

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

FEB 16 2024

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

SC Court of Appeals

APPELLATE CASE NO. 2023-000898

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

Plaintiffs,

vs.

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

RECORD ON APPEAL

Jonathan J. Anderson (S.C. Bar No. 383)
Jonathan L. Anderson (S.C. Bar No. 103127)
Anderson Law Group, LLC
P. O. Box 87
Charleston, SC 29402
(843) 723-0185
janderson@algsc.com
landerson@algsc.com
Attorneys for Respondent

Gene M. Connell, Jr. (S.C. Bar No. 1358)
KELAHER CONNELL & CONNOR, P.C.
P. O. Drawer 14547
Surfside Beach, SC 29587-4547
(843) 238-5648
gconnell@classactlaw.net

Michael H. Wells (S.C. Bar No. 68341)
Coastal Law, LLC
1104 N. Oak Street
Myrtle Beach, SC 29577
(843) 488-5000
mwells@coastal-law.com
Attorneys for Appellant

INDEX

Order Denying Plaintiff's Motion to Alter or Amend Judgment The Honorable R. Keith Kelly, May 5, 2023	1
Order Granting Motion to Dismiss of Charleston County Parks and Recreation Commission d/b/a James Island County Park The Honorable R. Keith Kelly, March 15, 2023	3
Order Denying Charleston County Parks and Recreation Commission's Motion to Alter/Amend The Honorable Paul M. Burch, April 12, 2022.....	9
Order Denying Charleston County Parks and Recreation Commission's Motion for Summary Judgment The Honorable Paul M. Burch, February 11, 2022.....	11
Order Approving Petition for Settlement of Claim for Wrongful Death and Survival Action Against South Carolina Department of Health and Environmental Control The Honorable Jennifer B. McCoy, March 31, 2020.....	15
Plaintiff's Motion for Reconsideration March 24, 2023	19
Charleston County Parks and Recreation Commission's Motion to Dismiss and Exhibit List, November 3, 2022	29
Charleston County Parks and Recreation Commission's Motion to Alter/Amend Order Denying Motion for Summary Judgment, February 21, 2022.....	41
Charleston County Parks and Recreation Commission's Supplemental Memo in Support of Motion for Summary Judgment, December 27, 2021	45
Plaintiff Eagle's Response in Opposition to Motion for Summary Judgment, November 19, 2021	51
Affidavit of Gene M. Connell, Jr., November 19, 2021	57
Affidavit of John Harrell, November 23, 2021	59
Charleston County Parks and Recreation Commission's Motion for Summary Judgment, May 14, 2021	61
Petition for Approval of Settlement of Claim for Wrongful Death and Survival Action Against South Carolina Department of Health and Environmental Control, March 26, 2020.....	67

Full, Final and Complete Release of South Carolina Department of Health and Environmental Control, March 17, 2020.....71

Second Amended Complaint, April 16, 2019.....75

Transcript of Record - Motion Hearing, January 23, 2023.88

Certificate of Counsel100

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

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

Plaintiffs,

vs.

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.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO: 2017-CP-10-01324

**ORDER DENYING PLAINTIFF'S
MOTION TO ALTER OR AMEND A
JUDGMENT**

This matter came before the Court on 24 March 2023 by way of Plaintiffs' timely Notice of Motion and Motion for Reconsideration, under Rule 59(e), SCRPC. Plaintiffs requested this Court alter or amend its 15 March 2023 Order granting Charleston County Parks and Recreation Commission's ("CCPRC") Motion to Dismiss for Lack of Subject Matter Jurisdiction, pursuant to Rule 12(b)(1), SCRPC. CCPRC filed a response to Plaintiff's Reconsideration Motion on 5 April 2023. This Court rules on this motion without oral argument, pursuant to Rule 59(f), SCRPC. After careful consideration of both parties' memoranda and other applicable authority, this Court DENIES Plaintiff's motion.

IT IS SO ORDERED

Honorable R. Keith Kelly
Circuit Court Judge
Ninth Judicial Circuit

___ May 2023

Gaffney, South Carolina



Charleston Common Pleas

Case Caption: Steven Mclemore , plaintiff, et al VS Charleston County of ,
defendant, et al
Case Number: 2017CP1001324
Type: Order/Other

It is so Ordered.

s/ R. Keith Kelly - 2165

Electronically signed on 2023-05-05 11:24:22 page 2 of 2

ELECTRONICALLY FILED - 2023 May 05 11:58 AM - CHARLESTON - COMMON PLEAS - CASE#2017CP1001324

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

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

Plaintiffs,

vs.

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.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO: 2017-CP-10-01324

ORDER GRANTING THE MOTION TO
DISMISS OF CHARLESTON COUNTY
PARKS AND RECREATION
COMMISSION D/B/A JAMES ISLAND
COUNTY PARK

This matter came before the Court on 23 January 2023 for a hearing on Defendant Charleston County Parks and Recreation Commission d/b/a James Island County Park's ("CCPRC") motion to dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(1), South Carolina Rules of Civil Procedure (SCRCP) for lack of subject matter jurisdiction. Present at the hearing were counsel for Plaintiffs, counsel for CCPRC, and counsel for SGA Architecture. After careful consideration of the written motion and arguments of counsel, the Court GRANTS Defendant CCPRC's Motion to Dismiss.

I. BACKGROUND

This matter arises from the drowning of 3-year-old "DM" at the James Island County Park on May 14, 2016. Plaintiffs' Complaint alleges that on the 14th of May, the McLemore family visited a spray-and-play area near a pond in the James Island County Park. 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 that DM was missing. Several hours later, Police divers found DM's body submerged in the nearby pond.

Plaintiffs' base their Complaint in causes of action arising out of Attractive Nuisance, Negligence/Gross Negligence, Wrongful Death, and Survival. All causes of action in every version of the complaints are simultaneously directed at all Defendants. Both the DHEC and CCPRC are governmental agencies, subject to suit under the South Carolina Tort Claims Act ("SCTCA").

II. PROCEDURAL HISTORY

Plaintiffs filed their initial suit on 14 March 2017 and subsequent Amended Complaints on 21 March 2018 and 16 April 2019.

On 17 March 2020, Plaintiffs confirmed settlement with the 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" (the "Release"). Plaintiffs then filed a petition requesting approval of the settlement which this Court approved and confirmed on 31 March 2020. Plaintiffs settlement with DHEC on 17 March 2020 did not include CCPRC as a party to that settlement.

On 14 May 2021, CCPRC filed a Rule 56, SCRCP motion for summary judgment based upon SC Code Ann. §15-78-70(d). Subject matter jurisdiction was not raised by either party in the Motion for Summary Judgment. This Court heard and subsequently denied Defendant's motion on 4 January 2022, filing the formal order on 11 February 2022. On 4 April 2022, this Court denied CCPRC's Rule 59(e) Motion to Alter or Amend the Judgment.

Defendants filed the present motion on 3 November 2022 raising the issue of subject matter jurisdiction. CCPRC's 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction is properly before the Court as "[t]he question of lack of subject matter jurisdiction may be raised at any time during the action. . ." Gnoc Corp. v. Estate of Rhyne, 312 S.C. 86, 88, 439 S.E.2d 274, 275 (1994) (emphasis added).

III. STANDARD OF REVIEW

A Motion to Dismiss under Rule 12(b)(1), SCRCP for lack of subject matter jurisdiction is a question of law. Porter v. Labor Depot, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct. App. 2007). See also, Posey v. Proper Mold & Eng'g, Inc., 378 SC 210, 217, 661 S.E.2d 395, 399 (Ct. App. 2008) ("The proper procedure for raising lack of subject matter jurisdiction prior to trial is to file a motion to dismiss pursuant to Rule 12(b)(1), SCRCP..."). Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. Dema v. Tenet Physician Servs.-Hilton Head, Inc., 383 S.C. 115, 120-21, 678 S.E.2d 430, 433 (2009). The South Carolina Tort Claims Act ("SCTCA") governs subject matter jurisdiction for all cases brought under the SCTCA. "A judgment of a court without subject matter jurisdiction is void." Coon v. Coon, 364 SC 563, 566, 614 S.E.2d 616, 617 (2005); SC Dept. of Soc. Servs. v. Tran, 418 SC 308, 314, 792 S.E.2d 254, 257 (Ct. App. 2016).

Under Rule 12(b)(1), the 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 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.*, at 88, 275 (emphasis added), citing *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).

IV. DISCUSSION

This Court lost jurisdiction over the subject matter of this litigation when Plaintiffs settled their claims against the Department of Health and Environmental Control (DHEC).

"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."
SC Code § 15-78-70(d)

Both CCPRC and DHEC are governmental entities and, therefore, Plaintiffs' settlement with DHEC in this action constitutes a complete bar to any further action by Plaintiffs against CCPRC and any other governmental entities as defined by SC Code Ann. §15-78-30. A complete bar to further action deprives the Court of subject matter jurisdiction in any claim against an entity of the State.

A. AS TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

During oral arguments, Plaintiffs argued that since the basis of this motion was SC Code §15-78-70(d), the issues giving rise to Defendant's Motion to Dismiss this motion was a repetition of an already decided issue in this case. This Court does not agree. Defendant's Motion for Summary Judgment was decided based on Judge Burch's interpretation of Judge McCoy's Settlement Order which stated "I find the settlement described in the Petition should be approved and confirmed as provided by S.C. Code Ann. §§ 62-3-1101 et seq." The Order further provided: "The compromise as recited in the Petition and the Release is approved as fair, just, and reasonable settlement of the contest and controversy existing between the Estate, its heirs, beneficiaries and assigns and Defendant South Carolina Department of Health & Environmental Control." Judge Burch's reasoning, based on the motion in front of him, was that he did not have authority to change another circuit court judge's Order and stated:

2017-CP-10-01324
Order Granting CCPRC's Motion to Dismiss

"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."

2017-CP-10-01324, Order Denying Summary Judgement, 11 Feb 2022.

Subject matter jurisdiction was not raised by either party in argument or briefs and was not addressed in the Order denying Summary Judgment or the Order denying reconsideration. This motion is ripe for consideration.

B. AS TO DEFENDANT'S 12(B)(1) MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Subject matter jurisdiction may be raised at any time during litigation. Gantt v. Selph, 423 S.C. 333, 338, 814 S.E.2d 523, 525 (2018). The issue in the present motion has not been addressed by this Court and is therefore ripe for adjudication. "When the dispute is not to the underlying facts but as to the interpretation of the law and development of the record will not aid in the resolution of the issues it is proper to decide even novel issues on a motion to dismiss." Bessinger v. BI-LO, Inc., 366 S.C. 426, 434, 622 S.E.2d 564, 568 (Ct. App. 2005).

A Motion to Dismiss under Rule 12(b)(1), SCRPC for lack of subject matter jurisdiction is a question of law. The subject matter jurisdiction of the court is derived from the authority granted to the court by the Constitution and laws of the state. Paschal v. Causey, 309 S.C. 206, 209, 420 S.E.2d 863, 865 (Ct. App. 1992). The SCTCA governs subject matter jurisdiction for those cases brought under it. "Because there is but one circuit court in South Carolina, with uniform subject matter jurisdiction throughout the state, §15-78-100(b) establishes subject matter jurisdiction for actions arising under the SCTCA in the circuit court throughout the state." Jeter v. S.C. DOT, 369 S.C. 433, 440, 633 S.E.2d 143, 147 (2006), internal citations omitted.

It is a cardinal rule of statutory interpretation to ascertain and effectuate the intention of the legislature. "A court should not consider a particular clause in a statute in isolation, but should read it in conjunction with the purpose of the entire statute and the policy of the law." Se. Toyota Distribs., LLC v. Jim Hudson Superstore, Inc., 387 S.C. 508, 514, 693 S.E.2d 33, 36 (Ct. App. 2010). The intent of the Legislature in drafting the South Carolina Tort Claims Act was that courts treat a claim against multiple agencies or political subdivisions as a single claim against the state. The legislature does not allow for repeated damages among governmental Defendants for a single occurrence—it treats recovery of damages from them as a unified block. The General Assembly has plenary powers to write the law, say what they mean, and mean what they say. It is not the

2017-CP-10-01324
Order Granting CCPRC's Motion to Dismiss

place of the Court to write the law of South Carolina. The statute is not ambiguous, and the Court will not torture the reading of the statute to ascertain its meaning.

The SCTCA is a limited waiver of sovereign immunity. South Carolina is the ultimate defendant, not the individual governmental entities, and a settlement in an action under the SCTCA "constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence." SC Code §15-78-70(d). Section 15-78-30 defines "Governmental entity" as "the State and its political subdivisions." The plain language of the statute uses the plural form of "subdivisions," indicating all subdivisions of the State are included in the definition.

Plaintiffs claim the specific, exclusionary language of their settlement agreement with DHEC allow them to continue their case against CCPRC.¹ It does not, as subject matter jurisdiction cannot be waived or conferred by consent. Paschal. Plaintiffs elected a remedy with the government defendants by entering a Settlement and Release with DHEC, satisfying the State of South Carolina's role as the superordinate defendant in this litigation.

THEREFORE, the Court finds that jurisdiction of the subject matter of this litigation was lost when Plaintiffs settled with DHEC, barring Plaintiffs from any further action against CCPRC, and **GRANTS** CCPRC's 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction.

IT IS SO ORDERED.

Honorable R. Keith Kelly
Circuit Court Judge
Ninth Judicial Circuit

¹ Plaintiffs included the following exclusionary language within the closing paragraph of the Release:

"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."

The exclusionary language of the Release is only effective in not expanding the terms of the release to include CCPRC and does not expand the subject matter jurisdiction of the court to that which is prohibited. Otherwise, the paragraph is then an attempt to circumvent S.C. Code Ann. §15-78-70(d) and confer subject matter jurisdiction upon the Court by consent.



Charleston Common Pleas

Case Caption: Steven Mclemore , plaintiff, et al VS Charleston County of ,
defendant, et al
Case Number: 2017CP1001324
Type: Order/Dismissal

It is so Ordered.

s/ R. Keith Kelly - 2165

Electronically signed on 2023-03-15 08:12:27 page 6 of 6

ELECTRONICALLY FILED - 2023 Mar 15 10:15 AM - CHARLESTON - COMMON PLEAS - CASE#2017CP1001324

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
)

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

) Civil Action No. 2017-CP-10-01324
)
)

) Plaintiffs,
)

v.)

ORDER

) Charleston County Parks and Recreation 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.)
)

This matter is before the Court on Defendants' Motion to Alter or Amend this Court's Order Denying Defendants' Motion for Summary Judgment. After hearing the arguments of counsel, reviewing the memoranda and other documents submitted to the Court, and the applicable authority, the Court hereby denies Defendants' Motion to Alter or Amend this Court's Order Denying Defendants' Motion for Summary Judgment.

THEREFORE, Defendants' Motion to Alter or Amend this Court's Order Denying Defendants' Motion for Summary Judgment is hereby DENIED.

IT IS SO ORDERED.

The Honorable Paul M. Burch
Judge, Fourth Judicial Circuit

Charleston, South Carolina
April 12, 2022



Charleston Common Pleas

Case Caption: Steven Mclemore , plaintiff, et al VS Charleston County of ,
defendant, et al
Case Number: 2017CP1001324
Type: Order/Other

So Ordered

s/Paul M. Burch, Judge #2048

Electronically signed on 2022-04-12 11:27:43 page 2 of 2

ELECTRONICALLY FILED - 2022 Apr 12 3:26 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1001324

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A NO. 2017-CP-10-01324

Steven McLemore, Individually and as)
Personal Representative of the Estate of)
D.M.; and Bonnie Jean Eagle,)
Individually and as natural parent of)
deceased minor, D.M.,)
Plaintiffs,)

vs.)

Charleston County Parks & Recreation)
Commission ("CCPRC") 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.)

ORDER DENYING DEFENDANT
CHARLESTON COUNTY PARKS AND
RECREATION COMMISSION'S
MOTION FOR SUMMARY JUDGMENT

This matter is before the Court based on Defendant Charleston County Parks and Recreation Commission's (CCPRC) d/b/a James Island County Park's Motion for Summary Judgment asserting that the settlement between Plaintiffs and the Department of Health and Environmental Control (DHEC) triggered the application of S.C. Code Ann. §15-78-70(d) to this matter as a complete bar to any further claims by Plaintiff against CCPRC. S.C. Code Ann. §15-78-70(d) 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."

This tragic case arises from the drowning of a 3-year-old child at the James Island County Park on May 14, 2016. On May 14, 2016, the McLemore family visited a spray-and-play park located near a pond at the James Island County Park. While packing to leave, Bonnie Jean Eagle, the deceased's

mother's attention was diverted, and her son disappeared. He was later discovered by police divers in a pond near the area where the McLemore family had been prior to the disappearance of the child.

Plaintiffs filed their suit on March 14, 2017. Plaintiffs agreed to settle with South Carolina Department of Health and Environmental Control (SCDHEC) only by signing a Full, Final and Complete Release with the South Carolina Department of Health and Environmental Control on March 17, 2020. Since this case involved a wrongful death, a Petition for approval of wrongful death settlement and an Order Approving Petition for Settlement of Wrongful Death were filed with the Charleston County Court of Common Pleas on March 31, 2020.

The Defendants argue that the settlement of the case with one governmental defendant (South Carolina Department of Health and Environmental Control) requires this court to dismiss the claim against Charleston County Parks & Recreation Commission, d/b/a James Island County Park because it also is a governmental entity. Defendants argue that S.C. Code § 15-78-10 controls this case and precludes this litigation from proceeding.

The court finds that the Defendant Charleston County Parks & Recreation Commission's (CCPRC) d/b/a James Island County Park's Motion for Summary Judgment should be denied. The \$10,000.00 settlement offer paid by the South Carolina Department of Health and Environmental Control was approved by this Court. The Order of Judge McCoy was based on a hearing that she held in which all Defendants were given notice. In her Order Judge McCoy stated:

Based upon these facts, I find the settlement described in the Petition should be approved and confirmed as provided by S.C. Code Ann. §§ 62-3-1101 et seq.

The Order further provides:

The compromise as recited in the Petition and the Release is approved as fair, just, and reasonable settlement of the contest and controversy existing

between the Estate, its heirs, beneficiaries and assigns and Defendant South Carolina Department of Health & Environmental Control.

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.

Accordingly, the court declines to grant summary judgment and the Motion for Summary Judgment by Charleston County Parks & Recreation Commission is denied.

AND IT IS SO ORDERED.

Paul M, Burch, Presiding Judge
County of Charleston
Ninth Judicial Circuit

_____, 2022

_____, South Carolina



Charleston Common Pleas

Case Caption: Steven Mclemore , plaintiff, et al VS Charleston County of ,
defendant, et al
Case Number: 2017CP1001324
Type: Order/Summary Judgment

So Ordered

s/Paul M. Burch, Judge #2048

Electronically signed on 2022-02-11 12:16:53 page 4 of 4

ELECTRONICALLY FILED - 2022 Feb 11 1:48 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1001324

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE No.: 2017-CP-10-01324

Steven McLemore, Individually and as)
Personal Representative of the Estate of)
D.M.; and Bonnie Jean Eagle, Individually)
and as Natural Parent for the Deceased)
Minor D.M.,)

**ORDER APPROVING PETITION
FOR SETTLEMENT OF CLAIM
FOR WRONGFUL DEATH
AND SURVIVAL ACTION AGAINST
SOUTH CAROLINA DEPARTMENT
OF HEALTH AND ENVIRONMENTAL
CONTROL**

Petitioners,)

vs.)

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

Defendants.)

This matter comes before me pursuant to S.C. Code Ann. §§ 62-3-1101 et seq. and upon the verified Petition of Personal Representative for an Order approving and confirming the settlement described in the Petition. The Petition is incorporated by reference and made a part of this Order. Personal Representative approves this settlement.

Personal Representative brings these claims seeking to recover for claims of wrongful death and survival actions against South Carolina Department of Health and Environmental Control. The settlement terms between the parties call for payment to personal Representative of the total sum of \$10,000.00 by the Defendant South Carolina Department of Health and Environmental Control. For Plaintiff's purposes, the settlement funds will be allocated to the wrongful death action, not the survival action. Nevertheless, for mutual promises exchanged, and the entering in of overall settlement agreement between these parties, the parties confirm that

adequate consideration is provided in exchange for a dismissal of all causes of action from Plaintiffs against this Defendant.

The payment of this sum has been conditioned upon the complete discharge of all claims of Petitioner, Petitioner's estate, and all heirs and beneficiaries and all individually named Plaintiffs against Defendant South Carolina Department of Health and Environmental Control arising out of the incident, including all claims or causes of action under the wrongful death and survival statutes.

After due consideration and inquiry into the circumstances surrounding the incident, I find the following facts:

1. The compromise between the parties, as recited in the Petition and the Release, has been negotiated by Personal Representative and his attorney; and
2. This compromise is just, reasonable, and in the best interests of those persons represented by Personal Representative and the Estate.

Based upon these facts, I find the settlement described in the Petition should be approved and confirmed as provided by S.C. Code Ann. §§ 62-3-1101 et seq.

THEREFORE, IT IS ORDERED:

- A. The compromise as recited in the Petition and the Release is approved as fair, just, and reasonable settlement of the contest and controversy existing between the Estate, its heirs, beneficiaries, and assigns and Defendant South Carolina Department of Health and Environmental Control.
- B. The Personal Representative is directed, empowered, and authorized to execute such documents as may be required to effectuate fully the compromise or settlement agreed upon and approved by this Court and to discharge completely all claims or demands of whatsoever.

nature against this Defendant, including all causes of action or claims for wrongful death and survivorship that Decedent, his survivors, heirs, beneficiaries, and/or representatives might have or could have arising out of the incident, including all claims or causes of action under the wrongful death and survival statutes against this Defendant.

C. The statutory beneficiary of the wrongful death and survival action is decedent's parents, and the duly appointed Personal Representative will take these proceeds according to South Carolina law, after deduction of attorney's fees and costs, and/or will comply with South Carolina law to distribute such funds.¹

Judge, Ninth Judicial District

Charleston, South Carolina
_____, 2020

¹ The payment of settlement funds in accordance with this Order absolves SCDHEC of any and all obligations to the decedent's Personal Representative or the beneficiary(ies) of the Estate or the individually named Plaintiffs. The Personal Representative shall comply with all South Carolina law, including the establishment of a Conservatorship. Such obligations are exclusively the obligation of the Personal Representative, and not the Defendants.



Charleston Common Pleas

Case Caption: Steven Mclemore , plaintiff, et al VS Charleston County of ,
defendant, et al
Case Number: 2017CP1001324
Type: Order/Approval Of Settlement

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2020-03-31 11:06:54 page 4 of 4

ELECTRONICALLY FILED - 2020 Mar 31 3:03 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1001324

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A NO. 2017-CP-10-01324

Steven McLemore, Individually and as)
Personal Representative of the Estate of)
D.M.; and Bonnie Jean Eagle,)
Individually and as natural parent of)
deceased minor, D.M.,)

Plaintiffs,)

vs.)

Charleston County Parks & Recreation)
Commission ("CCPRC") 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.)

PLAINTIFF'S NOTICE OF
MOTION AND MOTION FOR
RECONSIDERATION

YOU WILL PLEASE TAKE NOTICE that the undersigned moves the Court pursuant to South Carolina Rule of Civil Procedure 59 to reconsider the Order of the Honorable R. Keith Kelly filed March 15, 2023. The basis of this request is as follows:

1. This Court erred in overruling two other circuit judges in dismissing this case. The two other circuit judges are Judge McCoy, who approved the settlement, and Judge Burch who heard the motion for summary judgment. Judge McCoy approved a partial settlement with DHEC which stated in the Order "The compromise as recited in the Petition and Release is approved as fair, just and reasonable settlement of the contest and controversy existing between the Estate, its heirs, beneficiaries and assigns and the South Carolina Department of Health and Environmental Control. "

The error being that Charleston County Parks and Recreation Commission was a party to the case, had notice of the hearing and failed to object or appear. Thus, Charleston County Parks and Recreation Commission waived any argument it had under S.C. Code § 15-78-70(d).

2. The Charleston County Parks and Recreation Commission acquiesced and/or consented to the Order signed by Judge McCoy by failing to object to the Order or the plain language of the Order and Release stated “Notwithstanding this Release, the Plaintiffs do not hereby release any claims against Defendants, Charleston County Parks and 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.”

Plaintiff argues that the Court erred in failing to find that Charleston County Parks and Recreation Commission waived its rights since it was approved by a circuit judge at a hearing and acquiesced in the settlement since it had notice and opportunity to be heard and failed to object. This issue is not addressed in the Court’s Order.

3. This Court erred in overruling another circuit judge. In this case the same exact matters were heard on summary judgment before Judge Burch and the same exact matters were addressed by Judge McCoy in the motion approving the wrongful death settlement. This Court effectively overruled two other circuit court judges finding that there was no jurisdiction. Plaintiffs argue that this decision was erroneous as a matter of law.

4. This Court erred in holding the Plaintiff elected a remedy when the circuit court approved the settlement after notice to all parties. The error being that the settlement explicitly excluded Charleston County Parks and Recreation Commission from being released. This Order was not appealed and is the law of the case.

5. This Court erred in holding the Plaintiff's settlement with DHEC pursuant to a court order of settlement by Judge McCoy effectively foreclosed action under S.C. Code § 15-78-70(d). This ruling is erroneous as a matter of law in that Charleston County Parks and Recreation Commission failed to object at the settlement hearing and had notice and opportunity to be heard and thus are barred from objecting now.

6. This Court erred in failing to consider and failing to sign the Order presented by Plaintiff's counsel which addressed all these issues and made them ripe for review by an Appellate Court. A copy of that proposed Order is attached hereto as Exhibit 1.

7. This Court erred in dismissing this case. The error being Charleston County Parks and Recreation Commission "accepted" the ruling of Judge McCoy when she approved the settlement. In fact, Charleston County Parks and Recreation Commission should have appealed Judge McCoy's Order approving the death settlement if it wanted to preserve its position under S.C. Code § 15-78-70(d).

8. This Court erred in dismissing this case. The error being Charleston County Parks and Recreation Commission acquiesced or waived its position once the appeal time ran on Judge McCoy's Order.

9. Charleston County Parks and Recreation Commission failed to argue to Judge McCoy or Judge Burch that S.C. Code § 15-78-70(d) was applicable, and thus abandoned that argument.

10. The Order of Judge McCoy approving the settlement is the law of the case and Charleston County Parks and Recreation Commission cannot now complain since the Order was not appealed.

WHEREFORE, Plaintiff requests the Court reconsider its Order, reverse its decision of March 15, 2023 and set this case down for trial.

KELAHER, CONNELL & CONNOR, P.C.

s/Gene M. Connell, Jr.

Gene M. Connell, Jr. (S.C. Bar No. 1358)
The Courtyard, Suite 209
1500 U.S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net

March 24, 2023
Surfside Beach, South Carolina

Attorney for Plaintiff Bonnie Jean Eagle

EXHIBIT 1

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Steven McLemore and Bonnie Jean Eagle as
Natural Parents for the Estate of D [REDACTED]
M [REDACTED]

CASE NO: 2017-CP-10-01324

Plaintiffs,

ORDER GRANTING THE MOTION TO
DISMISS OF CHARLESTON COUNTY
PARKS AND RECREATION
COMMISSION D/B/A JAMES ISLAND
COUNTY PARK

vs.

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.

This matter came before the Court on 23 January 2023 for a hearing on Defendant Charleston County Parks and Recreation Commission d/b/a James Island County Park's ("CCPRC") motion to dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(1), South Carolina Rules of Civil Procedure (SCRCP) for lack of subject matter jurisdiction. Present at the hearing were counsel for Plaintiffs, counsel for CCPRC, and counsel for SGA Architecture. After careful consideration of the written motion and arguments of counsel, the Court GRANTS Defendant CCPRC's Motion to Dismiss.

I. BACKGROUND

This matter arises from the drowning of 3-year-old "DM" at the James Island County Park on May 14, 2016. Plaintiffs' Complaint alleges that on the 14th of May, the McLemore family visited a spray-and-play area near a pond in the James Island County Park. 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 that DM was missing. Several hours later, Police divers found DM's body submerged in the nearby pond.

Plaintiffs' base their Complaint in causes of action arising out of Attractive Nuisance, Negligence/Gross Negligence, Wrongful Death, and Survival. All causes of action in every version of the complaints are simultaneously directed at all Defendants. Both the DHEC and CCPRC are governmental agencies, subject to suit under the South Carolina Tort Claims Act ("SCTCA").

II. PROCEDURAL HISTORY

Plaintiffs filed their initial suit on 14 March 2017 and subsequent Amended Complaints on 21 March 2018 and 16 April 2019.

On 17 March 2020, Plaintiffs confirmed settlement with the 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" (the "Release"). Plaintiffs then filed a petition requesting approval of the settlement which this Court approved and confirmed on 31 March 2020. Plaintiffs settlement with DHEC on 17 March 2020 did not include CCPRC as a party to that settlement.

GMC proposed revision

This wrongful death settlement was heard previously by this court and approved in a court order. All parties were served with notice of the hearing; however, Charleston County Parks and Recreation Commission did not appear at the wrongful death hearing, nor did it object to the approval as to the settlement regarding DHEC only. The Order approving the death settlement with DHEC specifically referred to the wrongful death petition and reserved all claims against any additional Defendants. The Plaintiffs argued waiver, finality of the order, estoppel and consent as defenses which this Court has denied.

On May 14, 2021 Charleston County Parks and Recreation Commission filed a Rule 56, SCRC Motion for Summary Judgment based upon S.C. Code Ann. § 15-78-70(d). Subject matter jurisdiction was raised at that hearing before Judge Burch. Charleston County Parks and Recreation Commission made the same arguments concerning the provisions of S.C. Code Ann. § 15-78-70(d) as it has made in this motion. Judge Burch denied Defendant's Motion for Summary Judgment on January 4, 2022 and issued a formal order on February 11, 2022. On April 4, 2022, Judge Burch denied Charleston County Parks and Recreation's Rule 59(e) Motion to Alter or Amend the Judgment.

Defendants have filed a renewed Motion to Dismiss based on S.C. Code § 15-78-70(d). The Defendants argued that the Motion to Dismiss under S.C. Code § 15-78-70(d) is different from the motion made before Judge Burch for summary judgment on May 14, 2021. This Court finds that Charleston County Parks and Recreation Commission's 12(b)(1) motion is not prohibited by the Order issued by Judge Burch on February 11, 2022. This Court now finds it is not prohibited from granting Defendant's Motion to Dismiss for lack of subject matter jurisdiction.

On 14 May 2021, CCPRC filed a Rule 56, SCRCF motion for summary judgment based upon SC Code Ann. §15-78-70(d). Subject matter jurisdiction was not raised by either party in the Motion for Summary Judgment. This Court heard and subsequently denied Defendant's motion on 4 January 2022, filing the formal order on 11 February 2022. On 4 April 2022, this Court denied CCPRC's Rule 59(e) Motion to Alter or Amend the Judgment.

Defendants filed the present motion on 3 November 2022 raising the issue of subject matter jurisdiction. CCPRC's 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction is properly before the Court as "[t]he question of lack of subject matter jurisdiction may be raised at any time during the action. . ." Gnoc Corp. v. Estate of Rhyne, 312 S.C. 86, 88, 439 S.E.2d 274, 275 (1994) (emphasis added).

III. STANDARD OF REVIEW

A Motion to Dismiss under Rule 12(b)(1), SCRCF for lack of subject matter jurisdiction is a question of law. Porter v. Labor Depot, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct. App. 2007). See also, Posey v. Proper Mold & Eng'g, Inc., 378 SC 210, 217, 661 S.E.2d 395, 399 (Ct. App. 2008) ("The proper procedure for raising lack of subject matter jurisdiction prior to trial is to file a motion to dismiss pursuant to Rule 12(b)(1), SCRCF..."). Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. Dema v. Tenet Physician Servs.-Hilton Head, Inc., 383 S.C. 115, 120-21, 678 S.E.2d 430, 433 (2009). The South Carolina Tort Claims Act ("SCTCA") governs subject matter jurisdiction for all cases brought under the SCTCA. "A judgment of a court without subject matter jurisdiction is void." Coon v. Coon, 364 SC 563, 566, 614 S.E.2d 616, 617 (2005); SC Dept. of Soc. Servs. v. Tran, 418 SC 308, 314, 792 S.E.2d 254, 257 (Ct. App. 2016).

Under Rule 12(b)(1), the 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 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., at 88, 275 (emphasis added), citing 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).

IV. DISCUSSION

This Court lost jurisdiction over the subject matter of this litigation when Plaintiffs settled their claims against the Department of Health and Environmental Control (DHEC).

"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."

SC Code § 15-78-70(d)

Both CCPRC and DHEC are governmental entities and, therefore, Plaintiffs' settlement with DHEC in this action constitutes a complete bar to any further action by Plaintiffs against CCPRC and any other governmental entities as defined by SC Code Ann. §15-78-30. A complete bar to further action deprives the Court of subject matter jurisdiction in any claim against an entity of the State.

A. AS TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

During oral arguments, Plaintiffs argued that since the basis of this motion was SC Code §15-78-70(d), the issues giving rise to Defendant's Motion to Dismiss this motion was a repetition of an already decided issue in this case. This Court does not agree. Defendant's Motion for Summary Judgment was decided based on Judge Burch's interpretation of Judge McCoy's Settlement Order which stated "I find the settlement described in the Petition should be approved and confirmed as provided by S.C. Code Ann. §§ 62-3-1101 et seq." The Order further provided: "The compromise as recited in the Petition and the Release is approved as fair, just, and reasonable settlement of the contest and controversy existing between the Estate, its heirs, beneficiaries and assigns and Defendant South Carolina Department of Health & Environmental Control." Judge Burch's reasoning, based on the motion in front of him, was that he did not have authority to change another circuit court judge's Order and stated:

"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."

2017-CP-10-01324, Order Denying Summary Judgment, 11 Feb 2022.

GMC proposed revision

Subject matter jurisdiction was raised by Defendants in their arguments and briefs by citing S.C. Code § 15-78-70(d). However, this Court finds that does not prohibit me from granting Defendant's Motion to Dismiss under Rule 12(b)(1).

2017-CP-10-01324
Order Granting CCPRC's Motion to Dismiss

~~Subject matter jurisdiction was not raised by either party in argument or briefs and was not addressed in the Order denying Summary Judgment or the Order denying reconsideration. This motion is ripe for consideration.~~

B. AS TO DEFENDANT'S 12(B)(1) MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Subject matter jurisdiction may be raised at any time during litigation. Gantt v. Selph, 423 S.C. 333, 338, 814 S.E.2d 523, 525 (2018). The issue in the present motion has not been addressed by this Court and is therefore ripe for adjudication. "When the dispute is not to the underlying facts but as to the interpretation of the law and development of the record will not aid in the resolution of the issues it is proper to decide even novel issues on a motion to dismiss." Bessinger v. BI-LO, Inc., 366 S.C. 426, 434, 622 S.E.2d 564, 568 (Ct. App. 2005).

A Motion to Dismiss under Rule 12(b)(1), SCRPC for lack of subject matter jurisdiction is a question of law. The subject matter jurisdiction of the court is derived from the authority granted to the court by the Constitution and laws of the state. Paschal v. Causey, 309 S.C. 206, 209, 420 S.E.2d 863, 865 (Ct. App. 1992). The SCTCA governs subject matter jurisdiction for those cases brought under it. "Because there is but one circuit court in South Carolina, with uniform subject matter jurisdiction throughout the state, §15-78-100(b) establishes subject matter jurisdiction for actions arising under the SCTCA in the circuit court throughout the state." Ieter v. S.C. DOT, 369 S.C. 433, 440, 633 S.E.2d 143, 147 (2006), internal citations omitted.

It is a cardinal rule of statutory interpretation to ascertain and effectuate the intention of the legislature. "A court should not consider a particular clause in a statute in isolation, but should read it in conjunction with the purpose of the entire statute and the policy of the law." Se. Toyota Distribs., LLC v. Jim Hudson Superstore, Inc., 387 S.C. 508, 514, 693 S.E.2d 33, 36 (Ct. App. 2010). The intent of the Legislature in drafting the South Carolina Tort Claims Act was that courts treat a claim against multiple agencies or political subdivisions as a single claim against the state. The legislature does not allow for repeated damages among governmental Defendants for a single occurrence—it treats recovery of damages from them as a unified block. The General Assembly has plenary powers to write the law, say what they mean, and mean what they say. It is not the place of the Court to write the law of South Carolina. The statute is not ambiguous, and the Court will not torture the reading of the statute to ascertain its meaning.

The SCTCA is a limited waiver of sovereign immunity. South Carolina is the ultimate defendant, not the individual governmental entities, and a settlement in an action under the

2017-CP-10-01324

Order Granting CCPRC's Motion to Dismiss

SCTCA "constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence." SC Code §15-78-70(d). Section 15-78-30 defines "Governmental entity" as "the State and its political subdivisions." The plain language of the statute uses the plural form of "subdivisions," indicating all subdivisions of the State are included in the definition.

Plaintiffs claim the specific, exclusionary language of their settlement agreement with DHEC allow them to continue their case against CCPRC.¹ It does not, as subject matter jurisdiction cannot be waived or conferred by consent. *Paschal*. Plaintiffs elected a remedy with the government defendants by entering a Settlement and Release with DHEC, satisfying the State of South Carolina's role as the superordinate defendant in this litigation.

THEREFORE, the Court finds that jurisdiction of the subject matter of this litigation was lost when Plaintiffs settled with DHEC, barring Plaintiffs from any further action against CCPRC, and GRANTS CCPRC's 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction.

IT IS SO ORDERED.

Honorable R. Keith Kelly
Circuit Court Judge
Ninth Judicial Circuit

¹ Plaintiffs included the following exclusionary language within the closing paragraph of the Release:

"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."

The exclusionary language of the Release is only effective in not expanding the terms of the release to include CCPRC and does not expand the subject matter jurisdiction of the court to that which is prohibited. Otherwise, the paragraph is then an attempt to circumvent S.C. Code Ann. §15-78-70(d) and confer subject matter jurisdiction upon the Court by consent.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

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

Plaintiffs,

vs.

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.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO: 2017-CP-10-01324

MOTION TO DISMISS BY
CHARLESTON COUNTY PARKS AND
RECREATION COMMISSION FOR
LACK OF SUBJECT MATTER
JURISDICTION

COMES NOW THE DEFENDANT Charleston County Parks and Recreation Commission d/b/a James Island County Park ("CCPRC"), by and through its undersigned counsel, moving to dismiss Plaintiff's Complaint under Rule 12(b)(1), SCRPC for a lack of subject matter jurisdiction. As described more fully below, jurisdiction over the subject matter of this litigation was lost when Plaintiffs settled their claims against the Department of Health and Environmental Control (DHEC). See SC Code Ann. §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."

Plaintiffs' settlement with DHEC in this action constitutes a complete bar to any further action by the Plaintiffs against CCPRC. A complete bar to further action deprives the Court of subject matter jurisdiction in any claim against an entity of the State for the

same occurrence. Therefore, the Court no longer has subject matter jurisdiction and should dismiss CCPRC from this action.

I. PROCEDURAL BACKGROUND

This matter arose from the drowning of 3-year-old "DM" at the James Island County Park on May 14, 2016. Plaintiffs' Complaint alleges that on the 14th of May, the McLemore family visited a spray-and-play area near a pond in the James Island County Park. 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 that DM was missing. Several hours later, Police divers found DM's body submerged in the nearby pond. Plaintiffs filed their initial suit on March 14, 2017.

Plaintiffs filed Amended Complaints on March 21, 2018, and April 16, 2019. Plaintiffs confirmed a settlement with DHEC by signing a "Full, Final, and Complete Release of South Carolina Department of Health and Environmental Control" (the "Release") on March 17, 2020. [Exhibit A]. Plaintiffs filed a petition requesting approval of the settlement. [Exhibit B]. This Court approved and confirmed the settlement by Order Approving Petition for Settlement of Claim for Wrongful Death and Survival Action Against South Carolina Department of Health and Environmental Control in the Court of Common Pleas, Ninth Judicial Circuit, County of Charleston on March 31, 2020. [Exhibit C].

On May 14, 2021, CCPRC filed a Rule 56, SCRCPC motion for summary judgment based upon SC Code Ann. §15-78-70(d). This Court heard and subsequently denied the previous motion on January 4, 2022. [Exhibit D]. A formal order was signed and filed on

February 11, 2022 [Exhibit E]. On April 4, 2022, this Court denied CCPRC's Rule 59(e) Motion to Alter or Amend the Judgment. [Exhibit F]. The basis for the denial was stated in the Order:

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. [Exhibit D].

Subject matter jurisdiction was not raised by either party in the Motion for Summary Judgment.

II. STANDARD OF REVIEW

A Motion to Dismiss under Rule 12(b)(1), SCRPC for lack of subject matter jurisdiction is a question of law. Porter v. Labor Depot, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct. App. 2007). See also Posey v. Proper Mold & Eng'g, Inc., 378 SC 210, 217, 661 S.E.2d 395, 399 (Ct. App. 2008) ("The proper procedure for raising lack of subject matter jurisdiction prior to trial is to file a motion to dismiss pursuant to Rule 12(b)(1), SCRPC..."). Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. Dema v. Tenet Physician Servs.-Hilton Head, Inc., 383 S.C. 115, 120-21, 678 S.E.2d 430, 433 (2009). The SC Tort Claims Act ("SCTCA") governs subject matter jurisdiction for all cases brought under the SCTCA. "A judgment of a court without subject matter jurisdiction is void." Coon v. Coon, 364 SC 563, 566, 614 S.E.2d 616, 617 (2005); SC Dept. of Soc. Servs. v. Tran, 418 SC 308, 314, 792 S.E.2d 254, 257 (Ct. App. 2016).

2017-CP-10-01324
Motion to Dismiss (CCPRC)

Under Rule 12(b)(1), the 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 question of lack of subject matter jurisdiction may be raised at any time during the action and cannot be **waived or conferred by consent**. . .". 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)." Gnoc Corp. v. Estate of Rhyne, 312 S.C. 86, 88, 439 S.E.2d 274, 275 (1994) (emphasis added).

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).

III. ARGUMENT

This Court no longer has subject matter jurisdiction over this case as Plaintiffs elected a remedy with the government defendants by entering a Settlement and Release with the South Carolina Department of Environmental Controls ("DHEC"), satisfying the State of South Carolina's role as the superordinate defendant in this litigation.

A. THE LEGISLATURE INTENDS FOR COURTS TO TREAT GOVERNMENT DEFENDANTS AS ONE UNIT

It is a cardinal rule of statutory interpretation to ascertain and effectuate the intention of the legislature. Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007), internal citations omitted. In so doing, a court must read the statute "as a whole and sections that are part of the same general statutory law must be construed together and

2017-CP-10-01324
Motion to Dismiss (CCPRC)

each one given effect.” A.O. Smith Corp. v. S.C. Dep’t of Health & Envtl. Control, 428 S.C. 189, 203, 833 S.E.2d 451, 459 (Ct. App. 2019). Courts “should not concentrate on isolated phrases within the statute. Instead, we read the statute as a whole and in a manner consonant and in harmony with its purpose.” CFRE, LLC v. Greenville Cty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011), internal citations omitted.

The intent of the Legislature in drafting the South Carolina Tort Claims Act was that courts treat a claim against multiple agencies or political subdivisions as a single claim against the state. *See*, SC Code Ann §15-78-120. This is evident in the Legislature’s reaction to the South Carolina Supreme Court ruling the “Uniform Contribution Among Tortfeasors Act repealed sections 15-78-100(c)¹ and 15-78-120(a)(1)² of the Tort Claims Act.” *Se. Freight Lines v. City of Hartsville*, 313 S.C. 466, 469, 443 S.E.2d 395, 397 (1994). In response, the Legislature amended the Uniform Contribution Among Tortfeasors Act to include SC Code §15-38-65, which states explicitly, “[t]he Uniform Contribution Among Tortfeasors Act shall not apply to governmental entities.” *See also*, 1994 S.C. Acts 497, 1993 S.C. H.B. 4820, 1994 S.C. R. 609, 1994 S.C. Acts 497, 1993 S.C. H.B. 4820, 1994 S.C. R. 609, and *Dykema v. Carolina Emergency Physicians, P.C.*, 348 S.C. 549, 560 S.E.2d 894 (2002)

¹ “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)

² “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))

2017-CP-10-01324
Motion to Dismiss (CCPRC)

(detailing the history of this legislative process). This action by the Legislature protected both SC Code Ann. § 15-78-100 and —pertinent to this case— S.C. Code Ann § 15-78-120 as it reaffirmed the Legislature’s intent to group all “agencies or political subdivisions” together during litigation.

What is unambiguous in the SCTCA is that the Legislature does not allow for repeated damages among governmental Defendants for a single occurrence—it treats recovery of damages from them as a unified block: The State of South Carolina. SC Code Ann § 15-78-120. In this instance, the State of South Carolina settled with the Plaintiffs through DHEC without involving CCPRC. In doing so, Plaintiffs elected a remedy.

There is no indication in any court documents that SC Code Ann. § 15-78-70(d) was ever considered or discussed in the settlement negotiations, and it was not raised to the Court during the settlement confirmation hearings. Further, CCPRC was not involved in the settlement negotiations and did not attend the settlement confirmation hearings. The final decision of the Court to approve the settlement agreement did not mention SC Code Ann. §15-78-70(d).

B. ELECTION OF REMEDIES

The SCTCA is a limited waiver of sovereign immunity—a recognition that the State must stand before a jury to redress a Plaintiff’s wrongs from time to time. However, the State of South Carolina is the ultimate defendant, not the individual governmental entities that may have committed a tort. For efficiency and insurance purposes, South Carolina Courts engage in a useful fiction to silo off liability, but at the end of the day, Plaintiffs receive South Carolina tax dollars to redress their grievances. To allow Plaintiffs

2017-CP-10-01324
Motion to Dismiss (CCPRC)

to move forward in this case after settling with DHEC—without including CCPRC—is allowing them double recovery for the same cause of action. 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”).

Preventing judgments that overwhelmingly and adversely impact the Treasury of the State is the purpose of SC Code §15-78-70(d); it bars any further action by a claimant against governmental entities after a settlement or judgment regarding the same occurrence. It is also the reason why the Legislature acted so quickly to amend the Uniform Contribution Among Tortfeasors Act in 1994. It is also the reason 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 Ann. § 15-78-70 (LexisNexis, Lexis Advance through 2022 Regular Session Act No. 148, not including changes and corrections made by the Code Commissioner).

Plaintiffs included the following limiting language within the closing paragraph of the Release:

“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.”

SC Code Ann. §15-78-70(d) provides that a settlement in an action under the SCTCA “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 Ann. §15-78-70(d). While the Release declares that “This Release does not **release** any other governmental entity, other than SCDHEC” (emphasis added). The bar to further action is not a release, it is a removal and denial of subject matter jurisdiction from the Court. It prohibits the presentation and consideration of any further action by the Plaintiff against CCPRC in this case. The language within the Release cannot affect the application of S.C. Code Ann. §15-78-70(d) whether it was addressed in the Release or not. The subject matter jurisdiction of the court is derived from the authority granted to the court by the constitution and laws of the state. Paschal v. Causey, 309 S.C. 206, 209, 420 S.E.2d 863, 865 (Ct. App. 1992). The Release and the Court’s Order are silent on the issue of subject matter jurisdiction.

The limiting language of the Release is only effective in not expanding the terms of the release to include CCPRC and does not expand the subject matter jurisdiction of the court to that which is prohibited. Otherwise, the paragraph is then an attempt to circumvent S.C. Code Ann. §15-78-70(d) and confer subject matter jurisdiction upon the court by consent.

In Gnoc Corp. v. Estate of Rhyne, 312 S.C. 86, 88, 439 S.E.2d 274, 275 (1994), the South Carolina Supreme Court stated, “The question of lack of subject matter jurisdiction . . . cannot be waived or conferred by consent” 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) (emphasis added). The Release is like a quick claim deed in that it can only provide/convey those rights that are within the power of the parties to give. And in the case of the Court's approval of the Release, only those rights within the authority of the Court to grant. The Release cannot preserve, provide, or create the subject matter jurisdiction it destroyed by triggering S.C. Code Ann. §15-78-70(d). The Court's approval of the settlement agreement was the statutorily required approval for a death case and the final closing of the settlement agreement between the Plaintiffs and SCDHEC that created a "complete bar to any further action by the claimant (Plaintiffs) against CCPRC." Where the legislature by the laws of South Carolina removes subject matter jurisdiction, none exists. "Subject matter jurisdiction of a court depends upon the authority granted to the court by the Constitution and laws of the state." Paschal v. Causey, 309 S.C. 206, 209, 420S.E.2d863, 865 (Ct. App. 1992). It is axiomatic that subject matter jurisdiction cannot be waived or conferred by consent. Id.; See also Atlanta Skin & Cancer Clinic, P.C. v. Hallmark Gen. Partners, 320 S.C. 113, 121, 463 S.E.2d 600, 605 (1995).

IV. CONCLUSION

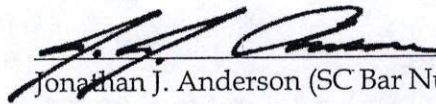
"Subject matter jurisdiction is 'the power to hear and determine cases of the general class to which the proceedings in question belong.'" Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994), quoting Bank of Babylon v. Quirk, 192 Conn. 447, 472 A.2d 21, 22 (1984). A court without subject matter jurisdiction does not have authority to act. Id. at 238, 442 S.E.2d at 600. See also S.C. Dept. of Soc. Servs. v. Tran, 418

2017-CP-10-01324
Motion to Dismiss (CCPRC)

S.C. 308, 314, 792 S.E.2d 254, 257 (Ct. App. 2016). The settlement agreement and release entered into by the Plaintiffs and DHEC deprives the court of that power over CCPRC. For the reasons stated above, this Court should grant CCPRC's Motion to Dismiss for lack of subject matter jurisdiction.

Respectfully submitted,

ANDERSON REYNOLDS & STEPHENS, LLC



Jonathan J. Anderson (SC Bar Number 383)
Jonathan L. Anderson (SC Bar Number 103127)
37 ½ Broad Street
P.O. Box 87
Charleston, SC 29401
(843) 723-0185 -phone
(843) 405-0313 -fax
janderson@arslawsc.com
landerson@arslawsc.com

November 2, 2022
Charleston, SC

ELECTRONICALLY FILED - 2022 Nov 03 1:25 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1001324

ANDERSON REYNOLDS & STEPHENS, LLC

ATTORNEYS AT LAW
37 ½ BROAD STREET
POST OFFICE BOX 87
CHARLESTON, SOUTH CAROLINA 29402

JONATHAN J. ANDERSON
LISA A. REYNOLDS
SHANNA MILCETICH STEPHENS
JONATHAN L. ANDERSON
DANIELLE WEGENER, of counsel

TEL. 843-723-0185
FAX. 843-405-0313
E-MAIL: JANDERSON@ARSLAWSC.COM

Please attach these Exhibits to the Motion/Dismiss F/Lack of Subject Matter Jurisdiction, filed today (11/03/22) by Charleston County Parks & Recreation Commission. The Exhibits were left off the Motion submission.

Respectfully submitted,

Molly Jankowski

Molly Jankowski

Paralegal to Jonathan J. Anderson, Esq.

2017-CP-10-01324
Motion to Dismiss (CCPRC)

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

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

vs.

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.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO: 2017-CP-10-01324

MOTION TO DISMISS BY
CHARLESTON COUNTY PARKS AND
RECREATION COMMISSION FOR
LACK OF SUBJECT MATTER
JURISDICTION

(Exhibit List)

- [Exhibit A] Full, Final, and Complete Release of South Carolina Department of Health and Environmental Control
- [Exhibit B] Petition Requesting Approval of Settlement
- [Exhibit C] Order Approving Petition for Settlement of Claim for Wrongful Death and Survival Action Against South Carolina Department of Health and Environmental Control
- [Exhibit D] Order Denying Defendants Charleston County Parks and Recreation Commission's Motion for Summary Judgment
- [Exhibit E] Order, filed February 11, 2022
- [Exhibit F] CCPRC's Rule 59(e) Motion to Alter or Amend the Judgment

ELECTRONICALLY FILED - 2022 Nov 03 1:25 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1001324

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

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

CASE NO: 2017-CP-10-01324

Plaintiffs,

DEFENDANT CHARLESTON
COUNTY PARKS AND RECREATION
COMMISSION ("CCPRC"), MOTION
TO ALTER OR AMEND COURT'S
ORDER DENYING CCPRC'S MOTION
FOR SUMMARY JUDGMENT

vs.

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.

PLEASE TAKE NOTICE that Defendant Charleston County Parks and Recreation Commission (hereinafter "CCPRC") through its undersigned counsel, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, respectfully moves for an Order altering or amending the Court's Order denying CCPRC's Motion for Summary Judgment pursuant to S.C. Code Ann. §15-78-70(d) ("the Statute" or S.C. Code Ann. §15-78-70(d))¹. All parties received written notice of Entry of a Judgment electronically on 11 February 2022.

BACKGROUND/PROCEDURAL HISTORY

This matter arose from the drowning of 3-year-old DM at the James Island County Park on 14 May 2016. Plaintiffs' Complaint alleges the McLemore family visited a spray-and-play area located near a pond in the James Island County Park. While packing to leave the attention of the deceased's mother was diverted from her son who subsequently disappeared. Later, police divers

¹ "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."

discovered his body in a pond near the area where the McLemore family was prior to the disappearance of the child.

Plaintiffs filed their initial suit on 14 March 2017. Plaintiffs confirmed a settlement with DHEC by signing a “Full, Final, and Complete Release of South Carolina Department of Health and Environmental Control” (“the Settlement Agreement”) on 17 March 2020. Plaintiffs filed a petition requesting approval of the Settlement Agreement on 26 March 2020. This Court approved and confirmed the settlement by **Order Approving Petition for Settlement of Claim for Wrongful Death and Survival Action Against South Carolina Department of Health and Environmental Control** (“the Settlement Order”) in the Court of Common Pleas, Ninth Judicial Circuit, County of Charleston on 31 March 2020.

ARGUMENT

This motion seeks reconsideration of CCPRC’s motion for summary judgment as the order denying the same does not rule on the issues raised by CCPRC.

CCPRC contends the Court misinterprets the application of the Statute and rules as if Plaintiffs and DHEC considered the Statute during the settlement process. There is no mention of the Statute within any of the documents filed in support of the settlement agreement, petition for approval of settlement, or the order approving the settlement. The language of the Statute clearly dictates the action to be taken following a settlement of claims brought under the SCTCA: settlement is the trigger that invokes the Statute. The Release and Settlement Order restricted the application of the release provisions to DHEC only and does not address the Statute’s prohibition of *“any further action by the claimant against an employee or governmental entity by reason of the same occurrence.”*

If the Settlement Release and Order considered the Statute, this is an attempt to nullify a section of the SCTCA and any order approving settlement under those circumstances is tantamount to a judicial order of nullification. "The general rule, well established in South Carolina, is that courts 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), (emphasis added). It is the stated policy of our Supreme Court to "...not lend its assistance to carry out the terms of a contract that violates statutory law or public policy..." Ward v. W. Oil Co., 387 S.C. 268, 274, 692 S.E.2d 516, 519 (2010). The settlement agreement if written with S.C. Code Ann. §15-78-70(d) in mind is a clear attempt to contract around and nullify the statute.

The proper reading of the agreement is the placement of limitations on the negotiated release of DHEC only. The terms of the settlement agreement and approving order have been fulfilled but in doing so S.C. Code Ann. §15-78-70(d) was triggered. The plain language of the statute allows the claimant to settle its claim but after that settlement any further action against a governmental entity is barred. S.C. Code Ann. §15-78-70(d) 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.*"

The statute does not release or surrender Plaintiff's claims against CCPRC as occurred with DHEC but bars or prohibits Plaintiff's claims against CCPRC. The application of the statute following the settlement with DHEC would not overrule the order issued by Judge McCoy approving the settlement. In essence, the settlement agreement and approving order make clear that Plaintiff is not by reason of the settlement agreement voluntarily surrendering any of its claims against

CCPRC. The provision of the settlement agreement and the approving order have been fulfilled. However, the settlement agreement and approving order triggered the consequences of the statute so that any further actions by the Plaintiffs against a governmental entity are involuntarily barred.

CONCLUSION

Under the well-established law of South Carolina, the Release has no effect on the application of S.C. Code Ann. §15-78-70(d) to this case or the settlement between Plaintiffs and DHEC. The settlement agreement between Plaintiffs and DHEC in this matter constitutes a complete bar to any further action by the Plaintiffs against CCPRC. Therefore, based upon the above discussion, the previously filed Motion for Summary Judgment, supporting memoranda of law, and the oral argument, CCPRC's Motion for Summary Judgment should be granted.

/s/ Jonathan J. Anderson

Jonathan J. Anderson (SC Bar No. 383)
Jonathan L. Anderson (SC Bar No. 103127)
ANDERSON REYNOLDS & STEPHENS, LLC
37 ½ Broad Street
P.O. Box 87
Charleston, SC 29401
(843) 723-0185 –phone
(843) 405-0313 –fax
janderson@arlawsc.com
landerson@arlawsc.com

*Attorneys for Charleston County Parks and
Recreation*

February 21, 2022
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

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

CASE NO: 2017-CP-10-01324

Plaintiffs,

SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF THE MOTION FOR
SUMMARY JUDGMENT BY
CHARLESTON COUNTY PARKS AND
RECREATION COMMISSION

vs.

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.

The defendant Charleston County Parks and Recreation Commission ("CCPRC") supplements its memorandum in support of CCPRC's motion for summary judgement. The format and structure of CCPRC's original memorandum filed with the motion for summary judgment is maintained and supplemented by additional text.

PROCEDURAL HISTORY AND FACTS

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

Plaintiffs filed their initial suit on March 14, 2017. Plaintiffs confirmed a settlement with DHEC by signing a "Full, Final, and Complete Release of South Carolina Department of Health

and Environmental Control” (the Release) on March 17, 2020. [Exhibit A to the original motion]. Plaintiffs filed a petition requesting approval of the settlement. [Exhibit B to the original motion]. This Court approved and confirmed the settlement by Order Approving Petition for Settlement of Claim for Wrongful Death and Survival Action Against South Carolina Department of Health and Environmental Control in the Court of Common Pleas, Ninth Judicial Circuit, County of Charleston on March 31, 2020. [Exhibit C to the original motion].

LAW AND ARGUMENT

The only South Carolina appellate case that addresses S.C. Code Ann. §15-78-70(d) is *Wade v. Berkeley County*, 348 S.C. 224 (2002). The case arose from a vehicle collision between Wade, Pierce, and a third-unknown driver. Wade agreed to not execute any judgment against Pierce or Pierce’s private insurer in exchange for \$13,000. Wade then amended his complaint deleting Pierce and named the County as a Defendant by alleging Pierce was acting within the course and scope of his employment with the County at the time of the accident.

At the time of the agreement, Wade had not initiated any action or claim against the County as Pierce’s employer. The trial court granted Berkeley County’s motion for summary judgment based upon S.C. Code of Laws Ann. §15-78-70(d) finding Wade’s action against the County was barred due to the settlement with Pierce. The Supreme Court reversed the trial court’s granting of Berkeley County’s summary judgment motion and held that the agreement between Wade and Pierce was not “[a] settlement or judgment in an action or a settlement of a claim under [S.C. Tort Claims Act]” because the agreement between Wade and Pierce was in their individual capacities, financed by Pierce’s private insurer, and no claim existed at the time against the County. Although the *Wade* case is not directly on point with the case at bar, the *Wade* Court did provide some guidance on what factors are needed for a case and settlement to be encompassed within S.C. Code

of Laws Ann. §15-78-70(d). The following analysis attempts to follow that analysis as well as the factors required by the statute.

In the matter before the Court, there is no question that the settlement agreement was between a governmental entity, DHEC¹, and the Plaintiffs. The settlement agreement arose from the action currently pending before this court. The action was brought under the South Carolina Tort Claims Act². Both DHEC and CCPRC were parties to this action prior to the settlement agreement being made. The acceptance and approval of the settlement agreement by the Court and the verification that the agreement provides full, final, and complete release of all claims against DHEC and finalizes the settlement agreement. The action/claim, parties, and agreement fit squarely within the statute and thereby bar Plaintiffs' claims against CCPRC.

Plaintiffs included the following limiting language within the closing paragraph of the Release:

"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 SG&A Architecture. This Release does not release any other governmental entity, other than SCDHEC."

To the extent Plaintiffs believe this paragraph provides them relief from the effects of S.C. Code Ann. §15-78-70(d), the Plaintiffs are mistaken for two reasons. The first reason is that the S.C. Code Ann. §15-78-70(d) provides that a settlement in an action under the S.C. Tort Claims Act "constitutes a complete bar to any further action by the claimant. . ." while the Release declares that "This Release does not **release** any other governmental entity, other than SCDHEC."

¹ See paragraph 6 of Plaintiff's Second Amended Complaint: 6. That upon information and belief that South Carolina Department of Health and Environmental Control (hereinafter "DHEC") is a South Carolina state agency whose operations are overseen by the S.C. Board of Health and Environmental Control.

² See paragraph 8 of Plaintiff's Second Amended Complaint: 8. That this action is being brought pursuant to the South Carolina Tort Claims Act § 15-78- 10, et seq., of the Code of Laws of South Carolina (1976), as amended

[emphasis added]. The bar to further action is not a release, it prohibits the presentation and consideration of any further action by the Plaintiff against CCPRC in this case. The language of the Release would have no effect on the application of S.C. Code Ann. §15-78-70(d) whether it was addressed in the Release or not.

However, if the limiting language of the Release is found by the Court to address the issue of "... a complete bar to any further action by the claimant. ..." the paragraph is then an attempt to circumvent S.C. Code Ann. §15-78-70(d). A review of S.C. law provides the general rule that a release or any other contract is incapable of circumventing a statute. The Release, like all settlement agreements, is a contract under S.C. law. See, *Byrd v. Livingston*, 398 S.C. 237, 241, 727 S.E.2d 620, 621, 2012 S.C. App. LEXIS 129, *4, 2012 WL 1699386 (S.C. Ct. App. May 16, 2012) ("In South Carolina jurisprudence, settlement agreements are viewed as contracts."); *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501, 2007 S.C. App. LEXIS 126, *17 (S.C. Ct. App. June 14, 2007) ("A release is a contract and contract principles of law should be used to determine what the parties intended.")

The parties' intent is contrary to the statute and affects the rights of CCPRC, a governmental entity that is not a party to the agreement but is a party in the action. See, *City of Newberry v. Newberry Elec. Coop., Inc.*, 387 S.C. 254, 257, 692 S.E.2d 510, 512, 2010 S.C. LEXIS 99, *3-4 (S.C. April 5, 2010) (denying an electrical cooperative's attempt to expand territory because it would allow a "creature of statute" to contract around another government agency's rights.).

The language of the Release violates the provisions of S.C. Code Ann. §15-78-70(d). The SC Supreme Court has stated "...this Court will not 'lend its assistance' to carry out the terms of a contract that violates statutory law or public policy..." *Ward v. W. Oil Co.*, 387 S.C. 268, 274, 692 S.E.2d 516, 519 (2010); See also *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371,

601 S.E.2d 342, 345 (2004) ("The general rule, well established in South Carolina, is that courts 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." (emphasis added). The limiting language in the Release violates S.C. Code Ann. §15-78-70(d) and the public policy underlying it. Enforcing the closing paragraph of the Release would require the Court to circumvent S.C. Code Ann. §15-78-70(d) based upon a contract.

CCPRC would invite the Court to adopt its first reason or interpretation of the Release as a document meant to prevent the inadvertent release of other defendants by reason of the Release. The last paragraph was not intended to circumvent S.C. Code Ann. §15-78-70(d) as the Release is silent on the code section. This interpretation allows the application S.C. Code Ann. §15-78-70(d) without a contractual analysis of the Release.

CONCLUSION

CCPRC did not waive any right nor is it exercising a right by moving for summary judgment pursuant to §15-78-70(d). The SCTCA is the only vehicle by which the State and its political subdivision may be sued. Plaintiffs' settlement with DHEC triggered the bar to action against CCPRC as an operation of law. The rules and procedures set out in the SCTCA are to be construed liberally in favor of the governmental entity:

- a. §15-78-20(a): "*. . . 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 with the limitations of this chapter and in accordance with the principle established herein.***"
- b. SCTCA §15-78-20(f): *The provisions of this chapter establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, **must be liberally construed in favor of limiting the liability of the State.***

- c. SCTCA §15-78-200: “. . . *The provisions of this chapter establish limitations on and exemptions to liability of the governmental entity and must be liberally construed in favor of limiting the liability of the governmental entity.*”

As outlined above, the settlement between the Plaintiffs and DHEC in the action captioned *Steven McLemore and Bonnie Jean Eagle as natural parents for the Estate of Duffy McLemore v. Charleston County Parks and Recreation d/b/a/ James Island County Park, SGA Architecture, et al.* constitutes a complete bar to any further-action by the Plaintiffs against CCPRC in the same action. Under the well-established law of South Carolina, the Release has no effect on the application of S.C. Code Ann. §15-78-70(d) to this case or the settlement between Plaintiffs and DHEC. Therefore, CCPRC’s Motion for Summary Judgment should be granted.

ANDERSON REYNOLDS & STEPHENS, LLC

/s/ Jonathan J. Anderson

Jonathan J. Anderson (SC Bar No. 383)

Jonathan L. Anderson (SC Bar No. 103127)

37 ½ Broad Street

P.O. Box 87

Charleston, SC 29401

(843) 723-0185 –phone

(843) 405-0313 –fax

janderson@arslawsc.com

landerson@arslawsc.com

*Attorneys for Charleston County Parks and
Recreation Commission-d/b/a James Island
County Park*

December 27, 2021

Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A NO. 2017-CP-10-01324

Steven McLemore, Individually and as)
Personal Representative of the Estate of)
D.M.; and Bonnie Jean Eagle,)
Individually and as natural parent of)
deceased minor, D.M.,)
Plaintiffs,)

vs.)

Charleston County Parks & Recreation)
Commission ("CCPRC") 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.)

PLAINTIFF BONNIE JEAN EAGLE'S
RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

I. BACKGROUND FACTS

This matter is before the Court based on Defendant Charleston County Parks and Recreation Commission's (CCPRC) Motion for Summary Judgment. The case involves the tragic death of 3-year-old D.M. at the James Island County Park on May 14, 2016. The McLemore family visited a spray-and-play park which was located near a pond at the James Island County Park. While packing to leave, it was noted that D.M. was missing. Police divers found D.M.'s body submerged in a nearby pond several hours later.

Numerous experts have alleged that the park was unsafe, including a pier which went into the pond which had not been properly blocked. The Defendants include Charleston County Parks & Recreation Commission, Yearround Pool Co., Inc., SGA Architecture and the South Carolina Department of Health and Environmental Control.

After the Plaintiffs filed suit, the South Carolina Department of Environmental Control, through its counsel, offered to pay the sum of \$10,000.00 to be released from the case. Negotiations occurred between Plaintiffs' prior counsel and lawyers for the South Carolina Department of Health and Environmental Control and a Release was entered into and agreed to by the parties.

South Carolina Department of Health and Environmental Control and the Plaintiffs included the following language within the closing paragraph of the Release:

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.

Plaintiff's prior counsel and South Carolina Department of Health and Environmental Control's lawyer filed a Petition for Approval of Settlement of Claim for Wrongful Death and Survival Action Against South Carolina Department of Health and Environmental Control on March 26, 2020. The court heard the matter on a non-jury term of court and issued its Order Approving Petition for Settlement of Claim for Wrongful Death and Survival Action Against South Carolina Department of Health and Environmental Control on March 31, 2020. The Order which has been attached to Defendant's motion and of which all co-Defendants had notice has the following language limited only to South Carolina Department of Health and Environmental Control:

...the parties confirm that adequate consideration is provided in exchange for a dismissal of all causes of action from Plaintiffs against this Defendant.

In a later part of the Order the Court states:

Based upon these facts, I find the settlement described in the Petition should be approved and confirmed as provided by S.C. Code Ann. §§ 62-3-1101 et seq.

In the Ordered section, the Court further states:

... discharge completely all claims or demands of whatsoever nature against this Defendant, including all causes of action or claims for wrongful death and survivorship that Decedent, his survivors, heirs, beneficiaries, and/or representatives might have or could have arising out of the incident....

II. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary judgment is an extreme remedy which should be cautiously invoked so that no person will be improperly deprived of a trial upon disputed factual issues. *Holloman v. McAllister*, 289 S.C. 183, 345 S.E.2d 728 (1986); *Baughman v. American Telephone and Telegraph Company*, 410 S.E.2d 537 (1991); *Watson v. Southern Ry. Co.*, 420 F.Supp. 483 (D.S.C. 1975).

To obtain summary judgment, the moving party must show that no genuine issue exists as to any material fact and that the moving party is entitled to summary judgment as a matter of law. Rule 56(c), SCRPC. It is the duty of the court, on motion for summary judgment, not to try issues of fact but only to determine whether there are genuine issues to be tried. Once having found that triable issues exist, the court must leave those issues for determination at trial. *Eagle Construction Co., v. Richland Construction Company, Inc.*, 264 S.C. 71, 212 S.E.2d 580 (1975); *Title Insurance Company of Minnesota v. Christian*, 267 S.C. 71, 226 S.E.2d 240 (1976). In determining whether any triable issues of fact exist, all inferences from the facts in the record must be viewed in the light most favorable to the party opposing the summary judgment motion. *Hamilton v. Miller*, 389 S.E.2d 652 (S.C.1990); *Manning, et al., v. Quinn*, 294 S.C. 383, 365 S.E.2d 24 (1988); *Tom Jenkins Realty, Inc., v. Hilton*, 278 S.C. 624, 300 S.E.2d 594 (1983); *Cafe Associates, Ltd., v. Gerngross*, 406 S.E.2d 162 (1991). Even where there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should not be granted. *Gardner v. Campbell*, 257 S.C. 209, 184 S.E.2d 700; *Jamison v. Howard*, 271 S.C. 385, 247 S.E.2d

450 (1978); *Hamilton v. Miller*, 389 S.E.2d 652 (S.C.1990). All ambiguities, conclusions and inferences arising in and from the evidence must be construed most strongly against the party moving for summary judgment. *Tom Jenkins Realty, Inc., v. Hilton*, 278 S.C. 624, 300 S.E.2d 594 (1983); *William v. Chesterfield Lumber Co.*, 267 S.C. 607, 230 S.E.2d 447 (1976). Summary judgment is appropriate only when the pleadings, depositions, interrogatory answers, admissions, and affidavits show that there is no genuine issue of material fact. *United States v. Diebold*, 369 U.S. 654, 655 (1962). The party opposing summary judgment need not come forward in any way if the moving party has not supported his motion to the point of showing that the issue is a sham. *Title Insurance Company of Minnesota v. Christian*, 267 S.C. 71, 226 S.E.2d 240 (1976); *Yarborough v. Rogers*, 411 S.E.2d 424 (1991).

III. APPLICABLE LAW

The Defendant has moved for summary judgment based on 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 any employee or governmental entity by reason of the same occurrence.”

In this case, Plaintiff notes that a Court Order approved this settlement and that Charleston County Parks & Recreation Commission had notice of a hearing before the Court and did not object to the settlement. Further, the Order approving the settlement signed by this Court was not appealed and is the law of the case. *Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d. 156 (2003) (unappealed order is law of case). It is without controversy that the Court approved the settlement and the Release, that a hearing was held, and that the Court’s own Order allows for other governmental defendants to be sued. As a result, because the Order approving the settlement against South Carolina Department of Health and Environmental Control is the law of the case and

Charleston County Parks and Recreation Commission had the ability to object, S.C. Code § 15-78-70(d) is not applicable.

Further, Plaintiff notes that Charleston County Parks & Recreation Commission is estopped from raising the argument that S.C. Code § 15-78-70(d) is applicable since South Carolina recognizes estoppel by record. Estoppel by record has been defined in the South Carolina case of *Watson v. Goldsmith*, 205 S.C. 215, 31 S.E. 2d 317 (1944). In that case, the court held, any person is precluded from denying facts adjudicated by a court of competent jurisdiction. The preclusion extends to the person and to those in a privity with the person. In South Carolina, estoppel by record or other writing can occur by judicial, legislative or a personal act. An example of estoppel by record in the judicial context would be that a judgment debtor may not deny the facts contained in a judgment roll. In this case, Charleston County Parks & Recreation Commission cannot deny that the court approved this settlement and that Charleston County Parks & Recreation Commission had notice and an opportunity to be heard and failed to object.

Further, Charleston County Parks & Recreation Commission waived any claim or right to argue a bar under S.C. Code § 15-78-70(d). South Carolina case law has consistently held that waiver has been repeatedly defined as the intentional relinquishment of a known right. (See generally 8A West's South Carolina Digest, Estoppel, Key No. 52.10(2) (1983 & Supp. 1990). Certain defenses are waived if not pleaded. See SCRCP 8(c).

In this case, because the circuit court approved the settlement and Charleston County Parks & Recreation Commission was a party to the case, it cannot now raise as a defense S.C. Code § 15-78-70(d). In fact, in the court's Order approving the settlement of the South Carolina Department of Health and Environmental Control's claim, this court found the Petition and Release is approved as just, fair and reasonable against this Defendant." Because the Charleston

County Parks & Recreation Commission had actual knowledge of the settlement and failed to object at a hearing, it waived its right to argue a complete bar under S.C. Code § 15-78-70(d).

Finally, the main thrust of S.C. Code § 15-78-70 is to protect individual employees of a governmental entity. S. C. Code § 15-78-70(d) addresses that issue when the statute is read as a whole. The case cited by the Defendant, *Wade v. Berkeley County*, 339 S.C. 513, 529 S.E.2d 743 (Ct. App. 2001); 348 S.C. 224, 559 S.E.2d 586 (S.C. 2002), has to do with settling with an individual who was an employee of the County, rather than a settlement of the County itself. The facts of the *Wade* case are distinguishable from what occurred in this matter. Further, there are no cases that hold that a settlement as to one governmental entity is a bar to settlement of action against a different governmental entity especially when the Release specifically reserves that right. When the statute is read in this light, the court must find as a matter of law that summary judgment should be denied.

KELAHER, CONNELL & CONNOR, P.C.

s/ Gene M. Connell, Jr.

Gene M. Connell, Jr. (S.C. Bar No. 1358)
The Courtyard, Suite 209
1500 U.S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net

November 19, 2021
Surfside Beach, South Carolina

Attorney for Plaintiff Bonnie Jean Eagle

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A NO. 2017-CP-10-01324

Steven McLemore, Individually and as)
Personal Representative of the Estate of)
D.M.; and Bonnie Jean Eagle,)
Individually and as natural parent of)
deceased minor, D.M.,)

Plaintiffs,)

vs.)

Charleston County Parks & Recreation)
Commission ("CCPRC") 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.)

**AFFIDAVIT OF
GENE M. CONNELL, JR.**

Personally appeared before me Gene M. Connell, Jr. who swears and states as follows:

1. I am counsel for Bonnie Jean Eagle in the above-captioned matter and have knowledge of the facts and circumstances surrounding the Release and Order in this case.

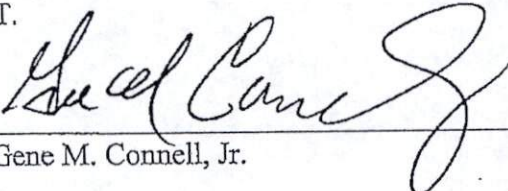
2. I contacted Attorney Phillip Ferderigos' offices, who represented the South Carolina Department of Health and Environmental Control in the settlement in this case and learned from his assistant that he was out on medical leave until January 1, 2022 and that he had protection from any court appearances.

3. I then asked his legal assistant who drafted the Release and Petition for Settlement in this case. She indicated that Mr. Ferderigos, as counsel for the South Carolina Department of Health and Environmental Control drafted the Release and Order Approving Settlement and that she typed it.

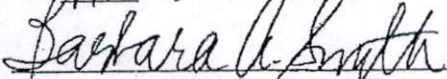
4. She further indicated from her review of the file that, Mr. Ferderigos, on behalf of the South Carolina Department of Health and Environmental Control, wanted to make sure that the Plaintiff had the ability to continue to sue other defendants in this action. She indicated that the specific language in the Petition and the specific language in the Release was drafted by Ferderigos and that it was agreed to with Plaintiffs' counsel.

5. Should this Court wish to hear from Phillip Ferderigos it will have to be after January 1, 2022, when he returns from medical leave. If the Court has any question about the intention of the South Carolina Department of Health and Environmental Control or its counsel, I request that the hearing be put off until he can return from medical leave. The basis of this request is that Ferderigos' testimony would be critical to the case and the Motion for Summary Judgment of Charleston County Parks & Recreation Commission.

FURTHER, AFFIANT SAYETH NOT.


Gene M. Connell, Jr.

SWORN AND SUBSCRIBED before me,
this 19th day of November, 2021.


Notary Public for South Carolina
My Commission Expires: 3/22/24

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A NO. 2017-CP-10-01324

Steven McLemore, Individually and as)
Personal Representative of the Estate of)
D.M.; and Bonnie Jean Eagle,)
Individually and as natural parent of)
deceased minor, D.M.,)
Plaintiffs,)

vs.)

**AFFIDAVIT OF
JOHN D. HARRELL, SR.**

Charleston County Parks & Recreation)
Commission ("CCPRC") 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.)

Personally appeared before me John D. Harrell, Sr. who swears and states as follows:

1. I was the attorney for Steven McLemore and Bonnie Jean Eagle, parents of the deceased, D.M.
2. I filed a lawsuit against all the Defendants when D.M. drowned at the James Island County Park.
3. The Defendants I sued are:
 - a. Charleston County Parks & Recreation Commission
 - b. James Island County Park
 - c. SGA Architecture
4. The Defendant Charleston County Parks & Recreation Commission filed a motion for summary judgment on May 14, 2021. I have reviewed the motion and it requests that Charleston County Parks & Recreation be dismissed because I partially settled the case with the South Carolina Department of Health and Environmental Control for the sum of \$10,000.00.

5. The Release specifically provided in bold print:

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.

6. I carefully drafted the above language and placed it in the Release. It was my specific intention not to release any other party or governmental entity.

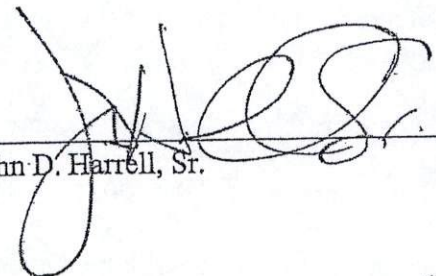
7. I had no intention of releasing any other party and the language I put in the Release was spelled out in the Release so as to allow my client to continue to bring their claims against all the other governmental defendants.

8. Further, the settlement agreement was prepared by the South Carolina Department of Health and Environmental Control's attorney, and his agreement to the Release is a waiver of any bar of any further action against any other governmental defendants.

9. The settlement monies in the amount of \$10,000.00 was paid by the Insurance Reserve Fund on behalf of South Carolina Department of Health and Environmental Control and they explicitly agreed in the Release to allow other claims against other state agencies not be released by the terms in the Release.

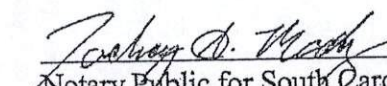
10. Finally, this Court approved the terms of the settlement in an Order dated March 31, 2021. In that Order, this Court approved the terms of the Release, which order was not appealed.

FURTHER, AFFIANT SAYETH NOT.



John D. Harrell, Sr.

SWORN AND SUBSCRIBED before me,
this 19 day of November, 2021.



Notary Public for South Carolina
My Commission Expires: _____

ZACHARY A. MOODY
Notary Public, State of South Carolina
My Commission Expires 3/3/2031



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

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

CASE NO: 2017-CP-10-01324

Plaintiffs,

MOTION FOR SUMMARY
JUDGMENT BY CHARLESTON
COUNTY PARKS AND RECREATION
COMMISSION

vs.

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.

Pursuant to Rule 56, SCRCP, the Defendant Charleston County Parks and Recreation Commission (CCPRC) moves the Court for an Order granting summary judgment in its favor on the ground that there is no genuine issue of material fact and CCPRC is entitled to judgment as a matter of law. The basis of this motion is Plaintiff's settlement with the Department of Health and Environmental Control (DHEC) which triggered S.C. Code Ann. §15-78-70(d):

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

Plaintiffs' settlement with DHEC in this action constitutes a complete bar to any further action by the Plaintiffs against CCPRC. Therefore, CCPRC is entitled to summary judgment in this action.

PROCEDURAL HISTORY AND FACTS

This matter arose from the drowning of 3-year-old DM at the James Island County Park on May 14, 2016. Plaintiffs' Complaint alleges that on the 14th of May, the McLemore family visited a spray-and-play area located near a pond in the James Island County Park. While packing to leave,

Ms. Eagle's nephew diverted her attention by spraying her with a bottle of water. After playfully chasing after the nephew, Ms. Eagle alleges she noticed that DM was missing. Police divers found DM's body submerged in the nearby pond several hours later.

Plaintiffs filed their initial suit on March 14, 2017. Plaintiffs confirmed a settlement with DHEC by signing a "Full, Final, and Complete Release of South Carolina Department of Health and Environmental Control" (the Release) on March 17, 2020. [Exhibit A]. Plaintiffs filed a petition requesting approval of the settlement. [Exhibit B]. This Court approved and confirmed the settlement by Order Approving Petition for Settlement of Claim for Wrongful Death and Survival Action Against South Carolina Department of Health and Environmental Control in the Court of Common Pleas, Ninth Judicial Circuit, County of Charleston on March 31, 2020. [Exhibit C].

LAW AND ARGUMENT

The only South Carolina appellate case that addresses S.C. Code Ann. §15-78-70(d) is *Wade v. Berkeley County*, 348 S.C. 224 (2002). The case arose from a vehicle collision between Wade, Pierce, and a third unknown driver. Wade agreed to not execute any judgment against Pierce or Pierce's private insurer in exchange for \$13,000. Wade then amended his complaint deleting Pierce and named the County as a Defendant by alleging Pierce was acting within the course and scope of his employment with the County at the time of the accident.

At the time of the agreement, Wade had not initiated any action or claim against the County as Pierce's employer. The trial court granted Berkeley County's motion for summary judgment based upon S.C. Code of Laws Ann. §15-78-70(d) finding Wade's action against the County was barred due to the settlement with Pierce. The Supreme Court reversed the trial court's granting of Berkeley County's summary judgment motion and held that the agreement between Wade and Pierce was not "[a] settlement or judgment in an action or a settlement of a claim under [S.C. Tort

Claims Act]” because the agreement between Wade and Pierce was in their individual capacities, financed by Pierce’s private insurer, and no claim existed at the time against the County.

In the matter before the Court, there is no question that the settlement agreement was between a governmental entity, DHEC¹, and the Plaintiffs. The settlement agreement arose from the action currently pending before this court. The action was brought under the South Carolina Tort Claims Act². Both DHEC and CCPRC were parties to this action prior to the settlement agreement being made. The acceptance and approval of the settlement agreement by the Court and the verification that the agreement provides full, final, and complete release of all claims against DHEC and finalizes the settlement agreement. The action/claim, parties, and agreement fit squarely within the statute and thereby bar Plaintiffs’ claims against CCPRC.

Plaintiffs included the following limiting language within the closing paragraph of the Release:

"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."

To the extent Plaintiffs believe this paragraph provides them relief from the effects of S.C. Code Ann. §15-78-70(d), the Plaintiffs are mistaken for two reasons. The first reason is that the S.C. Code Ann. §15-78-70(d) provides that a settlement in an action under the S.C. Tort Claims Act “constitutes a complete bar to any further action by the claimant. . .” while the Release declares that “This Release does not **release** any other governmental entity, other than SCDHEC.”

¹ See paragraph 6 of Plaintiff’s Second Amended Complaint: 6. That upon information and belief that South Carolina Department of Health and Environmental Control (hereinafter "DHEC") is a South Carolina state agency whose operations are overseen by the S.C. Board of Health and Environmental Control.

² See paragraph 8 of Plaintiff’s Second Amended Complaint: 8. That this action is being brought pursuant to the South Carolina Tort Claims Act § 15-78- 10, et seq., of the Code of Laws of South Carolina (1976), as amended

[emphasis added]. The bar to further action is not a release, it prohibits the presentation and consideration of any further action by the Plaintiff against CCPRC in this case. The language of the Release would have no effect on the application of S.C. Code Ann. §15-78-70(d) whether it was addressed in the Release or not.

Second reason is that if the limiting language of the Release is found by the Court to address the issue of “. . . a complete bar to any further action by the claimant. . .” the paragraph is then an attempt to circumvent S.C. Code Ann. §15-78-70(d). A review of S.C. law provides the general rule that a release or any other contract is incapable of circumventing a statute. The Release, like all settlement agreements, is a contract under S.C. law. See, *Byrd v. Livingston*, 398 S.C. 237, 241, 727 S.E.2d 620, 621, 2012 S.C. App. LEXIS 129, *4, 2012 WL 1699386 (S.C. Ct. App. May 16, 2012) (“In South Carolina jurisprudence, settlement agreements are viewed as contracts.”); *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501, 2007 S.C. App. LEXIS 126, *17 (S.C. Ct. App. June 14, 2007) (“A release is a contract and contract principles of law should be used to determine what the parties intended.”)

The parties' intent is contrary to the statute and affects the rights of CCPRC, a governmental entity that is not a party to the agreement but is a party in the action. See, *City of Newberry v. Newberry Elec. Coop., Inc.*, 387 S.C. 254, 257, 692 S.E.2d 510, 512, 2010 S.C. LEXIS 99, *3-4 (S.C. April 5, 2010) (denying an electrical cooperative's attempt to expand territory because it would allow a "creature of statute" to contract around another government agency's rights.);

The language of the Release violates the provisions of S.C. Code Ann. §15-78-70(d). The SC Supreme Court has stated "...this Court will not 'lend its assistance' to carry out the terms of a contract that violates statutory law or public policy..." *Ward v. W. Oil Co.*, 387 S.C. 268, 274, 692 S.E.2d 516, 519 (2010); *See also White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371, 601 S.E.2d 342,

345 (2004) ("The general rule, well established in South Carolina, is that courts 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." (emphasis added). The limiting language in the Release violates S.C. Code Ann. §15-78-70(d) and the public policy underlying it. Enforcing the closing paragraph of the Release would require the Court to circumvent S.C. Code Ann. §15-78-70(d) based upon a contract.

CCPRC would invite the Court to adopt its first reason or interpretation of the Release as a document meant to prevent the inadvertent release of other defendants by reason of the Release. The last paragraph was not intended to circumvent S.C. Code Ann. §15-78-70(d) as the Release is silent on the code section. This interpretation allows the application S.C. Code Ann. §15-78-70(d) without a contractual analysis of the Release.

CONCLUSION

As outlined above, the settlement between the Plaintiffs and DHEC in the action captioned *Steven McLemore and Bonnie Jean Eagle as natural parents for the Estate of Duffy McLemore v. Charleston County Parks and Recreation d/b/a/ James Island County Park, SGA Architecture, et al.* constitutes a complete bar to any further action by the Plaintiffs against CCPRC in the same action. Under the well-established law of South Carolina, the Release has no effect on the application of S.C. Code Ann. §15-78-70(d) to this case or the settlement between Plaintiffs and DHEC. Therefore, CCPRC's Motion for Summary Judgment should be granted.

SIGNATURE APPEARS ON NEXT PAGE

ANDERSON REYNOLDS & STEPHENS, LLC

/s/ Jonathan J. Anderson

Jonathan J. Anderson (SC Bar No. 383)

Jonathan L. Anderson (SC Bar No. 103127)

37½ Broad Street

P.O. Box 87

Charleston, SC 29401

(843) 723-0185 –phone

(843) 405-0313 –fax

janderson@arslawsc.com

landerson@arslawsc.com

May 14 2021
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 Steven McLemore, Individually and as)
 Personal Representative of the Estate of)
 D.M.; and Bonnie Jean Eagle, Individually)
 and as Natural Parent for the Deceased)
 Minor D.M.,)
)
 Petitioners,)
 vs.)
)
 Charleston County Parks & Recreation)
 Commission ("CCPRC") d/b/a James)
 Island County Park, Yearround Pool Co.,)
 Inc., SGA Architecture, South Carolina)
 Department of Health and Environmental)
 Control; John Doe and/or John Doe)
 Corporation,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT
 CASE No.: 2017-CP-10-01324

**PETITION FOR APPROVAL OF
 SETTLEMENT OF CLAIM
 FOR WRONGFUL DEATH
 AND SURVIVAL ACTION AGAINST
 SOUTH CAROLINA DEPARTMENT
 OF HEALTH AND ENVIRONMENTAL
 CONTROL**

1. Petitioner Steven McLemore is the duly appointed Personal Representative of the Estate of Minor D.M. by order of the Probate Court of Charleston County, South Carolina;
2. Petitioners Steven McLemore and Bonnie Jean Eagle are the natural parents of the Decedent Minor D.M.
3. Petitioners' Decedent suffered injuries resulting in death on May 14, 2016;
4. Petitioners have presented claims against the Defendant South Carolina Department of Health and Environmental Control for wrongful death and survival pursuant to South Carolina Code § 15-51-10 et seq. (death by wrongful act) and South Carolina Code § 15-5-90 (survival action).
5. It has been agreed that the Defendant South Carolina Department of Health and Environmental Control will pay the total sum of \$10,000.00 in settlement of any and all claims against it arising out of this accident;

6. Petitioners have negotiated and approved the proposed settlement. As the Personal Representative and in the Petitioners' individual capacity, Petitioners believe this settlement to be just, reasonable, and in the best interest of and for the Estate, its heirs, survivors, beneficiaries, and all persons represented by Petitioners who have an interest in this matter;

7. The statutory beneficiaries of the wrongful death and survival action are Decedent's parents, and the duly appointed Personal Representative will take these proceeds according to South Carolina law, after deduction of attorney's fees and costs, and/or will comply with South Carolina law.¹

8. Petitioners agree to pay any outstanding bills, liens, or expenses out of the settlement proceeds. Further, Petitioners agree to properly distribute the settlement proceeds to the Decedent's statutory beneficiary(s) and/or heir(s) at law or the appropriate devisee(s) of decedent's Estate.

9. Petitioners have employed an attorney, and attorney fees will be Four Thousand and No/100 Dollars (\$4,000.00) of the settlement amount.

10. The settlement funds from the payment by the Defendant South Carolina Department of Health and Environmental Control will be allocated as follows: \$10,000.00 to the wrongful death action and \$0.00 for the survival action.

11. Petitioners bring this Petition pursuant to South Carolina Code Ann. § 15-51-10 et seq. (wrongful death) and South Carolina Code Ann. § 15-5-90 (survival action) and waives any notice requirements set forth in Title 62 of the South Carolina Code of Laws.

¹ The payment of settlement funds in accordance with this Order absolves South Carolina Department of Health and Environmental Control of any and all obligations to the decedent's Personal Representative or the beneficiary(ies) of the Estate, or the individual named party Plaintiffs

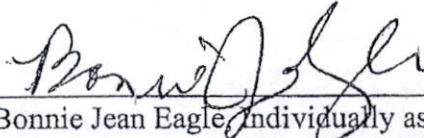
WHEREFORE, Petitioners pray this Court (1) approve the proposed settlement as provided by South Carolina Code Ann. §§ 15-51-41 et seq.; (2) approve the Full, Final and Complete Release; (3) authorize and empower Petitioners to deliver the Release and any other documents necessary to effectuate fully the settlement of the all claims and to discharge completely all claims or causes of action of whatsoever kind or nature that Petitioners or Estate has or might have against Defendant South Carolina Department of Health and Environmental Control arising from the death of Deceased.

Greenbrier, West Virginia
(County)

March 17, 2020
(Month / Day)



Steven McLemore, Individually as Natural Parent
and as Personal Representative of the
Estate of Minor D.M.

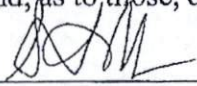


Bonnie Jean Eagle, Individually as
Natural Parent of the Deceased Minor D.M.

STATE OF WEST VIRGINIA)
)
COUNTY OF Greenbrier)

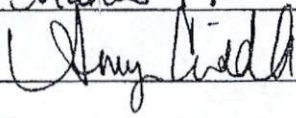
VERIFICATION

PERSONALLY APPEARED before me, Steven McLemore, who, after being duly sworn, deposes and states that he is the Personal Representative of the Estate of Minor D.M., and that the allegations contained in the foregoing Petition are true of his own knowledge, except as to those allegations stated upon information and belief, and, as to those, deponent believes them to be true.



Steven McLemore

SWORN to BEFORE me)
On March 17, 2020)



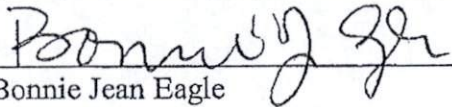
Notary Public for West Virginia
My Commission Expires: February 16, 2023



STATE OF WEST VIRGINIA)
)
COUNTY OF Greenbrier)

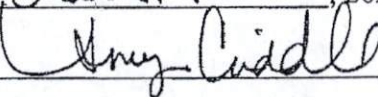
VERIFICATION

PERSONALLY APPEARED before me, Bonnie Jean Eagle, who, after being duly sworn, deposes and states that he is the Natural Parent of the Deceased Minor D.M., and that the allegations contained in the foregoing Petition are true of her own knowledge, except as to those allegations stated upon information and belief, and, as to those, deponent believes them to be true.

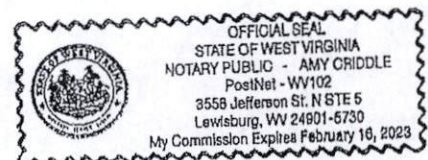


Bonnie Jean Eagle

SWORN to BEFORE me)
On March 17, 2020)



Notary Public for West Virginia
My Commission Expires: February 16, 2023



STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE No.: 2017-CP-10-01324

Steven McLemore, Individually and as)
Personal Representative of the Estate of)
D.M.; and Bonnie Jean Eagle, Individually)
and as Natural Parent for the Deceased)
Minor D.M.,)

Plaintiffs,)

v.)

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

Defendants.)

**FULL, FINAL, AND COMPLETE
RELEASE OF SOUTH CAROLINA
DEPARTMENT OF HEALTH AND
ENVIRONMENTAL CONTROL**

KNOW ALL MEN BY THESE PRESENTS, that STEVEN MCLEMORE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MINOR D.M., and Steven McLemore and Bonnie Jean Eagle, as parents of the Decedent Minor D.M., for and in consideration of the sum of Ten Thousand and No/100 Dollars (\$10,000.00) paid by or on behalf of SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL (SCDHEC), the receipt of which is hereby acknowledged, for him/her, his/her representatives, successors and assigns, and all other persons and entities that can or may claim by or through him hereby release acquit and forever discharge SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, its parent companies, subsidiaries, insurers, affiliates, agents, divisions, departments, agencies, attorneys, representatives, consultants, investigators, adjusters, employees, officers, directors, officials, servants, successors, and assigns and other persons and

entities (hereinafter "Payors") that can or may be liable, from any and all known or unknown injuries, damages, actions, causes of action, claims, demands, damages, loss of services, loss of profits, loss of income, expenses, compensation, right, suits of whatever kind or nature, whether past, present or future, on account of, arising out of or in any way growing out of damages suffered by the decedent, beneficiaries of the decedent, and/or Steven McLemore, As Personal Representative Of The Estate Of Minor D.M., in the above-captioned matter. The amount paid in consideration of said agreement will be assigned as follows: \$10,000.00 for the wrongful death; \$0.00 for the survival action. Further, in consideration of said payment, Steven McLemore does hereby authorize and direct his attorneys to dismiss with prejudice the action against the Payors only entitled Steven McLemore, Individually and as Personal Representative of the Estate of D.M.; and Bonnie Jean Eagle, Individually and as Natural Parent of Deceased Minor, D.M. vs. Charleston County Parks & Recreation Commission ("CCPRC") d/b/a James Island County Park, Yearround Pool Co., Inc., SGA Architecture, and South Carolina Department of Health and Environmental Control, and John Doe and/or John Doe Corporation, Civil Action No: 2017-CP-10-1324, existing in the Charleston County Court of Common Pleas, Charleston County, South Carolina.

This release of SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL and/or Payors, includes all damages of any type whatsoever, whether known or unknown, anticipated or unanticipated, and which have now arisen or may hereafter arise in the future.

It is further understood and agreed that the above consideration is being paid in a compromise settlement of a doubtful and disputed claim and that payment of this consideration shall not be construed, for any purpose, as an admission of liability on the part of SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL and/or

Payors, being released herein, who expressly deny any and all such liability. It is agreed that distribution of the above sum shall be a full and final settlement of any and all claims and/or liens against SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL and/or Payors.

In further consideration for the above settlement, Steven McLemore, As Personal Representative Of The Estate Of Minor D.M., covenants, indemnifies and holds harmless SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL and/or Payors, from any and all claims made against them, by reason of any assigned, subrogated, or derivative claim or claims for injuries or damages sustained, incurred or paid by decedent, beneficiaries and/or Steven McLemore, As Personal Representative Of The Estate Of Minor D.M., or on his/her behalf, including, but not limited to, Workers' Compensation, liens for health care services, whether by statute, contract, or otherwise, arising out of the aforesaid incident or by reason of any liens and/or judgments, and it is further agreed that Steven McLemore, As Personal Representative Of The Estate Of Minor D.M., will reimburse or make good any loss or damage or costs that SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL and/or Payors may have to pay by reason of such claims, including all legal expenses and attorneys' fees and costs in defense of such claim or claims.

It is further understood and agreed that there is no promise or agreement on the part of the persons, firms and corporations who are released to do or omit to do any acts or things not mentioned herein. This Release contains the entire agreement between the parties hereto, and the terms of this Release are contractual and not a mere recital.

It is further agreed that this Release is to be governed by and construed in accordance with the laws of the State of South Carolina.

Steven McLemore, As Personal Representative Of The Estate Of Minor D.M., and the undersigned(s), further represent and warrant that this Release has been read and its contents understood and discussed with her attorneys, and the Release is signed freely, voluntarily and with the knowledge and understanding that this is a Full, Final and Complete Release of SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL and/or Payors, and that Steven McLemore, As Personal Representative Of The Estate Of Minor D.M., or any other representative of the Estate, or any statutory beneficiary or any other individual may assert no further claims of any type against the parties released herein.

The undersigned also acknowledges his responsibility as a Personal Representative to the beneficiary(ies) of the Estate and agrees to comply with all of his fiduciary and statutory obligations to the beneficiary(ies), and/or any and all requirements and obligations set forth under South Carolina law and the courts of this State. **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.**

Executed this 17 day of March, 2020.

WITNESSES:

Meyun Kirkham

Mary Graveland

STEVEN MCLEMORE

BONNIE JEAN EAGLE

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2017-CP-10-1324

STEVEN MCLEMORE, INDIVIDUALLY)
And AS PERSONAL REPRESENTATIVE)
OF THE ESTATE OF D.M; and BONNIE)
JEAN EAGLE, INDIVIDUALLY and as)
NATURAL PARENT OF DECEASED)
MINOR, D.M.;)

Plaintiffs,)

vs.)

CHARLESTON COUNTY PARKS &)
RECREATION COMMISSION ("CCPRC"))
d/b/a JAMES ISLAND COUNTY PARK,)
YEARROUND POOL CO. INC., SGA)
ARCHITECTURE, and)
SOUTH CAROLINA DEPARTMENT OF)
HEALTH AND ENVIORNMENTAL)
CONTROL, and JOHN DOE and/or)
JOHN DOE CORPORATION;)

Defendants.)

**SECOND AMENDED COMPLAINT
(Jury Trial Demanded)**

FILED
2019 APR 16 PM 1:00
JULIE J. ARMSTRONG
CLERK OF COURT

The Plaintiffs, complaining of the Defendants herein, would respectfully show and allege unto the court as follows:

PARTIES

1. That the parties hereto, that are the subject matter thereof, and all of the matters and things hereinafter alleged are within the Jurisdiction of this Honorable Court.
2. That the Plaintiffs are residents and citizens of Dorchester County.
3. That upon information and belief, the Defendant Charleston County Parks and Recreation Commission d/b/a James Island County Park (hereinafter called "CCPRC") are and were

at all times herein mentioned a municipal corporation organized and existing under the laws of the State of South Carolina.

4. That upon information and belief, YearRound Pool Co. Inc. (hereinafter called "YearRound"), is a corporation which designs, develops, manufactures, markets, and constructs public pools, organized and existing under the laws of the State of South Carolina.
5. That upon information and belief, SGA Architecture (hereinafter called "SGA") is a corporation which designs pools, organized and existing under the laws of the State of South Carolina.
6. That upon information and belief that South Carolina Department of Health and Environmental Control (hereinafter "DHEC") is a South Carolina state agency whose operations are overseen by the S.C. Board of Health and Environmental Control.
7. That upon information and belief John Doe and/or John Doe Corporation is a corporation organized and existing under the laws of the State of South Carolina.
8. That this action is being brought pursuant to the South Carolina Tort Claims Act § 15-78-10, et seq., of the Code of Laws of South Carolina (1976), as amended, and is being brought in Charleston County, South Carolina, where the Defendants own property, employs agents and servants, and conducts business.
9. That prior to May 14, 2016, the Defendants, their agents and servants designed, owned, constructed, operated, and maintained, for public use, at James Island County Park, a "Splash Pad" constructed for public use at a public park; that the Defendants, their agents and servants, advertise through various media sources throughout the State that it has available services and facilities for use by families.

JURISDICTION

10. That the Court has subject- matter jurisdiction over the claims on this lawsuit under Article V § 11, of the South Carolina Constitution and South Carolina Code § 14-5-350.
11. That the Court has personal jurisdiction over Defendants.

VENUE

12. That venue is proper and just in this Circuit Court under South Carolina Code § 14-5-350.

FACTS

13. That the Plaintiffs repeat and reallege each and every allegation set forth in all foregoing paragraphs as if fully set forth herein verbatim.
14. That on May 14, 2016, D.M. McLemore, a minor, was an invitee at Defendant "CCPRC's" "Splash Pad" and in fact the entirety of the park located within the James Island County Park in the State of South Carolina, County of Charleston.
15. That D.M. enjoyed the park that day with his family, playing at the "Splash Pad" and the playground, when it was time to leave, Plaintiff Bonnie Eagle, told the kids to get ready to leave. Plaintiff Bonnie's nephew sprayed her with water, Bonnie chased after him briefly, when she turned around to check on the kids she realized immediately D.M. was missing.
16. That Plaintiff, Bonnie Eagle, frantically looked for her son all around the ungated and unfenced "Splash Pad" noticing a pond just behind the children's "Splash Pad" with water that looked like a solid surface.
17. That Plaintiff, Bonnie Eagle, ran to and employed the aide of the Defendant "CCPRC's" employees to aid in the search.
18. That the Plaintiffs' son was reported missing, by his mother Bonnie Eagle, D.M. subsequently was found submerged several hours later in the Defendant "CCPRC's" pond

by Charleston County's Dive Team, a pond that looked like a solid surface due to it being covered by green duck weed.

19. That the Defendants "CCPRC's" pond surface appeared to look like grass especially to D.M. who was just 3 years old at his untimely demise.
20. That the Defendant "CCPRC's" pond was severely overgrown without fencing or a gate creating an attractive nuisance for any young child.
21. That as a result of the incident, the Plaintiff's Steven McLemore and Bonnie Jean Eagle have and will continue to suffer severe emotional distress, anxiety, grief and sorrow.

FOR A FIRST CAUSE OF ACTION
(As to ALL Defendants Attractive Nuisance)

22. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if fully repeated verbatim herein.
23. Defendant "CCPRC" knew (or should have known) that placing an unfenced, ungated children's "Splash Pad" and play area next to an unfenced, ungated pond presents the potential of serious harm and or death.
24. Defendant "DHEC" knew (or should have known) that placing an unfenced, ungated children's "Splash Pad" and play area next to an unfenced, ungated pond presents the potential of serious harm and or death.
25. That the unfenced, ungated pond had grown over or become otherwise covered in algae to the extent that the surface of the same looked like an attractive play area, like a green and harmless play spot or grass or some other solid surface to the eyes of a 3-year-old child.
26. That there was a small dock at this pond that is unsupervised with no gate, with no rail; and the water that looks like a solid surface is very close to the standing part of the dock.

27. That the little three-year-old D.M. did, upon information and belief, walk out to that pond, within seconds after Plaintiff Bonnie looked away for a moment.
28. That D.M. easily accessed the pond as he was unhindered by any fence, gate, rope, cones, or any other device that could have served to prevent him from walking out on the dock/pond.
29. That the place where the condition exists is one on which ALL Defendants knew or should have known that children are likely to trespass.
30. That the created condition is one of which the ALL Defendants knew or should have known would involve an unreasonable risk of death or serious bodily harm to such children as D.M.
31. That ALL Defendants owed a duty of care to D.M., to discover the risks in or around the vicinity of the "Splash Pad" to take proper precautions to warn or eliminate foreseeable risks, especially when they knew or should have known that the premises would be utilized by children under 14 years of age.
32. That the utility to the government Defendants of maintaining the condition and the burden of eliminating the danger are so slight as compared with the great risk to children involved.
33. That this deadly hazard continues through to this date of the filing of these pleadings.
34. That the Plaintiffs have after nearly a year made the State aware of this issue and claim to date having received no meaningful response from the State, County or its insurer.
35. That the State, and their insurer continue in ignoring the death of the Plaintiffs 3-year-old child.
36. That the Defendants have failed to exercise reasonable care to eliminate this danger or otherwise to protect the children, as it is still present to this day.

37. As a direct and proximate result of the aforesaid attractive nuisance the carelessness and recklessness of the Defendants, the Plaintiffs' has been caused to suffer severe and permanent pain and suffering from the loss of their three-year-old son D.M.
38. That as a result, Plaintiffs are entitled to damages from ALL Defendants in an amount to be determined by the trier of fact, to deter the Defendants and from such activity in the future.

FOR A SECOND CAUSE OF ACTION
(As to ALL Defendants Negligence/Gross Negligence)

39. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if fully repeated verbatim herein.
40. That the Defendant's violated Swimming Pools, Recreational Waters Laws and Regulations R.61-51.C (8)(b) by designing and constructing a children's "Splash Pad," a type "C" pool requiring the deck area to be enclosed by a minimum four-foot fence as measured from the exterior of the pool area, with all openings in the barrier to be equipped with gates or doors, with latches, that close and latch, and shall not contain any openings large enough for a four (4) inch sphere to pass (see affidavits attached hereto as Exhibit "A").
41. That this deadly hazard continues through to this date of the filing of these pleadings.
42. That the State, and their insurer continue in ignoring the death of the Plaintiffs 3-year-old child.
43. That the direct and proximate cause of Plaintiff's injuries was Defendant's negligent and/or grossly negligent actions in the following particulars:
- a) In allowing the existence of an unsafe condition;
 - b) In failing to maintain the premises as are ordinarily used by the public in a reasonably safe condition;

- c) In failing to take any measures and precautions to prevent and avoid an unsafe condition from existing on the premises;
- d) In failing to inspect the premises for the existence of an unsafe condition;
- e) In failing to warn Plaintiff and other park invitees of the existence of an unsafe condition;
- f) In knowing that an unsafe condition existed and failing to correct the condition in a reasonable amount of time;
- g) In failing to take any action to prevent the unsafe condition that a reasonable entity would have taken in this situation;
- h) In creating a dangerous condition where the public travels;
- i) In acting in a grossly negligent manner; and,
- j) In failing to use any care to discover and remedy the dangerous condition.

44. The Defendants breached the duty of care owed to the Plaintiffs by failing to ensure that the minor child was not going to harm himself. The course of action the Defendants must provide a safe environment for small children, the Defendants' fishing pond or "Splash Pad" was not reasonably safe and was not fenced in any way and was otherwise negligent, grossly negligent, willful and wanton.
45. As a direct and proximate result of the negligence, gross negligence, carelessness and recklessness of the Defendants, as aforesaid, the Plaintiffs minor son D.M. has suffered a complete loss of the enjoyment of life. As a result of the Plaintiffs son's untimely death, they have suffered inexorable suffering, insomnia, depression, nightmares, stress and anxiety, emotional and mental pain and anguish causing Plaintiff ongoing, mental, physical and emotional harm, some or all of which will continue indefinitely into the future.
46. As a direct and proximate result of the negligence, gross negligence, carelessness and recklessness of the Defendants, as aforesaid, the Plaintiffs have been caused to expend substantial sums of money in an effort to care for and treat medical conditions and will continue to be required to expend such sums of money for an indefinite period of time into the future.
47. That this deadly hazard continues through to this date of the filing of these pleadings.
48. That the State, county and their insurer continue in ignoring the death of the Plaintiffs 3-year-old child.

49. As a result, Plaintiffs' are entitled to damages from the Defendants in an amount to be determined by the trier of fact, to deter the Defendants from such activity in the future.

FOR A THIRD CAUSE OF ACTION
(As to ALL Defendants Negligence/Wrongful Death)

50. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if fully repeated verbatim herein.
51. That, as a direct result of the negligent, grossly negligent, negligent *per se*, careless, reckless, willful and wanton acts and omissions of the Defendants Decedent suffered severe debilitating injuries which resulted in his death, as a result of which Decedent's statutory beneficiaries have lost the aid, comfort, support, society and companionship of the Decedent, and have suffered severe and extreme emotional distress, anxiety, grief and sorrow, for which the Plaintiffs are entitled to recover in their official capacity on behalf of heirs at law and statutory beneficiaries, actual and punitive damages pursuant to the provisions of §15-51-90, Code of Laws of South Carolina (1976, as amended) and for damages recoverable by the statutory beneficiaries and heirs of D.M. pursuant to § 15-51-10 *et seq.*, Code of laws of South Carolina (1976, as amended).
52. That the Defendants was negligent, grossly negligent, negligent *per se*, careless, reckless, willful and wanton in one or more of the following particulars, to-wit:
- a) In allowing the existence of an unsafe condition;
 - b) In failing to maintain the premises as are ordinarily used by the public in a reasonably safe condition;
 - c) In failing to take any measures and precautions to prevent and avoid an unsafe condition from existing on the premises;
 - d) In failing to inspect the premises for the existence of an unsafe condition;
 - e) In failing to warn Plaintiff and other park invitees of the existence of an unsafe condition;

- f) In knowing that an unsafe condition existed and failing to correct the condition in a reasonable amount of time;
- g) In failing to take any action to prevent the unsafe condition that a reasonable entity would have taken in this situation;
- h) In creating a dangerous condition where the public travels;
- i) In acting in a grossly negligent manner; and,
- j) In failing to use any care to discover and remedy the dangerous condition.

53. That as the direct and proximate result of the aforesaid negligent, grossly negligent, careless, reckless, willful and wanton acts or omissions of the Defendants, Decedent suffered great and permanent physical harm and injury from drowning in a pond overgrown with duckweed that was the direct and proximate cause of Decedent's death.
54. Plaintiffs are informed and believe that they are entitled to judgment against the Defendants in such a sum of actual and punitive damages that a trier of fact may determine, together with the cost of this action and for such relief as this court may deem just and proper.

FOR A FOURTH CAUSE OF ACTION
(As to ALL Defendants Negligence/Survival Action)

55. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if fully repeated verbatim herein.
56. Prior to his death, D.M. was 3 ½ years of age. By reason of his untimely death, his heirs have been deprived of all the benefits of his society and companionship and have been caused great mental shock and suffering by reason of his death. They have and will forever be caused grief and sorrow by the loss of D.M.'s love, society, and companionship. They have been deprived of his future experiences and judgments. They have incurred expenses for his funeral and final expenses and, as a result of the foregoing, they have been damaged as follows;
- a) mental shock and suffering;

- b) wounded feelings;
- c) grief and sorrow;
- d) loss of his companionship; and
- e) deprivation of the use and comfort of the Decedent's society and loss of future experiences, future knowledge and future judgments.

57. That the Plaintiff's Decedent's estate, as a direct and proximate result of the negligence, carelessness, gross negligence, and recklessness of the Defendants, as herein stated, has incurred expenses in the form of medical, funeral and burial expenses. The Plaintiffs are informed and believe that as a direct and proximate result of the negligence, carelessness, gross negligence, and recklessness of the Defendants, Plaintiff's Decedent suffered fear, physical pain, and suffering, and mental and emotional distress and anguish in the time before his death and incurred medical costs and funeral costs for which the Plaintiff's Decedent's estate is entitled to an award of actual and punitive damages pursuant to § 15-5-90, Code of Laws of South Carolina (1976, as amended) in an amount to be determined by a jury at the trial of this action.

58. As a further result, and because of the Defendants' reckless, willful, and grossly negligent conduct, which ultimate caused the wrongful death of D.M., the Plaintiffs are entitled to actual, consequential and punitive damages in an amount to be determined by a jury in accordance with the law and evidenced in the case.

FOR A FIFTH CAUSE OF ACTION
(As to ALL Defendants Premises Liability)

59. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if fully repeated verbatim herein.
60. Defendants owed a duty of care to D.M., an invitee, to discover the risks associated with the "Splash Pad" and pond and to take proper safety precautions to warn of or eliminate

foreseeable risks, especially when they knew of or should have known that the premises would be utilized by children under 14 years of age.

61. Defendants recklessly, willfully, wantonly, and with conscious disregard for the rights of D.M., breached their duty in one or more of the following particulars;

- a) In allowing the existence of an unsafe condition;
- b) In failing to maintain the premises as are ordinarily used by the public in a reasonably safe condition;
- c) In failing to take any measures and precautions to prevent and avoid an unsafe condition from existing on the premises;
- d) In failing to inspect the premises for the existence of an unsafe condition;
- e) In failing to warn Plaintiff and other consumers of the existence of an unsafe condition;
- f) In knowing that an unsafe condition existed and failing to correct the condition in a reasonable amount of time;
- g) In failing to take any action to prevent the unsafe condition that a reasonable entity would have taken in this situation;
- h) In creating a dangerous condition where the public travels;
- i) In acting in a grossly negligent manner;
- j) In failing to use any care to discover and remedy the dangerous condition;

62. As a result of Defendants reckless behavior, Plaintiffs are suffering the loss of their three-year-old son, as direct, foreseeable, and proximate result of Defendants breach of duty.

63. As a result, Plaintiffs' are entitled to damages from the Defendants in an amount to be determined by the trier of fact, to deter the Defendants from such activity in the future.

FOR A SIXTH CAUSE OF ACTION

-(As to ALL Defendants Negligent Construction/Design)

64. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if fully repeated verbatim herein.

65. The Defendants were negligent in failing to use good industry practices in its performance of the design and construction of the "Splash Pad" located at the James Island County Park.

66. Upon information and belief, Defendant "DHEC" was charged with overseeing and inspecting of good pool construction practice standards, particularly inspecting a four (4') foot fence around a Type "C" pool such as the one that is the subject of this litigation.
67. Upon information and belief, Defendant "DHEC"'s failure to inspect in a non-grossly negligent manner a four (4') foot fence around a Type "C" pool, and the lack thereof, amounting to, inter alia, a grossly negligent inspection Defendant "CCPRC's" Project leading to said subcontractors and/or employees work being defective and, generally, has caused the wrongful death of the Plaintiff's son, D.M.
68. Upon information and belief, the Defendants "YearRound" and "SGA" were contractors and/or subcontractors who were charged under the appropriate building codes, the contract with the Defendant "CCPRC", use good construction practice standards with the duty to ensure that the Defendant "CCPRC's" Project was being constructed in conformity with the applicable codes and good construction practices.
69. Upon information and belief, the Defendant "CCPRC" employed subcontractors and/or employees to perform much if not all of the construction. Said subcontractors and/or employees work was defective and generally has caused the wrongful death of the Plaintiff's son, D.M.
70. The Defendants owed to the Plaintiff's a duty to perform the construction work in the public park in the State of South Carolina in keeping with reasonable standards of good construction practice.
71. The Defendants failed in this duty and breached this duty, or in the alternative breached its contract with the Defendant, by failing in many respects which include but is not limited to:

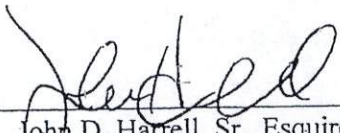
- a) Improperly and recklessly supervising their own work and/or that of the tradesmen to ensure that work performed by them was not itself performed negligently;
- b) Failing to follow specifications required to properly construct a safe "Splash Pad" that is to be used by children;
- c) Allowing substandard work on all portions of the "Splash Pad" to include the providing building services consistent with its trade for which the Defendants were responsible.
- d) In failing to adhere to the standards for pool installation

WHEREFORE, the Plaintiffs demand a trial by jury pursuant to Rule 38(b) of the South Carolina Rules of Civil Procedure, and further Plaintiffs demand judgment against the Defendants on the various causes of action, for both for actual, compensatory, consequential, incidental in an amount to be determined by the jury, which Plaintiffs allege, on information and belief, plus a separate punitive award in an amount deemed sufficient to impress upon the Defendants the seriousness of their conduct and to deter such similar conduct in the future,; reasonable attorneys, fees and costs; and for such other and further relief as the Court may deem just and proper.

Respectfully Submitted,

HARRELL LAW FIRM, P.A.

By: _____


John D. Harrell, Sr., Esquire
2000 Sam Rittenberg Blvd., Suite 2001
Charleston, South Carolina 29407
T: (843) 766-4700
F: (843) 766- 4784
john@hlfpa.com
Attorneys for the Plaintiffs

Charleston, South Carolina

Date: April 16, 2019

1 THE COURT: Okay. I have a motion here by defense. If
2 everybody's ready, we're here on Steven McLemore v. Charleston
3 County and the case number is 2017-CP-10-01324. And I have
4 the motion pulled up on my second screen right here to my
5 left. Okay.

6 Counsel?

7 MR. J.L. ANDERSON: Good morning, Your Honor. My name
8 is -- as I said before, my name is Jon Anderson, and I'm
9 joined here by J.J. Anderson, representing the Charleston
10 County Parks and Recreation Commission in this present action.
11 We're bringing this motion, as we believe that this Court no
12 longer has subject matter jurisdiction in this case. And I
13 wanted to give a quick little history about this because it's
14 a -- this case arises out of the heartbreaking and really
15 tragic death of a three-year-old, whose name is D.M. at the
16 James Island County Park. That happened approximately 14, I
17 believe that's -- May 14th of 2016. Plaintiffs filed suit, in
18 this case, against our client back in March of 2017 and then,
19 subsequently, throughout the years have amended their
20 complaint to include other defendants, most notably the South
21 Carolina Department of Health and Environmental Controls in
22 this case.

23 On March 17th of 2020, they entered a settlement
24 agreement, plaintiffs and the Department of Health and
25 Environmental Controls did. And that was approved by this

1 Court, I believe, at the end of that month, either at the end
2 of that month or the beginning of April of 2020. That action
3 right there is what precipitates our motion in front of this
4 Court, as we believe that the settlement in this case bars any
5 future action against any governmental entity in this case and
6 denies this Court subject matter jurisdiction.

7 As this Court is well aware, this is a -- this is a
8 question of law to be decided by this Court. It talks about
9 the power that a court has over the present case, and subject
10 matter jurisdiction can only be conferred by the legislature.
11 And so we're moving underneath Section 15-78-70(d).
12 Importantly, subject matter jurisdiction cannot be waived by a
13 consent.

14 Now, I said we're moving under 15-78-70(d). That is a
15 portion of the South Carolina Tort Claims Act. As is
16 necessary when suing a governmental defendant, you have to
17 move underneath the South Carolina Tort Claims Act and all the
18 provisions there within. That -- and I want to read it
19 because it's just one sentence but it's a very important
20 sentence. That provision of the act states that "A settlement
21 or judgment in an action or a settlement of a claim under this
22 chapter constitutes a complete bar to any further action by
23 the claimant against an employee or governmental entity by
24 reason of the same occurrence." We've talked about this a bit
25 in our brief, but it's our contention that, once the

1 plaintiffs settled with the Department of Health and
2 Environmental Controls, well that was a complete bar to any
3 further action in this case against any other governmental
4 entity by reason of the same occurrence.

5 There is one occurrence in this case, and that's what
6 we're -- and we believe this fits underneath that statute and
7 that this Court no longer has jurisdiction.

8 Now, previously, plaintiff has pointed to the fact that
9 their settlement agreement contains exclusionary language
10 basically saying that we can -- that this settlement is only
11 for DHEC and it's not for any other entities, but it's very
12 important to -- for all of us to remember that we cannot
13 contract against the legislature's intent. There are no --
14 there is no ability to contract -- which is what a settlement
15 agreement is -- and contract for things that run contrary to
16 the law of this land.

17 So we contend that plaintiff elected their remedy, and a
18 purpose of an election of remedy is to prevent double
19 recovery, specifically against the government in this case
20 that their election to do so bars all future action against
21 the governmental entities in this case.

22 We're happy to speak -- we speak in depth in the brief
23 about why the government -- why the -- I'm sorry --
24 legislature treats multiple government entities as one and how
25 that's their intent. I know sometimes we -- not sometimes,

1 almost universally in these personal injury cases, we tend to,
2 or at least plaintiffs -- and we're all -- we tend to lump in
3 a bunch -- as many people as we can, right? It's a useful
4 fiction to say, hey, the -- I'm going to sue DOT, The City of
5 Goose Creek, Berkeley County, DSS, and we're going to have
6 them all there. We do that in order to facilitate fact
7 finding. But we all know that you can't recover more than
8 300,000 dollars against all of your government entities for a
9 single occurrence. And that's because we all abide by the
10 fact that the government is one entity being sued with
11 multiple heads.

12 And so for fact-finding purposes, we engage in that, but
13 we all know that that's the State of South Carolina.
14 Ultimately, that is the party being sued in the case -- in
15 these cases. And so, that 15-78-70(d) -- which we refer to as
16 a settlement for one is a settlement for all -- that was
17 triggered. That was triggered when the settlement hearing
18 occurred, when it was approved, when they settled with SCDOT.
19 And, therefore, we do not believe this Court has any further
20 jurisdiction over the governmental entities in this case.

21 THE COURT: Thank you.

22 Mr. J.J. Anderson, anything?

23 MR. J.J. ANDERSON: I don't have anything to add right
24 now, Your Honor.

25 THE COURT: Okay.

1 All right. Mr. Rollins, you want to be heard?

2 MR. ROLLINS: Yes, Your Honor. Thank you. Excuse me.
3 To start with, I would say we were not part -- the plaintiffs
4 didn't have the same attorney when they engaged in this
5 settlement, so the current attorneys are not really conversed
6 on exactly what that negotiation of settlement process was.
7 This motion has been filed twice. It was filed in March of
8 '22 and then again. The motion is being heard today. The
9 second time it was filed, it was based on the same factual
10 information. It was styled primarily in the subject matter
11 jurisdiction motion this second time around, but it's still
12 based, exclusively, on 15-78-70.

13 15-78-70, it is important to note, it is very specific in
14 its language and I'll read the entire thing here. "A
15 settlement or judgment in an action or a settlement of a claim
16 under this chapter constitutes a complete bar to any further
17 action by the claimant against an employee or governmental
18 entity" -- and the operative and most important part is this,
19 Your Honor, quote -- "by reason of the same occurrence." And
20 our courts have exhaustively outlined the importance of this
21 occurrence language, most importantly in *Boiter v. South*
22 *Carolina Department of Transportation*, which is 393 S.C. 123,
23 and they looked at the statutory definition of occurrence,
24 which is found at 15-78-30, which defines it as, quote, "an
25 unfolding sequence of events, which proximately flow from a

1 single act of negligence." And then in the Boiter opinion,
2 the court ruled, quote, "there were two independent and
3 separate acts of negligence that occurred here: one, by SCDOT
4 and one by SCDPS."

5 So there is certain -- the argument that there is only
6 300,000 dollars total from all government entities is clearly
7 not the case. What our courts have consistently looked to,
8 for over a decade since this Boiter opinion, is the number of
9 independent acts of negligence. South Carolina -- when this
10 case was settled against DHEC -- again, I was not the attorney
11 then so I don't know exactly how that happened, but the party
12 that filed this motion, Charleston County Parks and Recs was a
13 party to that action. It could have appeared at the hearing
14 and requested that that order approving the settlement
15 specified what specific occurrences were being released, and
16 that, in fact, would have been the proper methodology to
17 invoke this statute if that was what was intended at the time.
18 The language in that order may be a bit inartfully worded, but
19 it does not specify what occurrences were released by that.
20 And our courts certainly don't prioritize or require parties
21 to engage in needless litigation. There is no reason that our
22 Court should have to adjudicate what, in this case, were
23 essentially regulatory breaches by DHEC and have an additional
24 two or three days of the trial when those were settled here --
25 and, arguably, should have been settled here, at least

1 according to the plaintiffs' prior attorney.

2 The occurrences that are brought against Charleston
3 County Parks and Rec are based on the design and operation of
4 that park. There is no overlap between what DHEC would be
5 allowed to do with regard to this entire sequence of events
6 versus what Charleston County Parks and Rec should be required
7 to do. DHEC served a purely regulatory function, something
8 that Charleston County Parks and Recs could not have done. In
9 the best possible analysis for Charleston County Parks and
10 Rec, this is a factual question that would be adjudicated by a
11 jury and that would be a verdict-form question: What claims
12 were released or what specific occurrences were released when
13 DHEC was released? I cannot conceive of any overlap there,
14 but certainly that is -- that is the intention of the
15 legislature in bringing this. It's not to require parties to
16 engage in protracted litigation over issues that are settled,
17 but to settle occurrences, which in this case, there is just
18 no overlap and no argument there could be any.

19 Unless you got any questions, I don't have anything else,
20 Your Honor.

21 THE COURT: Not right now.

22 Mr. Gene Connell, do you want to be heard, sir?

23 MR. CONNELL: Yes, sir. Thank you.

24 Your Honor, I argued the previous motion and it's a
25 little bit -- it's important for you to understand what

1 happened there. The defendants made this same argument in a
2 motion for summary judgment heard by Judge Burch. They argued
3 in that motion that there was no jurisdiction and that the 15-
4 78-70 was a complete bar. Judge Burch, in an order, which you
5 have, Your Honor, which is attached to their petition, said
6 that's not the case. And he said that for a couple of really
7 important reasons.

8 The first thing he said was -- is the death settlement
9 was approved by Judge McCoy, and attached to that death
10 settlement was a release. And in bold print, it says, this
11 does not release any other governmental defendant. And Judge
12 Burch, in his order, reasoned that the death settlement was
13 approved by her, notice was given to everybody in the case; if
14 you have an objection to this, please present it to us. And
15 no one presented an objection. And so Judge Burch indicated,
16 I can't overrule what Judge McCoy has already done. The no
17 max on that, one circuit judge can't overrule another one.
18 And so this is the third time that they are asking a court to
19 rule on something, which has been ruled on twice: once by
20 Judge McCoy, once by Judge Burch, and now you.

21 And Your Honor, we would ask that you look at the terms
22 of the release, which is attached to their petition, and it is
23 in bold italics that this matter can go forward against other
24 governmental defendants. We'd also ask that you look at the
25 affidavit of the prior lawyer, Mr. Harrell, and his affidavit

1 is in the record, and he says that it was a partial settlement
2 to DHEC only and to no one else.

3 And so we believe, Your Honor, that the record is really
4 clear that this is same motion and just re-canned in a
5 different version. Under any of those circumstances, Your
6 Honor, the death settlement was approved. They had notice.
7 They didn't object. They didn't appeal that. And Judge Burch
8 heard the same issues, and there's an order denying summary
9 judgment on this very same ground.

10 And so we ask that Your Honor deny the motion in this
11 case.

12 THE COURT: Mr. Anderson, anything in reply?

13 MR. J.J. ANDERSON: Your Honor, if I may, this is J.J.
14 Anderson. I was involved in the -- in the previous motion;
15 and I, in error, filed it as a motion for summary judgment
16 because, basically, the only other case listed in South
17 Carolina based on this -- based on this statute had been done
18 as a summary judgment. After having taken part in the -- in
19 the hearing with Judge Burke (sic) and his order, I'd realized
20 that this was actually a subject matter jurisdiction issue and
21 not a summary judgment issue. And there are two different
22 standards which are applied. Judge Burch certainly had a
23 scintilla by which he could deny my motion for summary
24 judgment based on the release language. And so, it's our
25 belief that as a motion for summary judgment -- excuse me, as

1 a motion for lack of subject matter jurisdiction, this is a
2 different motion and a different hearing.

3 I want to make it clear, as there was a lot of inuendo in
4 the last hearing, that the -- that the James Island County
5 Park was involved in the settlement. There was no settlement
6 involvement by our client or us as -- for the Charleston
7 County Parks and Recreation Commission. And I'm not even sure
8 that there was any notice given to us, except electronically
9 of the particular hearings. So we had no -- we were neutral
10 in that matter.

11 I have looked and have not found anything that requires a
12 co-defendant to step forward and object to a settlement, and
13 so I don't believe there's any real obligation that can be
14 held against Charleston County Parks and Recreation for not
15 trying to intervene in this settlement.

16 We believe that it is now properly before the Court as a
17 motion to dismiss for lack of subject matter jurisdiction. It
18 probably could have, if we had been sharper during the motion
19 for summary judgment and then converted to subject motion, but
20 it was not either by the Court or by any of the parties.
21 The -- and I think that our brief covers the rest of the
22 issues that were raised and -- Your Honor, DHEC had a
23 regulatory responsibility over the creation of the splash zone
24 where the incident started, where the child was playing. And
25 the plaintiffs have tried to bring in DHEC and make Charleston

1 County Parks and Recreation responsible for some fencing
2 issues that were involved in that, and all of it goes back to
3 the incident of this child drowning. It's not multiple
4 incidents in this case. It's a single incident.

5 So I don't know if my co-counsel has anything to add to
6 that, Your Honor, or if you would permit that, but thank you
7 for listening to me.

8 THE COURT: Yes, sir. Yes, sir.

9 Mr. --

10 MR. J.L. ANDERSON: If you'll permit, Your Honor, I
11 have --

12 THE COURT: Yeah.

13 MR. J.L. ANDERSON: -- just one thing I'd like to
14 mention. In response to Mr. Rollins, who brought up the idea
15 of multiple occurrences, I just want to direct this Court's
16 attention to the pleadings in this matter. They are non-
17 specific. They are as to all defendants. All the causes of
18 action against -- as to all defendants. There is no -- there
19 is no siloing of regulatory responsibility to DHEC or an
20 operational responsibility to Charleston County Parks and
21 Recreation. The pleadings are very clear: All defendants are
22 responsible for all problems under their pleadings to the
23 extent that they now want to say, well, this is clearly for
24 regulatory failures. I don't believe at all that that's
25 supported by any of the record in this case.

1 And so we're left here with the same issue with DHEC and
2 the Charleston County Parks and Recreation, both being sued
3 for the same exact causes of action with no bifurcation of
4 responsibility there whatsoever. And so I believe the record
5 does not really -- a close reading of that does not really
6 uphold Mr. Rollins' argument of multiple occurrences.

7 THE COURT: Okay.

8 And anything from Mr. Rollins or Mr. Connell before we
9 move on? Anything? Nothing?

10 MR. ROLLINS: Nothing from me, Your Honor.

11 THE COURT: All right, gentlemen. We're going to take it
12 under advisement, of course, and my law clerk and I will
13 discuss it and we'll get some information to you very soon.

14 Good to see everyone.

15 MR. J.L. ANDERSON: Thank you, Your Honor.

16 MR. J.J. ANDERSON: Thank you, Judge.

17 MR. ROLLINS: Thank you, Your Honor.

18 THE COURT: Yes, sir.

19 (End of Transcript of Record)

20

21

22

23

24

25

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

RECEIVED

FEB 16 2024

SC Court of Appeals

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

Plaintiffs,

vs.

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

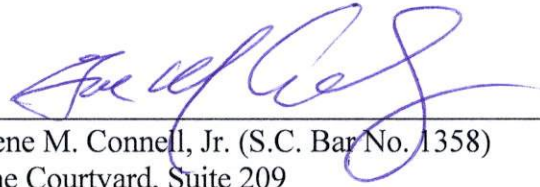
Respondent

CERTIFICATE OF COUNSEL

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

(Signature on following page)

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr. (S.C. Bar No. 1358)
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net

Michael H. Wells (S.C. Bar No. 68341)
Coastal Law, LLC
1104 N. Oak Street
Myrtle Beach, SC 29577
Phone: (843) 488-5000
mwells@coastal-law.com

January 18, 2024

Attorneys for Appellant Bonnie Jean Eagle