims Act to the contrary, the Tort Claims Act
10 applies standard tort law. And understanding tort law, if you
11 release the agent, the principal is released, too.

12 MR. WILLIAMS: Well, and that's where, as Mr. Anderson
13 brought up, the Wade case is very important because the case
14 in Andrade, it basically was decided based upon the Uniform
15 Contribution Among Tortfeasors Act. That act does not apply
16 to the South Carolina Tort Claims Act. In fact, it expressly
17 in the Uniform Contribution Among Tortfeasors Act it says that
18 it does not apply to governmental entities. And so that is
19 very clear in 15-38-65. So we don't believe that Andre's
20 holdings applies to this case at all.

21 In fact, it's interesting to note that the Wade v.
22 Berkeley County case was decided subsequent to the Andrade
23 case.

24 THE COURT: What's the citation for Wade?

25 MR. WILLIAMS: I'm sorry, sir?

1 THE COURT: What's the citation for Wade?

2 MR. WILLIAMS: Wade is 348 S.C. 344 (sic), and I have the
3 Southeastern Second cite as well.

4 THE COURT: I've already got it. One minute. Okay.

5 MR. WILLIAMS: Okay.

6 THE COURT: Tell me that cite again.

7 MR. WILLIAMS: 348 --

8 THE COURT: Okay.

9 MR. WILLIAMS: -- S.C. 344 (sic).

10 MR. ANDERSON: It's 224, Your Honor.

11 THE COURT: Okay. Because that's not bringing it up
12 either. S.C. 224?

13 MR. ANDERSON: That's correct, Your Honor.

14 THE COURT: Okay. Now I've got it.

15 MR. WILLIAMS: Okay. I apologize.

16 THE COURT: It's okay.

17 MR. WILLIAMS: I wrote it down wrong. But in Wade, what
18 the court says is that a settlement or judgment under this
19 chapter that it does constitute a complete bar to any further
20 action against an employee or governmental entity by reason of
21 the same occurrence. But the court determined that under this
22 chapter requires that there actually be a claim that's brought
23 under the chapter. And in fact, the language in Wade is
24 important to note.

25 What the court says is 15-78-70(d) permits a plaintiff to

1 maintain an action against a governmental employee in his
2 individual capacity, settle, and then pursue an action against
3 the governmental employer for the tort that his employee
4 allegedly committed while in the scope of employment. And the
5 court notes that that circumvents some of the intent or the
6 policy of the act. But based on the legislative history, the
7 court says, we don't have any other choice but to allow this
8 to occur.

9 And that's the exact situation that we have in this case
10 where the plaintiff maintained an action against the
11 governmental employee in their individual capacity, and then
12 they settled, and then they pursued an action against the
13 government. And according to Wade, which I said, was decided
14 subsequent to Andrade --

15 THE COURT: Mr. Williams, just a second. Now I just read
16 Wade. Wade isn't on this issue. I mean, in Wade, it's not --
17 it's a covenant not to execute. And the question is whether a
18 covenant not to execute triggers the statutory provision
19 barring any other claim. That's not the issue in this case,
20 is it? I mean, that --

21 MR. WILLIAMS: I believe that it is. I believe it's
22 exactly --

23 THE COURT: The defendant is not asserting the Tort
24 Claims Act provision that's cited in Wade. They're saying,
25 under the common law, this is a settlement not a covenant not

1 Anderson, I'm inclined to rule against you because, I mean,
2 the contract is ambiguous. And I think if the claim is going
3 to go to a jury, then I think the jury is going to have to
4 make a decision as to what that contract means. I don't think
5 I can rule -- because in order to rule in your favor, I have
6 to rule as a matter of law there's only one permissible
7 interpretation of this contract, correct?

8 MR. ANDERSON: Your Honor, I think our courts have looked
9 at this. If you look at the -- at least in the Wade action
10 and Andrade action, they looked at the -- they talked a
11 covenant not to execute and whether a covenant not to execute
12 is a release, and they both found that it is a release. And
13 in this particular action --

14 THE COURT: Okay. So now Andrade you're telling me says,
15 even if the document is not a release but just a covenant not
16 to execute, that document excuses the principal as well?

17 MR. ANDERSON: Yes, Your Honor. That's what the court
18 found in --

19 THE COURT: Okay. Well, let me take -- okay. What's the
20 citation for that?

21 MR. ANDERSON: The Andrade case, Your Honor, is 345 S.C.
22 216.

23 THE COURT: All right.

24 MR. ANDERSON: And at 3 -- I don't know if the
25 Court would like me to --

1 THE COURT: Okay. Go ahead, yeah.

2 MR. ANDERSON: To page 328 of that decision. It states,
3 "when Andrade issued a covenant not to sue" --

4 THE COURT: Page 328?

5 MR. ANDERSON: Well, it's page 6 of the -- it depends
6 on -- it says, id at 328. It's on --

7 THE COURT: Right. But that's a citation, isn't it, to
8 Black's Law Dictionary, I think?

9 MR. ANDERSON: Yes, Your Honor. I've got a -- it's
10 page -- it's under the law analysis. Oh, excuse me, 669.

11 THE COURT: There we go. Okay. That's the same
12 pagination I have, okay, 669. Go ahead.

13 MR. ANDERSON: It states, "when Andrade issued a covenant
14 not to sue in Johnson's favor, any claims she had against him
15 were terminated. Thus, the SCEG's derivative liability based
16 upon Johnson's conduct was extinguished. Where we define the
17 covenant released Johnson but not SCEG, it would necessarily
18 follow the SCEG could seek indemnification from Johnson and
19 recover the entire amount of any verdict against it from him.
20 This would effectively strip the covenant not to sue of any
21 real meaning and result in what the court in Nelson v.
22 Gillette described as a corrosive cycle of indemnity. The
23 right to contribution exists only in situations involving
24 joint tortfeasors."

25 Here, Your Honor, we don't have joint tortfeasors. We

1 have basically the principal and -- the agent and the
2 principal. They are one. It's not like there's multiple
3 tortfeasors that are involved in multiple layers of liability
4 or degrees of liability. Here, you have simply it's vicarious
5 liability derivative from Ms. Campbell being negligent;
6 therefore, her negligence is imputed to the governor's office.

7 THE COURT: Okay. Let me read.

8 (Pause)

9 MR. ANDERSON: Your Honor --

10 THE COURT: Hold on. Let me read. All right. Yes, sir,
11 I've finished.

12 MR. ANDERSON: Your Honor, the common law of this state
13 as I'm reading -- quoting from Andrade, "the common law of
14 this state provides that a covenant not to sue an employee
15 operates as an acquittal of the employer who is only
16 derivatively liable. A covenant not to sue would be" --

17 THE COURT: Mr. Anderson, I've got -- I've read it. It's
18 okay. Let me --

19 Okay. Mr. Williams, I'm about to rule for Mr. Anderson.
20 I think Andrade controls. Andrade says it doesn't matter
21 whether it's a covenant not to execute or whether it's a
22 release. If it's principal-agent, it's not joint tortfeasors
23 and the principal is released. I mean, I don't -- I mean, it
24 is exactly -- now, it's got a red flag in Russell (phonetic).
25 I would look to see what the negative treatment is.

1 MR. WILLIAMS: Yes, Your Honor. The negative treatment
2 indicates that it's regarding -- the underlying court
3 indicated that the -- they concluded that the dealer agreement
4 provides evidence of a contractual duty, and by SCEG to
5 oversee the proper installation. And the court, the Supreme
6 Court, overruled that and said their interpretation that
7 neither agreement did not comport with that.

8 THE COURT: That there's --

9 MR. WILLIAMS: What they --

10 THE COURT: There's no discussion of the principal-agent
11 release. Okay. I'm just looking, okay.

12 MR. WILLIAMS: That's correct, Your Honor.

13 MR. ANDERSON: Your Honor, if I might. One of the
14 important things about Andrade to understand is that in the
15 language there -- and you probably read it just a moment
16 ago -- but the court points to common law of South Carolina.
17 In South Carolina a matter of principal, who's only
18 vicariously liable that they don't have a proportional portion
19 that they all have to pay, but they can instead shift the
20 entire loss to the employee. And under the common law, they
21 have that right to do that if they choose to do that. So they
22 can recover in full back from their servant.

23 THE COURT: Right.

24 MR. ANDERSON: That was a big part in Andrade.

25 THE COURT: I hear you.

1 MR. ANDERSON: They said, if that covenant is there, then
2 that person's been released. How can we allow this employer
3 or this master to bring a claim back against them? Well, none
4 of that exists under the Tort Claims Act. The Tort Claims Act
5 in fact says the employee has no responsibility and it all
6 belongs to that of the governmental entity. So the Andrade
7 case --

8 THE COURT: Slow down.

9 MR. ANDERSON: Yes.

10 THE COURT: You said the Tort Claims Act says the
11 employee has no liability at all?

12 MR. WILLIAMS: Your Honor, may I? It doesn't. It
13 doesn't state --

14 THE COURT: Hold on. Let me hear from Mr. -- because Mr.
15 Williams, in that case, why did the defendant settle with you?

16 MR. WILLIAMS: Okay. Well, the Tort Claims Act --
17 because the claim wasn't brought under the Tort Claims Act.

18 THE COURT: Okay.

19 MR. WILLIAMS: The Tort Claims Act specifically -- what
20 it specifically says is that the actions should be brought in
21 the name of the entity and not in the name of the employee or
22 the individual.

23 THE COURT: Right.

24 MR. WILLIAMS: And so that's what the Tort Claims Act
25 specifically says. And what we can take from that is that

1 there is no right for the governmental entity to go back
2 against their own employee to recover as there is in common
3 law and as there was in Andrade and was one of the factors
4 that the court looked at in deciding Andrade.

5 THE COURT: If you bring the claim under the tort's
6 claims act, which you did not.

7 MR. WILLIAMS: Well, I have now. But initially, it was
8 not brought under the Tort Claims Act. It was brought against
9 the individual person, yes.

10 THE COURT: I think I've heard enough. Counsel, I
11 appreciate it. This is a tough issue, but I think Andrade is
12 controlling. I'm going to rule for the defense in this case.

13 COURT'S RULING

14 MR. ANDERSON: Thank you, Your Honor.

15 THE COURT: So Mr. Anderson, will you draft me an order?

16 MR. ANDERSON: Yes, Your Honor.

17 THE COURT: Okay.

18 MR. WILLIAMS: Thank you, Your Honor.

19 MR. ANDERSON: Thank you, Your Honor.

20 THE COURT: Yes. I appreciate it, gentlemen.

21 (End of Transcript of Record)

22

23

24

25



USAA Casualty Insurance Company

STATE OF SOUTH CAROLINA COVENANT NOT TO EXECUTE, POLICY RELEASE, AND SETTLEMENT AGREEMENT COUNTY OF RICHLAND

Policy Name	Policy Number	Effective Date
Karen P Campbell	008345106 - 018	04/23/2019

In consideration of the total sum of (\$100,000.00) dollars, sufficiency of which is hereby acknowledged, the undersigned, hereby covenant and forever discharge Karen P Campbell and their property agents, servants, employees, heirs, successors, and assigns, none of whom admits any liability to the undersigned, but expressly deny such liability, from any and all claims, demands, damages, actions, and causes of actions, or suits of any kind or nature whatsoever, and more particularly on account of all injuries and damages, known or unknown, both to person and property of the undersigned which have resulted or may in the future develop from an automobile accident on April 23, 2019 in Columbia South Carolina

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. The undersigned expressly reserves the right to prosecute a legal action in tort against Karen P Campbell solely for the purpose of establishing a claim for any such benefits due from any other party or insurance company for the purpose of establishing a claim for such benefits under such policy or policies. For the consideration recited above, the undersigned specifically agree and covenant that they 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. If any judgment is obtained against the releasees, the undersigned agree to seek to collect such judgment only from another party or carriers.

The undersigned further agree and covenant that if a verdict is returned against the releasees, they will take such steps as are necessary to mark the judgment paid and satisfied as soon as is legally practicable without making any effort to collect any amount from the releasees.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 20th day of July, 2020

Signed, sealed, and delivered in the presence of: [Signature]

[Signature] 07/02/2020 Wanda Whetstone

EXHIBIT "A"

ELECTRONICALLY FILED - 2023 JUL 20 9:38 AM - RICHLAND - COMMON PLEAS - CASE#2021CP4001276

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF RICHLAND)	FIFTH JUDICIAL CIRCUIT
)	
Wanda Whetstone,)	Civil Action No. 2021-CP-40-1276
)	
Plaintiff,)	
)	
v.)	AFFIDAVIT OF KAREN P. CAMPBELL
)	
State of South Carolina, Office of the)	
Governor,)	
)	
Defendants.)	
_____)	

I, Karen P. Campbell, having first been duly sworn, hereby depose, declare, and state as follows:

1. I am over the age of eighteen (18) and am of sound mind and competent to give this Affidavit, and if called upon to testify with respect to the matters set forth herein, I could and would competently do so.
2. I am currently employed by the Office of the Governor of the State of South Carolina and serve as Special Assistant to the First Lady and Governor's Mansion Director. I have served in this position for approximately four (4) years.
3. My duties in connection with my current employment include managing the operation of the Governor's Mansion Complex.
4. On April 23, 2019, during my lunch break, I was running a personal errand to my personal bank when I was involved in a minor automobile accident with Ms. Wanda Whetstone. I was driving my personal vehicle at the time of the accident and was not performing any duty related to the above-referenced position or acting within the scope of my employment. This errand

occurring during my lunch break and had nothing to do with my employment or position with the Office of the Governor.

5. It is my understanding that Ms. Whetstone previously made a claim against my personal insurance company related to this accident and subsequently settled or resolved that claim with my personal insurance company.

6. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

FURTHER AFFIANT SAYETH NOT.

This 7th day of April, 2021.

Karen P. Campbell
Karen P. Campbell

SWORN TO AND SUBSCRIBED BEFORE ME
this 7th day of April, 2021.

Thomas J. [Signature]
Notary Public for the State of South Carolina

My Commission Expires: 8/17/2027

RECEIVED

Sep 07 2023

SC Court of Appeals

ELECTRONICALLY FILED - 2023 Aug 30 4:09 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4001278

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

William A. McKinnon Presiding Judge, Sixteenth Judicial Circuit

Case No. 2021CP4001276

Wanda Whetstone

Appellant,

v.


State of South Carolina, Office of
the Governor

Respondent.

NOTICE OF APPEAL

Wanda Whetstone appeals the order of the Honorable William A. McKinnon dated August 8, 2023 on Appellant's Motion to Reconsider. Appellant received electronic notice of entry of this order on August 8, 2023.

August 30, 2023
Date



Mitchell J. Williams
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Po Drawer 7788
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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

William A. McKinnon, Circuit Court Judge

Case No. 2023-001424

Wanda Whetstone

Appellant,

v.

State of South Carolina,
Office of the Governor

Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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Dated: November 30, 2023