RECEIVED
Feb 12 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Court Judge
Case No. 2017-CP-10-01324

APPELLATE CASE NO.: 2023-000898

Steven McLemore and Bonnie Jean Eagle as Natural Parents for the Estate of D.M.,

Plaintiffs,

v.

Charleston County Parks and Recreation Commission d/b/a James Island County Park; Yearround Pool Co., Inc.; SGA Architecture; South Carolina Department of Health and Environmental Control; and John Doe and/or John Doe Corporation,

Defendants.

OF WHOM:

Bonnie Jean Eagle is .... Appellant,

and

Charleston County Parks and Recreation Commission d/b/a James Island County Park is ....Respondent.

FINAL BRIEF OF RESPONDENT

Jonathan J. Anderson (SC Bar Number 383)
Jonathan L. Anderson (SC Bar Number 103127)
ANDERSON LAW GROUP, LLC
37 ½ Broad Street | P.O. Box 87
Charleston, SC 29401
Phone: (843) 723-0185
Fax: (843) 405-0313
janderson@algsc.com
landerson@algsc.com

Counsel for Charleston County Parks and Recreation Commission d/b/a James Island County Park

I. TABLE OF CONTENTS

I. TABLE OF CONTENTS i

II. TABLE OF AUTHORITIES ii

III. STATEMENT OF ISSUES ON APPEAL 1

A. Did the Trial Court err in its application of S.C. Code §15-78-70(d) when it granted Respondent's Motion to Dismiss for lack of subject matter jurisdiction? 1

IV. STATEMENT OF THE CASE 1

A. FACTUAL BACKGROUND 1

B. PLEADINGS 1

C. SETTLEMENT WITH DHEC 2

D. PETITION TO APPROVE SETTLEMENT 2

E. CCPRC'S MOTION FOR SUMMARY JUDGMENT 3

F. CCPRC'S 12(B)(1) MOTION TO DISMISS 3

V. STANDARD OF REVIEW 5

VI. ARGUMENT 5

A. A SETTLEMENT AGREEMENT CANNOT VIOLATE STATE LAW. 6

1) A SETTLEMENT AGREEMENT IS A CONTRACT. 6

2) A CONTRACT CANNOT VIOLATE STATE LAW. 6

3) PARTIES MAY NOT CONFER SUBJECT MATTER BY CONSENT. 7

4) PLAINTIFFS ELECTED A REMEDY. 8

B. THE LAW OF THE CASE DOCTRINE IS INAPPLICABLE. 10

C. THE CIRCUIT COURT PROPERLY RULED IT NO LONGER HAD SUBJECT MATTER JURISDICTION. 11

D. ESTOPPEL IS NOT AVAILABLE AGAINST THE GOVERNMENT TO THWART THE APPLICATION OF PUBLIC POLICY. 13

VII. CONCLUSION 16

II. TABLE OF AUTHORITIES

CASES

AMERICAN AGRIC. CHEM. CO. V. THOMAS, 206 S.C. 355, 34 S.E.2D 592 (1945) 7, 12

AUSTIN V. STOKES-CRAVEN HOLDING CORP., 387 S.C. 22, 691 S.E.2D 135 (2010) 9

BATESBURG COTTON OIL CO. V. S. R. CO., 103 S.C. 494, 88 S.E. 360 (1916) 10

BOWERS V. S.C. DOT, 360 S.C. 149, 600 S.E.2D 543 (CT. APP. 2004) 6

BROWN V. FELKEL, 320 S.C. 292, 465 S.E.2D 93 (CT. APP. 1995) 9

BUILDERS MUT. INS. CO. V. BOB WIRE ELEC., INC., 424 S.C. 161, 817 S.E.2D 807 (CT. APP. 2018) 10

BYRD V. LIVINGSTON, 398 S.C. 237, 727 S.E.2D 620 (CT. APP. 2012) 6

CAMPBELL V. CITY OF N. CHARLESTON, 431 S.C. 454, 848 S.E.2D 788 (CT. APP. 2020) 13

CAPITAL CITY INS. CO. V. BP STAFF, INC., 382 S.C. 92, 674 S.E.2D 524 (CT. APP. 2009) 5

CATAWBA INDIAN TRIBE OF S.C. V. STATE OF SOUTH CAROLINA, 372 S.C. 519, 642 S.E.2D 751 (2007) 5

CHAPMAN V. METRO. LIFE INS. CO., 172 S.C. 250, 173 S.E. 801 (1934) 10

CHARLESTON COUNTY PARKS & REC. COMM'N V. SOMERS, 319 S.C. 65, 459 S.E.2D 841 (1995) .. 5

CITIZENS FOR RESPONSIBILITY & ETHICS V. FEC, 363 F. SUPP. 3D 33, 39 (D.D.C. 2018) 2D 59, 63 (D.D.C. 2002) 5

DYKEMA V. CAROLINA EMERGENCY PHYSICIANS, P.C., 348 SC 549, 560 S.E.2D 894 (2002) 9

EX PARTE DOE, 393 S.C. 147, 711 S.E.2D 892 (2011) 6

GNOC CORP. V. ESTATE OF RHYNE, 312 S.C. 86, 439 S.E.2D 274 (1994) 7, 15

GRANT V. CITY OF FOLLY BEACH, 346 S.C. 74, 551 S.E.2D 229 (2001) 14

HODGES V. RAINEY, 341 S.C. 79, 533 S.E.2D 578 (2000) 11

JETER V. S.C. DOT, 369 S.C. 433, 633 S.E.2D 143 (2006) 5

JUDY V. MARTIN, 381 S.C. 455, 674 S.E.2D 151 (2009) 10

LANDING DEV. CORP. V. MYRTLE BEACH, 285 S.C. 216, 329 S.E.2D 423 (1985) 14, 15

LIFSCHULTZ FAST FREIGHT, INC. V. HAYNSWORTH, MARION, MCKAY & GUERARD, 334 S.C. 244, 513 S.E.2D 96 (1999) 10

LUJAN V. DEFS. OF WILDLIFE, 504 U.S. 555, 112 S. CT. 2130, 119 L. ED. 2D 351 (1992) 5

MIDLANDS UTIL., INC. V. S.C. DEP'T OF HEALTH & ENVTL. CONTROL, 298 S.C. 66, 378 S.E.2D 256 (1989) 15

N. CHARLESTON V. N. CHARLESTON DIST., 289 S.C. 438, 346 S.E.2D 712 (1986) 14

NOOJIN V. NOOJIN, 417 S.C. 300, 789 S.E.2D 769 (CT. APP. 2016) 10

OXFORD FIN. COS. V. BURGESS, 303 S.C. 534, 402 S.E.2D 480 (1991) 15

PARKER V. SPARTANBURG SANITARY SEWER DIST., 362 S.C. 276, 607 S.E.2D 711 (CT. APP. 2005) 13
PASCHAL V. CAUSEY, 309 S.C. 206, 420 S.E.2D 863 (CT. APP. 1992) 12
PEE DEE STORES, INC. V. DOYLE, 381 S.C. 234, 672 S.E.2D 799 (CT. APP. 2009) 6
PETROLEUM TRANSP., INC. V. PUBLIC SERVICE COMM'N, 255 S.C. 419, 179 S.E.2D 326 (1971) 7
S.C. PUB. INT. FOUND. V. WILSON, 437 S.C. 334, 878 S.E.2D 891 (2022) 5
SAVE CHARLESTON FOUND. V. MURRAY, 286 S.C. 170, 333 S.E.2D 60 (CT. APP. 1985) 9
SE. FREIGHT LINES V. CITY OF HARTSVILLE, 313 SC 466, 443 S.E.2D 395 (1994) 8
SHEKOYAN V. SIBLEY INT'L CORP., 217 F. SUPP. 2D 59 (D.D.C. 2002) 5
SOUTH CAROLINA DEP'T OF SOC. SERVS. V. PARKER, 275 S.C. 176, 268 S.E.2D 282 (1980) 14
STATE V. HEWINS, 409 S.C. 93, 760 S.E.2D 814 (2014) 10
STATE V. LATIMORE, 390 S.C. 88, 700 S.E.2D 456 (CT. APP. 2010) 15
SULLIVAN-CARTER V. CARTER, 439 S.C. 406, 887 S.E.2D 146 (CT. APP. 2023) 14
THOMPSON V. SWICEGOOD, 430 S.C. 648, 845 S.E.2D 920 (CT. APP. 2020) 5
WHITE V. J.M. BROWN AMUSEMENT CO., 360 S.C. 366, 601 S.E.2D 342 (2004) 6

STATUTES

S.C. CODE §15-38-65 (2022) 9
S.C. CODE §15-78-40 (2015) 8
S.C. CODE §23-3-460(A) 15
S.C. CODE ANN. §§ 62-3-1101 (2022) 2
S.C. CODE ANN. §15-78-100 (2022) 8, 9
S.C. CODE ANN. §15-78-120 (2012) 8, 9
S.C. CODE ANN. §15-78-70(D) (2012) 3, 5, 11, 12
SC CODE ANN. §15-78-120 8

REGULATIONS

S.C. CODE REGS. 61-51.C(8)(B) (2014) 2

TREATISES

NORMAN J. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 46.03 AT 94 (5TH ED. 1992) 11

III. STATEMENT OF ISSUES ON APPEAL

A. Did the Trial Court err in its application of S.C. Code §15-78-70(d) when it granted Respondent's Motion to Dismiss for lack of subject matter jurisdiction?

IV. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

This matter arises from the drowning of three (3) year-old "DM" at the James Island County Park on 14 May 2016. Plaintiffs' Complaint alleges that the McLemore family visited a spray-and-play area near a pond at the James Island County Park on that day. While packing to leave, Ms. Eagle's nephew diverted her attention by spraying her with a bottle of water. Ms. Eagle alleges that after playfully chasing after the nephew, she noticed DM was missing. Several hours later, police divers found DM's body submerged in the nearby pond.

B. PLEADINGS

Plaintiffs filed their initial suit on 14 March 2017 and Amended their Complaint twice on 21 March 2018, and 16 April 2019. (R. pp.75-87). The operable Complaint is the Second Amended Complaint, which lists six (6) causes of action:

- Attractive Nuisance;
- Negligence/Gross Negligence;
- Negligence/Wrongful Death;
- Negligence/Survival Action;
- Premises Liability;
- Negligent Construction/Design.

Every cause of action is directed simultaneously at every defendant. The Complaint alleges the single act of negligence, from which the terrible sequence of events unfolded, was the lack of a fence, pursuant to S.C. CODE REGS. 61-51.C(8)(b) (2014).[1] (R. p.80).

C. SETTLEMENT WITH DHEC

On 17 March 2020, Plaintiffs confirmed a settlement with Defendant South Carolina Department of Health and Environmental Control ("DHEC"), by signing a "Full, Final, and Complete Release of South Carolina Department of Health and Environmental Control" ("Release" and/or "Settlement" or "Settlement Agreement"). (R. pp.71-74). DHEC offered Plaintiffs ten thousand dollars ($10,000.00) to resolve their participation in this lawsuit. Plaintiffs accepted this offer. The parties made consideration for this agreement in the form of mutual promises: DHEC to pay Plaintiffs, and Plaintiffs to dismiss DHEC from this lawsuit with prejudice.

D. PETITION TO APPROVE SETTLEMENT

On 26 March 2020, Plaintiffs filed a petition requesting approval of the settlement ("Petition"). On 31 March 2020, Judge McCoy approved and confirmed "the settlement ***as described in the Petition***." (R. pp.15-18, emphasis added). Judge McCoy's Order incorporates Appellant's Petition for Approval by reference but does not incorporate the Release. Further on, Judge McCoy's Order states for a second time, "…I find the settlement ***described in the Petition*** should be approved and confirmed as provided by S.C. CODE ANN. §§ 62-3-1101 (2022) et seq." (R. p.16, lines 14-15, emphasis added). Defendant/Appellant Charleston County Parks and Recreation Commission d/b/a James Island County Park ("CCPRC") draws the Court's attention

---

[1] After describing the alleged unheeded regulatory structure, Plaintiffs contend "[t]hat this deadly hazard continues to this date of the filing of these pleadings." (R. p. 80).The unsafe condition was the lack of a fence which was the "direct and proximate cause of Plaintiff's injuries…" (R. p.80).

to this repeated language because the Petition filed by Plaintiffs does not contain the exclusionary language relied on by Appellant in support of her appeal. The Release was not filed as a part of the public record in this case, unsurprisingly, counsel for CCPRC was not included in the deliberations between Plaintiffs and DHEC concerning the Release.

E. CCPRC'S MOTION FOR SUMMARY JUDGMENT

On 14 May 2021, CCPRC filed a Rule 56, SCRCP motion for summary judgment based, in part, upon S.C. CODE ANN. §15-78-70(d) (R. pp.61-66). Judge Burch heard and denied the motion on 4 January 2022, filing a formal order on 11 February 2022. The basis for the denial was:

> *It is well settled in South Carolina that one circuit judge cannot overrule another circuit judge's order. In this case, the Release and the Petition were approved by this Court on March 31, 2020. This Court cannot overrule another circuit judge's order.*
>
> (R. p.13, lines 3-5).

On 4 April 2022, Judge Burch denied CCPRC's Rule 59(e), SCRCP Motion to Alter or Amend the Judgment. (R. pp.9-10).

F. CCPRC'S 12(B)(1) MOTION TO DISMISS

On 3 November 2022, CCPRC filed a Motion to Dismiss based on the Circuit Court's lack of subject matter jurisdiction. (R. pp.29-40). In front of the Honorable R. Keith Kelly, CCPRC argued that by operation of law, the settlement between Plaintiffs and DHEC triggered S.C. CODE §15-78-70(d), which states:

> *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.*
>
> S.C. CODE §15-78-70(d) (2012).

CCPRC argued that the "complete bar" called for in the Statute removed subject matter jurisdiction from the Circuit Court, and dismissal was appropriate. Plaintiffs did not file a written response, but raised the following issues during oral arguments:

- Their settlement with DHEC covered only the "occurrence" of negligence by DHEC. (R. p.93 line 2-p.95 line 20).
- Judge Burch previously denied CCPRC's Motion for Summary Judgment based on the precept that "one circuit judge cannot overrule another." (R. p.95, line 23-p.96, line 20).
- The language of the Release specifically excluded CCPRC, as supported by the affidavit of Attorney John Harrell. (R. p.96, line 21-p.97, line 11).
- CCPRC had an opportunity to object to the settlement but failed to do so. (R. p.97, line 5-11).

CCPRC responded:

- There does not appear to be a requirement in South Carolina jurisprudence for a co-defendant to object to the settlement of another. (R. p.98, line 11-15).
- No iteration of Plaintiff's Complaint raises the idea of multiple occurrences, and the Second Amended Complaint directed all causes of action to all parties simultaneously. (R. p.99, line 13-p.100, line 6).

Judge Kelly granted CCPRC's Motion to Dismiss and filed a formal order to that effect on 15 March 2023. (R. pp.3-8). Plaintiffs filed a timely Motion for Reconsideration (R. pp.19-28), to which CCPRC responded, resulting in a denial of Plaintiff's motion by Judge Kelly.

Appellant concludes her Statement of the Case by stating the Statute "is silent as to the issue in this case and thus does not prohibit this lawsuit." Appellant's Initial Brief, at 2, FN 1, (15 November 2023). Respondent strongly disagrees with this analysis and posits that the plain meaning of the Statute is that once a plaintiff settles with a governmental entity (or a judgment is granted), that "constitutes a complete bar to any further action against an employee or governmental entity by reason of the same occurrence." S.C. CODE §15-78-70(d) (2005).

V. STANDARD OF REVIEW

Subject matter jurisdiction is a question of law that this Court reviews *de novo*. *Thompson v. Swicegood*, 430 S.C. 648, 658, 845 S.E.2d 920, 925 (Ct. App. 2020). Therefore, this Court is "free to decide questions of law with no deference to the trial court." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009), citing *Catawba Indian Tribe of S.C. v. State of South Carolina,* 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). See also, *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 340, 878 S.E.2d 891, 894 (2022). ("Generally, whether subject matter jurisdiction exists is a question of law, which the appellate court is free to decide with no particular deference to the circuit court.") Under Rule 12(b)(1), a Plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *Shekoyan v. Sibley Int'l Corp*., 217 F. Supp. 2d 59, 63 (D.D.C. 2002); *Citizens for Responsibility & Ethics v. FEC*, 363 F. Supp. 3d 33, 39 (D.D.C. 2018)2d 59, 63 (D.D.C. 2002). The issue of interpretation of a statute is a question of law for the court. *Jeter v. S.C. DOT*, 369 S.C. 433, 438, 633 S.E.2d 143, 146 (2006), citing *Charleston County Parks & Rec. Comm'n v. Somers*, 319 S.C. 65, 459 S.E.2d 841 (1995).

VI. ARGUMENT

The Circuit Court properly ruled that it no longer had subject matter jurisdiction over CCPRC. In interpreting S.C. CODE §15-78-70(d) ("the Statute"), Judge Kelly correctly determined Appellant's elected a remedy against the superordinate Defendant—the State of South Carolina—by settling DHEC. (R. p.7). Because Appellant chose to settle with DHEC, by operation of law, the Court lost subject-matter jurisdiction over the other governmental entity in this suit. Appellant has not, and cannot, meet her burden of proof to establish the continued existence of subject matter jurisdiction.

A. A SETTLEMENT AGREEMENT CANNOT VIOLATE STATE LAW.

Appellant argues that Judge McCoy's approval of the Release via the Petition for Settlement nullifies S.C. CODE §15-78-70(d). Respondent does not argue that the Release is unenforceable, only that the final clause improperly attempts to expand subject matter jurisdiction by consent. Respondent reiterates that the Petition for Approval does not contain the exclusionary language relied on by Appellant, and the Release was not entered into the Court record.

1) A SETTLEMENT AGREEMENT IS A CONTRACT.

There is no question, and Appellant does not contest, that South Carolina jurisprudence views settlement agreements and releases as contracts. *Byrd v. Livingston*, 398 S.C. 237, 241, 727 S.E.2d 620, 621 (Ct. App. 2012) ("In South Carolina jurisprudence, settlement agreements are viewed as contracts."); *Ex parte Doe*, 393 S.C. 147, 151, 711 S.E.2d 892, 894 (2011) ("A release is a contract, and the scope of a release is gathered by its terms.") As such, this Court must apply general contract principles when reviewing a settlement agreement or release. *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241-42, 672 S.E.2d 799, 803 (Ct. App. 2009) ("General contract principles are applied in the construction of a settlement agreement because (…) a settlement agreement is a contract."); 18 S.C. Jur. Release §2 (2003) ("Because a release is a contract, principles of law applicable to contracts generally are also applicable to releases."); *Bowers v. S.C. DOT*, 360 S.C. 149, 153, 600 S.E.2d 543, 545 (Ct. App. 2004).

2) A CONTRACT CANNOT VIOLATE STATE LAW.

South Carolina courts make it abundantly clear they "will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions." *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004). Within the SCTCA, the Legislature states "it

is declared to be the public policy of the State of South Carolina that the State, and its political subdivisions, are only liable for torts within the limitations of this chapter and in accordance with the principles established herein." S.C. CODE ANN. § 15-78-20(a) (1988). Appellant's Settlement Agreement with DHEC includes a provision which reads:

> *Notwithstanding this Release, the Plaintiffs do not hereby release any claims against Defendants Charleston County Parks & Recreation Commission ("CCPRC") d/b/a James Island County Park, Yearround Pool Co., Inc., or SGA Architecture. This Release does not release any other governmental entity other than SCDHEC.* (R. p.74).

This exclusionary clause within the Release is an attempt to circumvent the plain language of the Statute ("A settlement…in an action…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.") While Appellant intended to settle her claim "only with DHEC and no other governmental defendant," the law precludes this option, and our courts cannot enforce a contract which violates the public policy of South Carolina as expressed through the SCTCA. In the face of clear, unambiguous, and dispositive statutory language supporting public policy, the Appellant's exclusionary clause was void *ab initio*.

3) PARTIES MAY NOT CONFER SUBJECT MATTER BY CONSENT.

Furthermore, subject matter jurisdiction cannot be created or modified by contract. "The question of lack of subject matter jurisdiction may be raised at any time during the action and cannot be **waived or conferred by consent**. . ." *Gnoc Corp. v. Estate of Rhyne*, 312 S.C. 86, 88, 439 S.E.2d 274, 275 (1994) (emphasis added), referencing *Petroleum Transp., Inc. v. Public Service Comm'n,* 255 S.C. 419, 179 S.E.2d 326 (1971); *American Agric. Chem. Co. v. Thomas*, 206 S.C. 355, 34 S.E.2d 592 (1945). Appellant asks this Court to enforce their Settlement

Agreement, which contains an exclusionary clause contrary to state law and attempts to expand the Circuit Court's jurisdiction further than the Legislature intended.

4) PLAINTIFFS ELECTED A REMEDY.

It is logical to ask—since the Legislature intends for governmental agencies to be liable for their torts as a private individual (S.C. CODE §15-78-40 (2015))—why this provision exists at all? Why does the Statute operate in a manner precluding a Plaintiff from recovering against multiple governmental defendants for a single occurrence? Simply put, governmental entities are all separate manifestations of a single entity: the State of South Carolina. The Statute is a codification of the election of remedies doctrine as applied to the State to prevent double recovery by any Plaintiff.

When a Plaintiff sues multiple governmental entities, South Carolina Courts engage in the useful fiction that these entities are distinct and separate for efficiency, liability apportionment, and insurance purposes. However, the intent of the Legislature in drafting the South Carolina Tort Claims Act was for courts to treat a single occurrence claim against multiple governmental actors as a single claim against the State. *See*, S.C. CODE ANN. §15-78-120 (2012). This is evident from the Legislature's reaction to the South Carolina Supreme Court ruling that "Uniform Contribution Among Tortfeasors Act repealed sections 15-78-100(c)[2] and 15-78-120(a)(1)[3] of the Tort Claims Act." *Se. Freight Lines v. City of Hartsville*, 313 SC 466, 469, 443 S.E.2d 395, 397 (1994). In

[2] "In all actions brought pursuant to this chapter when an alleged joint tortfeasor is named as party defendant in addition to the governmental entity, the trier of fact must return a special verdict specifying the proportion of monetary liability of each defendant against whom liability is determined." S.C. CODE ANN. §15-78-100(c).

[3] "Except as provided in Section 15-78-120(a)(3), no person shall recover in any action or claim brought hereunder a sum exceeding three hundred thousand dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved." S.C. CODE ANN. §15-78-120(a)(1).

response, the Legislature amended the Uniform Contribution Among Tortfeasors Act to include S.C. CODE ANN. §15-38-65 (2022), which states explicitly, "[t]he Uniform Contribution Among Tortfeasors Act shall not apply to governmental entities." *See also,* 1994 SC Acts 497, 1993 SC H.B. 4820, 1994 SC R. 609, 1994 SC Acts 497, 1993 SC H.B. 4820, 1994 SC R. 609, and *Dykema v. Carolina Emergency Physicians, P.C.*, 348 SC 549, 560 S.E.2d 894 (2002) (detailing the history of this legislative process). This action by the Legislature protected both S.C. CODE ANN. §15-78-100 (2022) and—pertinent to this case—S.C. CODE ANN. §15-78-120 (2012) as it reaffirmed the Legislature's intent to group all "agencies or political subdivisions" together during litigation of a single occurrence.

When a plaintiff receives funds from a governmental agency via judgment or settlement, they receive South Carolina tax dollars to redress their grievances. Allowing Appellant to move forward in this case after settling with DHEC—without including CCPRC—is allowing them double recovery against the State of South Carolina for the same occurrence. The prevention of this is "the basic purpose of election of remedies." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 56, 691 S.E.2d 135, 152-53 (2010), quoting *Save Charleston Found. v. Murray*, 286 S.C. 170, 333 S.E.2d 60 (Ct. App. 1985). See also, *Brown v. Felkel*, 320 S.C. 292, 295 n.1, 465 S.E.2d 93, 95 (Ct. App. 1995) ("The election of remedies doctrine focuses on the prevention of a double recovery based on the same injury").

The Legislature does not allow for repeated damages among multiple governmental defendants for a single occurrence; it treats recovery of damages from them as a unified block: The State of South Carolina. S.C. CODE ANN. § 15-78-120. In this instance, Appellant settled with the State of South Carolina through DHEC, without involving CCPRC, and thereby elected a remedy: the SCTCA precludes them from pursuing further recovery from the State.

B. THE LAW OF THE CASE DOCTRINE IS INAPPLICABLE.

The Law of the Case Doctrine is a "discretionary appellate doctrine with no preclusive effect on successive trial proceedings." *State v. Hewins*, 409 S.C. 93, 113 n.5, 760 S.E.2d 814, 824 (2014). As Appellant point out, this doctrine precludes re-litigating issues which "were either not raised on appeal, but should have been raised, or raised on appeal but expressly rejected by the appellate court." *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). This doctrine "applies only to subsequent proceedings in the same litigation following an appellate decision." *Builders Mut. Ins. Co. v. Bob Wire Elec., Inc.*, 424 S.C. 161, 165, 817 S.E.2d 807, 809 (Ct. App. 2018), referencing *Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 334 S.C. 244, 245, 513 S.E.2d 96, 96-97 (1999). As the Appellate Court has not yet made any determinations in this case, there is no law of the case on which to base this argument.

However, should this Court interpret this doctrine as a variation of the argument that "one circuit court judge cannot overrule another," Respondent notes that grounds for objection or appeal of the Settlement Agreement between Plaintiffs and DHEC by CCPRC do not exist. Respondent's Motion to Dismiss is based solely on the jurisdictional impact caused by the Settlement Agreement. As a general principle of law, "[everyone] is presumed to know the effect of a contract that he signs, and misrepresentations as to the legal effect made to him by the other party will not invalidate the contract."[4] *Chapman v. Metro. Life Ins. Co.*, 172 S.C. 250, 262, 173 S.E. 801, 806 (1934), citing *Batesburg Cotton Oil Co. v. S. R. Co.*, 103 S.C. 494, 500-01, 88 S.E. 360, 362 (1916). See also, *Noojin v. Noojin*, 417 S.C. 300, 310 n.5, 789 S.E.2d 769, 774 (Ct. App. 2016) ("Where

[4] Appellant does not contend CCPRC or its counsel misrepresented anything concerning the contract between Plaintiffs and DHEC, but counsel for CCPRC includes the entire quote to avoid the appearance of 'cherry picking' quotes for their benefit.

an instrument evidences care in its preparation, it will be presumed its words were employed deliberately and with intention.")

In this case, Plaintiff's Settlement Agreement with DHEC triggered S.C. CODE §15-78-70(d), which stripped the Circuit Court of its subject matter jurisdiction over any other governmental defendant(s).

C. THE CIRCUIT COURT PROPERLY RULED IT NO LONGER HAD SUBJECT MATTER JURISDICTION.

Respondent agrees with Appellant's statement that the Legislature "specifically conferred subject matter jurisdiction of all tort claims against governmental entities on the trial court" through S.C. CODE §15-78-100(b). Appellant's Initial Brief, at 7. However, the fact that the Legislature granted this jurisdiction in the first place ensures they may place reasonable limits on it, which it did in S.C. CODE §15-78-70(d).

The Respondent has never, and does not now, contest the appropriate jurisdiction to file a suit against a governmental entity is the circuit court of the county where the tort occurred. Neither does it challenge the South Carolina Torts Claim Act ("SCTCA") grants subject matter jurisdiction to the trial courts of this State. However, the initial grant of subject matter jurisdiction is irrelevant to Judge Kelly's Order that the result of Appellant's Settlement Agreement was to remove the trial courts power to hear and determine any further proceedings by Appellant against governmental entities. Respondent contends that when the Legislature enacts a bill containing the words "complete bar," the Legislature means what it says. "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000), citing Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992).

Appellant posits the appropriate question before this Court is whether "a second circuit court judge can grant a Rule 12(b), SCRCP motion if one governmental defendant settles and it was court approved by another judge?" Appellant's Initial Brief, at 7. This question reiterates Judge Burch's ruling that "one circuit judge [can] not overrule another circuit judge." *Id.*, at 3. If Respondent argued that Judge McCoy's Settlement Order was invalid, this would be the appropriate argument, but that is not Respondent's argument. Respondent contends the trial court ***lost*** subject matter jurisdiction over this case because Appellant's election to settle with DHEC "constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence." S.C. CODE §15-78-70(d).

The Order Granting CCPRC's Motion to Dismiss did not overrule Judge McCoy's or Judge Burch's orders.[5] Judge McCoy dealt with the validity of an agreement to settle the dispute between the Plaintiffs and DHEC. Neither her Order, nor the agreement between the parties, is overturned by the Circuit Court's recognition that it no longer has subject-matter jurisdiction.

Despite this, even if this Court did overrule either Judge McCoy or Judge Burch, this is a complaint without a remedy; no judge can grant a trial court subject matter it does not have. "The jurisdiction of a Court over the subject-matter of an action depends upon the authority granted to it by the Constitution and laws of the State and is fundamental." *Am. Agric. Chem. Co., at 362, 595*. See also, *Paschal v. Causey*, 309 S.C. 206, 209, 420 S.E.2d 863, 865 (Ct. App. 1992) (stating subject matter jurisdiction is conferred by the Constitution and state laws and cannot be waived or conferred by consent.)

---

[5] Appellant made previous arguments that CCPRC's Motion to Dismiss was precluded because their Motion for Summary Judgment also relied on S.C. CODE §15-78-70(d) and, therefore, already raised the issue of subject matter jurisdiction. (R. p.20).There is no evidence for this contention as neither CCPRC's written briefs, nor the Order by Judge Burch indicate an argument concerning subject matter jurisdiction. Had Judge Burch viewed CCPRC's Summary Judgment Motion as a challenge to subject matter jurisdiction, he would have been bound by Rule 12(h)(3), SCRCP to address it within his Order.

Respondent respectfully requests this Court affirm the lower court's ruling that, while it initially had subject matter jurisdiction over this case, the settlement between Appellant and DHEC removed that jurisdiction through the operation of the Statute.

D. ESTOPPEL IS NOT AVAILABLE AGAINST THE GOVERNMENT TO THWART THE APPLICATION OF PUBLIC POLICY.

Appellant argues, for the first time in response to the Motion to Dismiss, CCPRC's failure to object to the Settlement Agreement at the time of its hearing before Judge McCoy estops CCPRC from asserting S.C. CODE §15-78-70(d) as a defense in this case.[6] As a point of precision, CCPRC asserts subject matter jurisdiction as a defense, not S.C. CODE §15-78-70(d). However, this is a distinction without a difference, as the operation of the Statute denies the Circuit Court's subject matter jurisdiction.

Previously, Appellant argued CCPRC's failure to object to the Settlement Agreement constituted a waiver of their ability to raise the Statute. (R. pp.20-21). However, the Statute is self-executing, and therefore, is not a right CCPRC can waive, either passively or actively. See, *Campbell v. City of N. Charleston*, 431 S.C. 454, 464, 848 S.E.2d 788, 793 (Ct. App. 2020) (ruling that a failure to affirmatively plead limitations on damages does not constitute a waiver of those limitations as the statute was self-executing); *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 285, 607 S.E.2d 711, 716 (Ct. App. 2005) (ruling since the Act contained no verbiage requiring government agencies to plead the statutory monetary cap, the cap is self-executing).

Appellant's current argument utilizes estoppel to thwart the application of public policy. "As a general rule, estoppel does not lie against the government to prevent the due exercise of its

[6] CCPRC acknowledges that Appellant's raised "Estoppel by Record" in their response to the Motion for Summary Judgment (R. p. 55), but Appellant does not assert that argument now, and did not assert it in response to CCPRC's 12(b)(1) Motion to Dismiss.

police power or to thwart the application of public policy." *Grant v. City of Folly Beach*, 346 S.C. 74, 80, 551 S.E.2d 229, 232 (2001) citing *South Carolina Dep't of Soc. Servs. v. Parker*, 275 S.C. 176, 268 S.E.2d 282 (1980). Respondent refers this Court to §VI.A.2 of this brief, which explains that the SCTCA is a statutory expression of the public policy regarding the waiver and limitations of the State's sovereign immunity. One of those principles is found in the Statute, which is a mechanism for preventing double recovery against the State for a single occurrence.

Appellant avers that she can prove estoppel against CCPRC by showing: (1) she had neither the knowledge nor ability to learn the truth about (presumably) the effects of settling with only one governmental defendant, (2) she justifiably relied on Judge McCoy's Order, and (3) this reliance caused her to change her position prejudicially. *Grant*, at 80, 232.

First, Appellant's contention that she neither knew nor had the ability to learn the truth about the effect of settling with only one governmental defendant is not a tenable position. Generally, governmental entities violate this prong when they enforce laws more stringently than the text of the law allows. See, *Landing Dev. Corp. v. Myrtle Beach*, 285 S.C. 216, 219-20, 329 S.E.2d 423, 424-25 (1985) (ruling that Myrtle Beach was estopped from denying Plaintiffs a business license for short-term rentals since an ordinance did not specify short-term rentals were not allowed in a particular zoning area.) In the present instance, the Statute was clear, unambiguous, and in effect at the time she entered the Settlement Agreement[7] , and "ignorance of the law remains no excuse." *Sullivan-Carter v. Carter*, 439 S.C. 406, 417, 887 S.E.2d 146, 152 (Ct. App. 2023) (a failure to understand the nuances of the laws concerning common law marriage is not an excuse allowing for the existence of a common-law marriage.) See also, *State v. Latimore*,

[7] "It is a fundamental rule of contract construction that the law existing at the time and place of making of a contract is a part of the contract." *N. Charleston v. N. Charleston Dist.*, 289 S.C. 438, 442, 346 S.E.2d 712, 715 (1986), internal citations omitted.

390 S.C. 88, 98, 700 S.E.2d 456, 462 (Ct. App. 2010) (where an offender failed to abide by the updated requirements of S.C. CODE §23-3-460(A), his ignorance of the changes did not excuse his failure to abide); *Oxford Fin. Cos. v. Burgess*, 303 S.C. 534, 539, 402 S.E.2d 480, 482 (1991) ("Landlord's mistaken view of the law is of no avail to him.")

Second, Appellant contends she justifiably relied upon Judge McCoy's Order, but the standard is that she must show she "justifiabl[y] reli[ed] upon the conduct **of the party estopped**." *Midlands Util., Inc. v. S.C. Dep't of Health & Envtl. Control*, 298 S.C. 66, 71, 378 S.E.2d 256, 259 (1989), emphasis added. Appellant must show she relied upon CCPRC's conduct, which is not a contention she makes to this Court. Instead, she argues she relied on Judge McCoy's conduct. To the extent she detrimentally relied on any party's action, it was not the actions of CCPRC.

Finally, Appellant contends "the action based thereon was of such a character as to change prejudicially the position of the party claiming the estoppel." *Landing Dev. Corp., at* 219, 424. It is unclear to which action she refers, and Appellant provides no supporting facts or law to support this position.

Appellant does not meet the criteria to assert estoppel in this action against Respondent. In any event, the assertion of estoppel does not waive a party's right to assert a lack of subject matter jurisdiction. Once again, Appellant misconstrues CCPRC's argument by declaring that Respondent says Judge McCoy's Order is not applicable. Not so. Respondent argues that by operation of law, the Circuit Court lost subject matter jurisdiction when Appellant settled with a separate governmental agency and that subject matter jurisdiction "cannot be waived or conferred by consent..." as Appellant attempted to do in the final clause of the Settlement Agreement. *Gnoc Corp.*, at 88, 275.

VII. CONCLUSION

On 17 March 2020, Appellant entered a Settlement Agreement to resolve this lawsuit with the South Carolina Department of Health and Environmental Controls. Within that agreement was a clause that purported to maintain an action against Respondent, but which is contrary to the plain language of the South Carolina Tort Claims Act. As courts in South Carolina will not enforce a contract when it violates public policy as expressed through statutory law, the exclusionary clause is both void and severable. Appellant's settlement with DHEC "constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence." S.C. CODE §15-78-70(d). As a result, the Circuit Court lost subject matter jurisdiction over this case concerning CCPRC.

Appellant's contention that Judge McCoy's Order is the law of the case is inapplicable as the Court of Appeals has not yet ruled in this case. Even if it were to apply, a court cannot grant itself subject matter jurisdiction where the Legislature denies it.

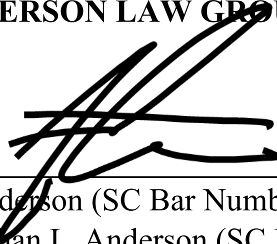
Respondent does not contest the original jurisdictional grant to the circuit court but argues it lost that jurisdiction after Plaintiffs settled with DHEC.

Finally, Appellant cannot meet the elements to assert estoppel against Respondent, and—even if she could—a party cannot be estopped from asserting a defense in subject matter jurisdiction.

For the above reasons, Respondent respectfully requests this Court affirm Judge Kelly's ruling and dismiss this case against Respondent as the circuit court no longer has subject matter jurisdiction over this case.

SIGNATURE ON NEXT PAGE

ANDERSON LAW GROUP, LLC



JJ Anderson (SC Bar Number 383)
Jonathan L. Anderson (SC Bar Number 103127)
37 ½ Broad Street | PO Box 87
Charleston, SC 29401
Phone: (843) 723-0185
Fax: (843) 405-0313
janderson@algsc.com
landerson@algsc.com

9 February 2024
Charleston, SC

RECEIVED
Feb 12 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Court Judge
Case No. 2017-CP-10-01324

APPELLATE CASE NO.: 2023-000898

Steven McLemore and Bonnie Jean Eagle as Natural Parents for the Estate of D.M.,

Plaintiffs,

v.

Charleston County Parks and Recreation Commission d/b/a James Island County Park; Yearround Pool Co., Inc.; SGA Architecture; South Carolina Department of Health and Environmental Control; and John Doe and/or John Doe Corporation,

Defendants.

OF WHOM:

Bonnie Jean Eagle is .... Appellant,

and

Charleston County Parks and Recreation Commission d/b/a James Island County Park is ....Respondent

CERTIFICATE OF COUNSEL

This **Final Brief of Respondent** complies with Rule 211, SCACR, because it is identical to the brief previously served under Rule 208, SCACR, except for references in place of or in addition to the record indicated in the Record on Appeal. No other changes have been made to this brief.

Michael H. Wells, Esquire
COASTAL LAW, LLC
1104 N. Oak Street
Myrtle Beach, SC 29577
T: (843) 488-5000
mwells@coastal-law.com

Gene M. Connell, Jr., Esquire
KELAHER CONNELL & CONNOR, P.C.
The Courtyard, Suite 209
1500 U.S. Highway 17 North
PO Drawer 1454 7
Surfside Beach, SC 29587
T: (843) 238-5648
gconnell@classactlaw.net

Molly Jankowski
ANDERSON LAW GROUP, LLC

RECEIVED
Feb 12 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Court Judge
Case No. 2017-CP-10-01324

APPELLATE CASE NO.: 2023-000898

Steven McLemore and Bonnie Jean Eagle as Natural Parents for the Estate of D.M.,

Plaintiffs,

v.

Charleston County Parks and Recreation Commission d/b/a James Island County Park; Yearround Pool Co., Inc.; SGA Architecture; South Carolina Department of Health and Environmental Control; and John Doe and/or John Doe Corporation,

Defendants.

OF WHOM:

Bonnie Jean Eagle is .... Appellant,

and

Charleston County Parks and Recreation Commission d/b/a James Island County Park is ....Respondent

PROOF OF SERVICE

PERSONALLY appeared before me, Molly Jankowski, who, being duly sworn, deposes and says that she is an employee of Anderson Law Group, LLC and that she served a copy of **Final Brief of Respondent** on the the 10th day of February 2024 by depositing a copy of same in the United States Mail, postage prepaid, to:

Michael H. Wells, Esquire
COASTAL LAW, LLC
1104 N. Oak Street
Myrtle Beach, SC 29577
T: (843) 488-5000
mwells@coastal-law.com

Gene M. Connell, Jr., Esquire
KELAHER CONNELL & CONNOR, P.C.
The Courtyard, Suite 209
1500 U.S. Highway l7 North
PO Drawer 1454 7
Surfside Beach, SC 29587
T: (843) 238-5648
gconnell@classactlaw.net

Molly Jankowski
ANDERSON LAW GROUP, LLC