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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

RECEIVED

JUN 21 2024
SC Court of Appeals

Appellate Case No. 2024-000905

Ronald A. Zack, as Personal Representative of the Estate of Allan L. Zack.....Respondent,

v.

Greenville County and South Carolina Department of Corrections.....Defendants,
of whom South Carolina Department of Corrections is.....Appellant.

PETITION FOR REHEARING

RILEY POPE & LANEY, LLC

s/David A. DeMasters

David A. DeMasters
SC Bar No. 79860
RILEY POPE & LANEY, LLC
2838 Devine Street
Columbia, SC 29205
(803) 799-9993
ddemasters@rplfirm.com

*Counsel for Petitioner South Carolina
Department of Corrections*

Columbia, SC

June 21, 2024

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GROUNDS FOR THE PETITION FOR REHEARING

In this case of first impression in South Carolina, Petitioner South Carolina Department of Corrections petitions this Court pursuant to Rule 221 of the South Carolina Appellate Court Rules, to consider the merits of the appeal filed by Petitioner. This Petition is based upon the following grounds:

1. On June 9, 2023, Plaintiff initiated this action against Defendants Greenville County and the South Carolina Department of Corrections (“SCDC”). This case involves a question of first impression – whether the gross negligence standard applies to SCDC’s defenses when no subsection containing the gross negligence standard was asserted by SCDC. More specifically due to SCDC never having custody or control of Plaintiff’s decedent as he was being detained at a local jail when he passed away.
2. In his Complaint, Plaintiff asserted claims for damages against SCDC for negligence, gross negligence and violations of the South Carolina Constitution. Plaintiff’s claims arise from the death of his son as a result of an overdose of fentanyl while he was a detainee at the Greenville County Detention Center awaiting trial.
3. On August 16, 2023, SCDC filed a motion to dismiss Plaintiff’s claims. Specifically, SCDC argued in pertinent part that:
 - a. SCDC is immune from liability pursuant to S.C. Code Ann. § 15-78-60 (13).
 - b. Plaintiff’s claim for “Violations of South Carolina Constitution” is barred as the South Carolina Constitution does not provide for a

private cause of action. *See, Palmer v. State*, 829 S.E.2d 255, 261 (Ct. App. 2019).

4. On March 13, 2024, the trial court heard SCDC's motion.
5. On April 9, 2024, the trial court issued an order which decided the merits of several of SCDC's defenses and affects its substantial rights. Specifically, the trial court held that the gross negligence standard applies to subsection (13) of the South Carolina Tort Claims Act even though SCDC did not contend that any exception which includes gross negligence applies in this case.
6. On May 31, 2024, Petitioner timely filed a notice of appeal from the trial court's order.
7. Seven days later, on June 7, 2024, this Court summarily dismissed the appeal ruling that an order denying a motion to dismiss is not appealable regardless of the effect of the trial court's order.
8. The trial court's order is immediately appealable under S.C. Code Ann. § 14-3-330(1) because it involves a substantial matter forming parts of SCDC's defenses and the merits of the case.
9. This Court should conduct the required case-by-case analysis to determine if the order is appealable.
10. SCDC is entitled to an order granting its petition and permitting it to proceed with its appeal of the trial court's order.

ARGUMENT

The Trial Court's Order is Immediately Appealable

This Court has jurisdiction to review any “intermediate judgment, order or decree in a law case **involving the merits** in actions commenced in the court of common pleas ...” S.C. Code Ann. § 14-3-330(1) (emphasis added). An order “involves the merits,” when it “**finally determines** some substantial matter forming the whole or part of some cause of action or **defense.**” *Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993) (emphasis added). Whether an order is immediately appealable must be determined on a case-by-case basis. *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015). This Court did not conduct a case-by-case analysis and SCDC is entitled to a rehearing accordingly.

In *Stone v. Thompson*, 426 S.C. 291, 826 S.E.2d 868 (2019), the South Carolina Supreme Court granted certiorari to determine whether a family court order which found that a common-law marriage existed was immediately appealable under S.C. Code Ann. § 14-3-330. *Id.* at 292, 826 S.E.2d at 868. Notably, the appealed order did not end the case because divorce and equitable distribution causes of action were still pending. *Id.* at 294, 826 S.E.2d at 869. This Court held that the order was interlocutory because it did not end the case, and further, that it was not immediately appealable under the statute. *Id.* at 292-93, 826 S.E.2d at 868-69.

The South Carolina Supreme Court disagreed and reversed. *Id.* at 293, 826 S.E.2d at 869. The Court found that the order was appealable under 14-3-330(1) because it finally determined a substantial matter forming part of a cause of action and a defense to it, and therefore involved the merits. *Id.* at 295, 826 S.E.2d at 870.

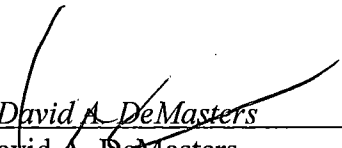
The Court noted that the family court's determination "finally determined a substantial matter"—whether the parties were married. *Id.* That issue was key to the defense in the case; "Thompson's primary—and to this point, exclusive—defense to the family court causes of action was that the parties were not married. Accordingly, the court weighed the evidence and finally determined a substantial matter forming part of Stone's causes of action, as well as Thompson's defense, which satisfies the test we clarified in *Mid-State.*" *Id.*

Similar to the Order in *Stone*, the trial court's order in this case determined elements of Plaintiff's claims and gutted SCDC's affirmative defenses raised pursuant to the South Carolina Tort Claims Act. Specifically, the trial court decided on its own that the gross negligence standard applies to S.C. Code Ann. § 15-78-60(13) as "other exemptions under the SCTCA containing a gross negligence exception apply in this case." (Order 2). The trial court unilaterally made this determination even though SCDC did not contend that any section that includes the gross negligence applies in this case and specifically advised the Court that it did not make such a contention. That determination of a novel question of law is a substantial matter underpinning SCDC's defenses to Plaintiff's causes of action. As such, the order involves the merits and is immediately appealable.

CONCLUSION

In this case of first impression, the trial court determined a substantial matter forming parts of SCDC's defenses and the merits of the case. Therefore, the underlying order is immediately appealable pursuant to S.C. Code Ann. § 14-3-330(1). Accordingly, Petitioner South Carolina Department of Corrections respectfully petitions this Court to reconsider its order issued on June 7, 2024, and consider the merits of SCDC's appeal.

RILEY POPE & LANEY, LLC


s/David A. DeMasters
David A. DeMasters
SC Bar No. 79860
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Columbia, SC 29205
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ddemasters@rplfirm.com

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of whom South Carolina Department of Corrections is.....Appellant.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing by depositing a copy of it in the United States mail, postage prepaid, on June 21, 2024 addressed to their respective attorneys of record as follows:

Kyle J. White
J. Drew Bradshaw
White, Davis, and White Law Firm, P.A.
Post Office Box 1346
Anderson, SC 29622
(864) 231-8090

Dan Pruitt
Dan Pruitt Injury Law Firm
300 Pettigru St., #100
Greenville, SC 29601
(864) 280-7660

Attorneys for Respondent Ronald A. Zack,

*as Personal Representative of the Estate of
Allan L. Zack*

Charles F. Turner, Jr., Esq.
John Patrick Riordan, Esq.
WILLSON JONES CARTER & BAXLEY, P.A.
325 Rocky Slope Road, Suite 201
Greenville, SC 29607
(864) 672-3711

Attorneys for Defendant Greenville County

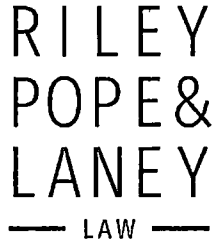
RILEY POPE & LANEY, LLC


s/David A. DeMasters

David A. DeMasters
SC Bar No. 79860
RILEY POPE & LANEY, LLC
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Columbia, SC 29205
(803) 799-9993
ddemasters@rplfirm.com

Columbia, SC

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South Carolina | North Carolina

South Carolina Office:
Riley Pope & Laney, LLC
2838 Devine Street
Columbia, SC 29205
Phone: 803.799.9993
Fax: 803.239.1414
www.rplfirm.com

June 21, 2024

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

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SC Court of Appeals

Re: Ronald A. Zack, as Personal Representative of the Estate of Allan L. Zack v. Greenville County and South Carolina Department of Corrections
Appellate Case No.: 2024-000905
Our File No.: 5021.01323

Dear Ms. Kitchings:

Enclosed for filing is the Petition for Rehearing in the above case. Also enclosed are the following:

- (1) Proof of Service of the Petition for Rehearing filed on behalf of Respondent.
- (2) A filing fee of \$50.00.

If you need anything further, please let me know.

Sincerely,


s/David A. DeMasters

Enclosures

cc: Kyle J. White, Esq. (w/enclosures)
J. Drew Bradshaw, Esq. (w/enclosures)
Dan Pruitt, Esq. (w/enclosures)
Charles F. Turner, Jr., Esq. (w/enclosures)