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**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas Daniel M. Coble, Circuit Court Judge

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Appellate Case No. 2024-000837

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Ramonda D. Byers, as Personal Representative of the Estate of Mario Byers,. . Respondent

v.

Greenville County and South Carolina Department of Corrections, . . . . . Defendants,

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

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RETURN TO PETITION FOR A WRIT OF CERTIORARI

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### **QUESTIONS PRESENTED BY PETITIONER**

1. Did the Court of Appeals fail to properly consider whether the Trial Court’s order was immediately appealable because it decided a novel question of law – whether the South Carolina Department of Corrections (“SCDC”) owes a legal duty to all detainees housed in local jails by performing annual inspections pursuant to Section 24-9-20 of the South Carolina Code?
2. Did the Court of Appeals fail to properly consider whether the Trial Court’s order was immediately appealable under Sections 14-3-330(1) and 14-3-330(2) of the South Carolina Code because the decisions decided SCDC’s defenses and affects substantial rights of SCDC?
3. Did the Court of Appeals fail to properly consider this appeal given the exceptional circumstances presented?

### **STATEMENT OF THE CASE**

This action arises from the death of Mario Byers at the Greenville County Detention Center (“the jail”) in June 2021. Pursuant to S.C. Code Ann. §§ 24-9-10 – 30, Petitioner South Carolina Department of Corrections (hereinafter “Petitioner” or “SCDC”), through its Jail and Prison Inspection Division, is required to at least annually inspect every local detention center in South Carolina, including the Greenville jail, to ensure they are in compliance with Minimum Standards for Local Detention Facilities in South Carolina and other applicable codes, provide written reports to county officials, and ensure that corrective action is taken to include any noted deficiencies, up to and including closing the jail if necessary. Compl. ¶ 14.

Respondent filed this action on May 3, 2023 alleging that SCDC was grossly negligent in inspecting the jail and failing to take corrective action to ensure issues were corrected at the jail, including overcrowding and understaffing, and that this contributed to the death of Byers in June 2021. *Id.* On June 21, 2023, Petitioner filed a motion pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure asking for the case to be dismissed because it “owes no legal

duty to Plaintiff.” *Ramona D. Byers, as Personal Representative of the Estate of Mario Byers v. Greenville County and South Carolina Department of Corrections*, C/A No. 2023-CP-40-02273 (S.C. Ct. Com. Pl. Jun. 21, 2023). A hearing was held before the Honorable Daniel Coble on February 7, 2024. On March 1, 2024, the trial court entered an order denying Petitioner’s Rule 12(b)(6) motion and granting Respondent’s motion to compel discovery. *Ramona D. Byers, as Personal Representative of the Estate of Mario Byers v. Greenville County and South Carolina Department of Corrections*, C/A No. 2023-CP-40-02273 (S.C. Ct. Com. Pl. Jun. 21, 2023) (hereinafter “Mar. 1, 2024 Order”).

On March 11, 2024, Petitioner filed a notice appeal of the trial court’s order denying its Rule 12(b)(6) motion. On March 15, 2024, the South Carolina Court of Appeals dismissed the appeal holding, “This appeal arises out of an order of the circuit court denying Appellant’s motion to dismiss, and granting Respondent’s motion to compel discovery. Because the underlying order is not immediately appealable, we dismiss this appeal.” *Ramona D. Byers, as Personal Representative of the Estate of Mario Byers v. Greenville County and South Carolina Department of Corrections*, No. 2024-000347 (S.C. Ct. App. Filed Mar. 15, 2024). On March 28, 2024, Petitioner filed a petition for rehearing with the Court of Appeals, which was denied on April 30, 2024. On May 24, 2024, Petitioner petitioned this Court for certiorari, which as set forth herein, should be denied.

## ARGUMENT

### **I. The Court of Appeals Correctly Found That the Trial Court’s Order Denying Petitioner’s Rule 12(b)(6) Motion Was Not Immediately Appealable.**

The South Carolina Court of Appeals correctly held that the trial court’s order denying Petitioner’s Rule 12(b)(6) motion “is not immediately appealable” and correctly dismissed the Petitioner’s interlocutory appeal. Section 14-3-330 of the South Carolina Code “limits [the appellate] court’s ability to hear appeals.” *Burkey v. Noce*, 398 S.C. 35, 36, 726 S.E.2d 229, 230 (Ct. App. 2012). Section 14-3-330 provides for limited appellate jurisdiction and states in full:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330.

Petitioner attempts to argue that “the Trial Court’s order is immediately appealable under Sections 14-3-330(1) and 14-3-330(2) because it involves the merits of the case, pertains to the ability of SCDC to assert legal defenses, and affects substantial rights of SCDC.” *See* Pet. at 5.

However, in analyzing the entirety of this statute, this Court has long held that “the denial of a Rule 12(b)(6) motion is not directly appealable under S.C. Code Ann. § 14-3-330 (1976).” *Moyd v. Johnson*, 289 S.C. 482, 347 S.E.2d 97, 98 (1986); *see Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 234 847 S.E.2d 268, 274 (Ct. App. 2020) (“Denials of Rule 12(b)(6) motions are not immediately appealable . . . .”); *Burkey*, 398 S.C. at 36, 726 S.E.2d at 230 (“Generally, the denial of a motion to dismiss under Rule 12(b)(6), SCRPC, is not immediately appealable.”); *see also Rose v. Thrash*, 291 S.C. 459, 459, 354 S.E.2d 378, 378 (1987) (“We hold that the denial of a motion for judgment on the pleadings is not directly appealable under S.C. Code Ann. § 14-3-330 (1976), even if it raises only a question of law.”). The Court of Appeals in dismissing the appeal cited to this Court’s decision in *McLendon v. S.C. Dept. of Highways and Public Transp.*, 313 S.C. 525, 443 S.E.2d 539 (1994), which reaffirmed that a “motion to dismiss has the effect of asserting that respondent has failed to state a cause of action. The denial of such a motion is not immediately appealable under S.C. Code Ann. § 14-3-330 (1976 & Supp. 1993).” 313 S.C. at 525, 443 S.E.2d at 540. Indeed, “[c]urrently, this Court does not allow immediate appellate review of the denial of any Rule 12(b), SCRPC motion.” *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11 (2000).

This Court has found that “[t]he basic policy behind denying immediate review of pretrial motions is avoidance of piecemeal litigation where the rights of the parties have not been substantially impacted.” *Breland*, 339 S.C. at 93. For instance, in *Brown v. County of Berkeley*, 366 S.C. 354, 622 S.E.2d 533 (2005), individual county council members attempted to appeal the denial of their motion to dismiss based on a claim that they were absolutely immune from suit under the South Carolina Tort Claims Act. The Court held, “[b]ecause the denial of the individual members of the Berkeley County Council’s motion to dismiss is an interlocutory order and neither

involves the merits nor affects a substantial right of the parties, we hold that this motion is not presently subject to appellate review.” 622 S.E.2d at 538.

With respect to Petitioner’s contention that, despite the clear authority above, the denial of its Rule 12(b)(6) Motion “involves the merits of the case,” this contention is belied by the very case it cites, *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993), which defines “involves the merits” as an order which “must finally determine some substantial matter forming the whole or a part of some cause of action or defense. *Mid-State* holds, “[a] party who is denied a dismissal under Rule 12 has forfeited nothing, they must simply continue to trial.” 310 S.C. at 334-35, 426 S.E.2d at 780. It further holds that “[i]f a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment.” *Id.* In other words, “the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings. Therefore, the denial of a motion to dismiss is not directly appealable.” *Levi v. N. Anderson Cnty. EMS*, 409 S.C. 374, 381, 762 S.E.2d 44, 48 (Ct. App. 2014).

As to the contention that the order denying Petitioner’s Rule 12(b)(6) motion “affects substantial rights,” under 14-3-330(2), this Court holds that “this subsection has only been used when the trial court order affected the ‘mode of trial’ because if those orders are not immediately appealed, no appellate review is available to correct any error.” *Breland*, 339 S.C. at 93. In other words, there is no impact on substantial rights where “any error in the order can be corrected on appeal following the trial.” *Id.* As stated above, this Court in *Breland* then reaffirmed that “this Court does not allow immediate appellate review of the *denial* of any Rule 12(b) motion.” *Id.*

Petitioner’s reliance on *Stone v. Thompson*, 426 S.C. 291, 826 S.E.2d 868 (2019) does not yield a different conclusion. *Stone* did not involve the denial of a Rule 12(b)(6) motion. Rather,

in *Stone*, the family court conducted a bifurcated trial, in which it determined in the first phase of trial whether the parties had a common-law marriage, and then in the second phase would have held proceedings for divorce and equitable distribution. The first phase to determine whether a common-law marriage existed consisted of “a 7-day trial that featured 29 witnesses, 12 videotaped depositions, and nearly 200 exhibits.” 426 S.C. at 293, 826 S.E.2d at 869. In a “Final Order,” the family court finally determined that the parties had been in a common-law marriage since 1989, and the wife immediately appealed, prior to the case going to the second phase. *Id.* This Court found that this order finding that a marriage existed involved the merits and was immediately appealable because “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*.” 426 S.C. at 295, 826 S.E.2d at 870. In so holding the Court emphasized the narrowness of its holding:

We emphasize the particular circumstances that lead to our holding today, in keeping with our practice of narrowly construing section 14-3-330. . . . In bifurcating the issues, the family court recognized the central importance of the common-law marriage determination, without which the other causes of action could not proceed. The court conducted an extensive trial on this sole issue, and the vast majority of the evidence adduced likely will not be relevant during any future proceedings for divorce and equitable distribution. While the subsequent proceedings are separate from the common-law marriage trial (by nature of this bifurcation), the existence of a marriage clearly involves the merits of those issues. **Thus, our holding as to appealability would apply only where, following a bifurcated hearing, a claim or defense has been finally determined.**

426 S.C. at 295-96, 826 S.E.2d at 870 (emphasis added). Thus, *Stone* provides no grounds for the immediate appeal of the denial of Petitioner’s 12(b)(6) motion in this case, and no jurisdiction exists for the appeal at this time under S.C. Code § 14-3-330.

## **II. Section 14-3-330 of the South Carolina Code Contains No “Exceptional Circumstances” Provision for Appellate Jurisdiction by the Court of Appeals.**

Petitioner also submits as a question presented, “Did the Court of Appeals fail to properly

consider this appeal given the exceptional circumstances presented?” Pet. at 1. Again, Section 14-3-330 of the South Carolina Code “limits [the appellate] court’s ability to hear appeals.” *Burkey*, 398 S.C. at 36, 726 S.E.2d at, 230. Section 14-3-330 contains no “exceptional circumstances” provision, and as set forth above, this Court has long made clear that a denial of a Rule 12(b)(6) motion is not immediately appealable. *See State v. Ledford*, 422 S.C. 244, 248, 810 S.E.2d 868 (2018) (“The provisions of section 14-3-330, including subsection (2), have been narrowly construed, and the immediate appeal of orders issued before or during trial generally has not been permitted.”).

### **III. Petitioner Is Not Entitled To An Extraordinary Common Law Writ of Certiorari The Forgoes the Normal Appellate Process.**

Moreover, to the extent the Petition can be read to allege that an extraordinary common law writ of certiorari is appropriate for a direct appeal of the trial court’s order to this Court, the South Carolina Supreme Court does not recognize an “exceptional circumstances” standard in the grant of a common law writ of certiorari, and even if it did, no such “exceptional circumstances” exist in this case. This Court “may use a common-law writ of certiorari to correct errors of law, particularly where a trial court exceeded its authority.” *State v. Price*, 441 S.C. 423, 433, 895 S.E.2d 633, 638 (2023). This Court has made clear that it “generally [will not] accept matters on a writ of certiorari that can be entertained in the trial court or on appeal.” *In re Breast Implant Product Liability*, 331 S.C. 540, 543 n.2, 503 S.E.2d 445 (1998). This Court recently reiterated that “[w]e will not, however, use a common-law writ of certiorari as a substitute for a party’s right of appeal.” *State v. Price*, 441 S.C. 423, 434, 895 S.E.2d 633, 639 (2023). In other words, “[a] writ of certiorari is an extraordinary form of relief that generally is used only in the absence of other effective relief.” *Rowe v. City of West Columbia*, 334 S.C. 400, 408, 513 S.E.2d 379 (Ct. App. 1999); *see* Rule 245(a), S.C.R.A.P. (“The Supreme Court will not entertain matters in its

original jurisdiction when the matter can be determined in a lower court in the first instance, without material prejudice to the rights of the parties.”). As set forth above, Petitioner’s appellate rights are preserved after a trial in this case, and thus, other effective means of relief remain available, precluding any extraordinary grant of relief in a common law writ of certiorari.

With respect to any perceived “exceptional circumstances” exception for granting an extraordinary writ of certiorari, this Court in *Price* clarified:

We recently stated we may issue a common law writ of certiorari whenever we find ‘exceptional circumstances exist’ to warrant our doing so. *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 471, 674 S.E.2d 154, 160 (2009) (citing *In re Breast Plant Prod. Liab. Litig.*, 331 S.C. 540, 543 n.2, 503 S.E.2d 445, 447 n.2 (1998)). In making this statement, we did not intend to create an additional standard for the issuance of a common-law writ of certiorari. Rather, we simply recognized the Court is not required to issue any writ, and doing so is in our discretion.

441 S.C. at 434 n.5, 895 S.E.2d at 639 n.5. Thus, to the extent Petitioner claims that a showing of “exceptional circumstances” warrants a grant of certiorari, *Price* makes clear that no such standard exists.

Furthermore, nothing regarding the trial court’s denial of Petitioner’s Rule 12(b)(6) motion rises to the level of the extraordinary circumstances found by the Court in the rare cases it has granted a writ of certiorari to immediately review an order that is not immediately appealable. *See Oncology & Hematology Assocs. of S.C. LLC v. South Carolina Dep’t of Health & Env’tl. Control*, 387 S.C. 380, 692 S.E.2d 920, 924 (2010) (“Our willingness to review a discovery order by way of a writ of certiorari will be as rare as the proverbial ‘hen’s tooth.’”). This Court has stressed that such writs are exceedingly rare and discouraged the Bench and Bar from seeking them:

In light of the concurring opinion’s reference to extraordinary writs, we caution the bench and the Bar that such writs are aptly named, as they are intended only for the most *extraordinary* and exceptional situations. . . . We stress that denial of immunity under the Act will not meet this high threshold absent a showing of truly extraordinary circumstances, and we seek to discourage unsuccessful defendants from seeking such writs.

*State v. Isaac*, 405 S.C. 177, 185 n.6, 747 S.E.2d 677, 681 n.6 (2013).

For instance, in *In re Breast Implant Product Liability Litigation*, 331 S.C. 540, 503 S.E.2d 445 (1998) there was so much litigation pending regarding defects in breast implants, that Chief Justice David W. Harwell specially assigned Judge Henry F. Floyd to dispose of all pre-trial motions and other matters arising out of the litigation, with Chief Justice Ernest Finney, Jr. subsequently allowing Judge Floyd to promulgate a Case Management Order regulating pre-trial proceedings. When the defendants moved for a second time to dismiss the plaintiffs' causes of action for strict liability under S.C. Code Ann. § 15-73-10, Judge Floyd denied the motion, but then *sua sponte*, moved to certify questions to this Court to determine whether the statute and Restatement (Second) of Torts § 402A applied to healthcare providers. In granting certiorari and finding the circumstances particularly exceptional, the Court held that “[n]ovel questions of law concerning issues of significant public interest that are contained in numerous state and federal actions are involved in this matter. A decision by this Court would serve the interests of judicial economy by eliminating numerous inevitable appeals raising these issues.” *Id.*

Similarly, *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154 (2009), which is relied upon by Petitioner, dealt with product liability litigation over Bridgestone/Firestone tires on Ford vehicles that resulted in thousands of cases throughout the country. *Laffitte* was not a case based on the denial of a Rule 12(b)(6) motion, but rather dealt with the discovery of an alleged trade secret of a “skim stock formula” for the tires and the appropriate standard for discovery of a trade secret. In granting certiorari, this Court held, “[t]he instant case presents such exceptional circumstances as it involves a novel question of law in a matter that has been the subject of numerous claims in state and federal courts. A decision by this Court at this time best serves the interests of judicial economy by eliminating the numerous inevitable appeals raising this novel

issue of significant public interest.” 674 S.E.2d at 160-61.

Contrary to these two rare decisions by this Court where the Court found extraordinary circumstances due to an issue that was a part of “numerous state and federal actions,” in this case, Petitioner merely points to “at least three other pending cases” in this state. Pet. at 18. In fact, Petitioner is incorrect that the same legal issues in this case are at issue in each of those other cases. Petitioner fails to mention that in *Black* and *Zack*, Petitioner did not challenge in its motion to dismiss whether there were duties owed by Petitioner under S.C. Code Ann. §§ 24-9-10 *et seq.* or whether there is a private right of action under that statute, but instead asserted as the sole ground for dismissal, “Defendant SCDC is immune from claims related to ‘regulatory inspection powers or functions, including the failure to make an inspection, or making an inadequate or negligent inspection, of any property to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety’ as set forth in S.C. Code Ann. § 15-78-60(13). *Brenda Black, as Personal Representative of the Estate of David Posey v. Greenville County and South Carolina Department of Corrections*, C/A No. 2023-CP-40-03639 (S.C. Ct. Com. Pl. Aug. 24, 2023); *Ronald Zack, as Personal Representative of the Estate of Allan L. Zack v. Greenville County and South Carolina Department of Corrections*, C/A No. 2023-CP-40-03029 (S.C. Ct. Com. Pl. Aug. 16, 2023). Further, as set forth below, with respect to whether courts examine the “applicability” of other exceptions under the South Carolina Tort Claims Act as opposed to the exceptions actually asserted by a governmental entity, the trial court’s order plows no new ground and relies on settled case law from this Court. Thus, to the extent that the Court chooses to examine whether “exceptional circumstances” exist, this is clearly not such a case for the Court to utilize its discretion to grant an extraordinary writ of certiorari and forego the normal appellate process.

#### **IV. The Court of Appeals Order Dismissing The Appeal As Not Immediately Appealable Does Not Contain a Novel Question of Law**

The Court of Appeals' order from which Petitioner seeks certiorari does not contain "important issues of first impression in South Carolina." Pet. at 7. The Court's "review on certiorari is confined to an examination of the decision of the Court of Appeals for errors of law or for findings which are wholly unsupported by the evidence." *Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650, 659 (2011) (Pleicones, J., dissenting) (emphasis added). In each of the cases cited by Petitioner, the trial court had made a final ruling, and the Court of Appeals had actually ruled upon the matters of "first impression" rather than dismissing the appeal as interlocutory. *See Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 760 S.E.2d 785, 788 (2014) ("The Court of Appeals reversed in a split decision, the majority finding (1) an agenda is required for regularly scheduled meetings, and (2) County Council's amendment of an agenda less than twenty-four hours before the meeting violated the 'spirit' and 'purpose' of FOIA's notice requirement."); *Murphy v. Owens-Corning Fiberglas Corp.*, 356 S.C. 592, 595, 590 S.E.2d 479 (2003) (granting certiorari where the trial court had dismissed the action "on the grounds South Carolina lacked subject matter jurisdiction over the suits in light of the Door Closing Statute" and the *en banc* Court of Appeals reversed); *F & D Elec. Contractors, Inc. v. Powder Coaters*, 350 S.C. 454, 457, 567 S.E.2d 842 (2002) (following a trial and the reversal by the Court of Appeals finding that a directed verdict should have been granted, granting certiorari on the question of "Did the trial court err in denying BG Holding's motion for directed verdict because the record was devoid of any evidence of owner's consent to materialman's performance of work on its property as required by S.C. Code Ann. § 29-5-10?").

Here, the substantive portion of the Court of Appeals' March 15, 2024 order states that "[t]his appeal arises out of an order of the circuit court denying Appellant's motion to dismiss, and

granting Respondent’s motion to compel discovery. Because the underlying order is not immediately appealable, we dismiss the appeal.” Mar. 15, 2024 Order. As set forth above and as demonstrated by the citations in the order itself, the fact that such orders are not immediately appealable has long been settled, and thus, the Court of Appeals’ order on which the Petition is based does not raise issues of first impression.

**V. To The Extent the Court Considers the Merits of Petitioner’s Arguments, The Trial Court Order Was Correct and Contains No Errors of Law.**

To the extent that Petitioner passes upon the merits of the trial court’s order, the petition is not the proper place to argue the merits of the trial court’s order, *see* Rule 242(i), S.C.R.A.P. (“If the petition is granted, the Clerk shall notify each party or each party’s attorney specifying the question or questions to be considered, and the parties shall prepare briefs addressing the question(s)”), and even if it was, as set forth below, several of the issues raised by Petitioner are not issues of first impression , and Petitioner is simply incorrect in its arguments.

**1. The Statutes Creating the Jail and Prison Inspection Program Create A Private Right of Action Against SCDC.**

Petitioner relies heavily on its argument that in finding a statutory duty owed by Petitioner in this case, “the Trial Court disregarded this Court’s decision in *Denson v. National Cas. Co.*, 439 S.C. 142, 886 S.E.2d 228 (2023).” Pet. at 8. To the contrary, the trial court explicitly acknowledged *Denson* and held that “SCDC owes a statutory duty to Plaintiff based on the two-prong test described in *Denson v. Nat’l Casualty Co.*, 439 S.C. 142, 886 S.E.2d 228 (2023).” Mar. 1, 2024 Order, at 3. This Court in *Denson* simply reaffirmed the longstanding test for whether a private action is created by a statute, which requires a showing : “(1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect.” *Denson*, 439 S.C. at 152, 886

S.E.2d at 233-34 (quoting *Rayfield v. S.C. Dep't of Corr.*, 297 S.C. 95, 103, 374 S.E.2d 910, 914 (Ct. App. 1988)). The Trial Court properly analyzed Petitioner's obligations to inspect local jails and provide corrective actions under the Jail and Prison Inspection Program set forth in S.C. Code Ann. §§ 24-9-10 – 30 and found that the statute's "essential purpose is to provide for the protection, health, and welfare of the detainees housed at the jail," and that Plaintiff's decedent was a member of the class of individuals, i.e. the detainees at the Greenville jail, that the statute was intended to protect. Mar. 1, 2024 Order, at 4. In fact, whether Petitioner owes duties under this statute is not an issue of first impression, as this Court has previously noted, "This is not to suggest that **the DOC could not be held to its duty to adopt standards, or to conduct inspections of local facilities pursuant to § 24-9-20.**" *Myrtle Beach Hosp. v. City of Myrtle Beach*, 341 S.C. 1, 6 n.4, 532 S.E.2d 868 (2000) (emphasis added).

## **2. The Special Duty Exception to the Public Duty Rules Applies.**

Petitioner next takes issue with the trial court's finding that "the statutory duties created and owed by SCDC under S.C. Code Ann. §§ 24-9-10 – 30" "fall under the 'special duty' exception to the public duty rule." Pet. at 10. Again, under this "special duty" exception, a "plaintiff may prevail against a public duty defense if the statute not only concerns the duties of a public office, but also has the essential purpose of protecting identifiable individuals from a particular kind of harm." *Rayfield*, 297 S.C. at 106, 374 S.E.2d at 916.

The trial court's reliance on *Steinke v. South Carolina Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999) was appropriate, and Petitioner's attempts to distinguish *Steinke* are unavailing. In *Steinke*, this Court held that the South Carolina Amusement Rides Safety Code, S.C. Code Ann. § 41-18-10, *et seq.*, was not subject to the public duty rule and created a private cause of action against the Department of Labor, Licensing, and Regulation. *Id.* at 390.

The plaintiffs alleged in that case the Department did not adequately inspect or investigate a “crawlevator” that lifted bungee jumpers to the top of a 160-foot arch and failed to take corrective action to revoke or suspend the license that had been issued to the operator. *Id.* at 384. The cable on the “crawlevator” eventually snapped while in operation, killing two people. *Id.*

Petitioner suggests that *Steinke* is somehow distinguishable from the statutes in this case because the Court found in *Steinke* that “an essential purpose of the Amusement Rides Safety Code is to protect against a particular kind of harm, i.e., harm caused by poorly designed, constructed, or maintained amusement rides.” Pet. at 11. This is no different than the trial court’s holding that “the essential purpose of S.C. Code Ann. § 24-9-10, *et seq.* is to provide for the health, welfare, and protection of the detainees housed at the jail and places the duty on SCDC to ensure these detainees are protected.” Mar. 1, 2024 Order, at 7. Indeed, in discussing the “essential purpose” element in *Steinke*, the Court held that similar to Petitioner’s duties in this case, “a reading of the entire Act reveals the Legislature imposed numerous specific and crucial duties upon Department in order to ensure the safety of park visitors and workers.” *Steinke*, 336 S.C. at 390.

Further, just as in *Steinke*, where the Court found “[m]embers of the larger class of visitors and employees the statute was intended to protect – the riders and workers at a specific, reportedly hazardous amusement ride – were readily identifiable before the fact of the injury,” the trial court properly found that “Plaintiff’s decedent was within the protected class as a detainee at the Greenville jail, given the other deaths and suicides, and SCDC certainly had reason to know the likelihood of harm if it failed to ensure the jail met minimum standards.” Mar. 1, 2024 Order, at 7. In fact, as the Court clarified in *Steinke* “[i]t is not always necessary . . . that members of the protected class actually be known by name to the governmental entity before the fact of an injury.” *Steinke*, 336 S.C. at 391.

Moreover, the fact that Department of Labor, Licensing, and Regulation in *Steinke* could impose civil penalties on an owner that did not comply with the Act does not distinguish it from this case. Under §§24-9-10, et seq., copies of the jail inspection reports are required to be filed by Petitioner with the sheriff through the Director of the Department of Corrections, the Director is then required to notify the sheriff if the facility does not meet minimum standards, the sheriff “shall initiate appropriate corrective action within ninety days,” and if he does not, Petitioner “may order that the local confinement facility, or objectionable portion therefore, be closed” or “may stipulate actions to avoid or delay closing the facility.” S.C. Code Ann. § 24-9-20 – 30. In other words, the statute gives Petitioner the right to impose penalties similar to those outlined in *Steinke*.

Indeed, Petitioner’s attempt to claim this case is “more similar” to *Adkins v. Varn*, 312 S.C. 188, 439 S.E.2d 822 (1993) falls short. Rather than placing specific duties to inspect jails, such as in this case, the Greenville County Animal Control Ordinance in *Adkins* provided the general authority for animal control officers in Greenville County and stated that “[t]he officers designated by Greenville County with the enforcement of animal control shall have the authority to enforce all applicable laws concerning animal control as set forth by this Ordinance or other laws and such additional procedures, duties and responsibilities as the county shall establish.” *Adkins*, 312 S.C. at 191, 439 S.E.2d at 824. Thus, unlike this case and *Steinke* where there are specific inspection duties and other obligations in the statute, the Court found in *Adkins* that “[t]he terms used in the Animal Control Ordinance are general, and they allow for a discretionary delegation of the duty to a non-government contractor. There is no identification of a particular class of potential victims, and the terms do not identify a particular kind of harm.” 312 S.C. at 193, 439 S.E.2d at 825. Therefore, the trial court made no error of law in holding that a “special duty” applies in this case.

**3. When An Applicable Exemption of the Tort Claims Act Contains A Gross Negligence Exception, The Gross Negligence Exception Is Read Into All Other Applicable Exemptions and Petitioner Failed to Preserve Its Argument.**

Finally, Petitioner claims “the South Carolina Court of Appeals failed to address a key issue in every case involving a governmental entity under the Tort Claims Act, namely whether SCDC has the right to determine which sections of the Act it asserts.” Pet. at 13. Again, the Court of Appeals order addressed whether the trial court’s order denying the Rule 12(b)(6) motion was immediately appealable, which is the sole issue for this Court in determining whether to grant certiorari and whether any there was an error of law by the Court of Appeals. Moreover, Petitioner did not raise and preserve this issue with the trial court. “Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.” *Elam v. South Carolina Dep’t of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772 (2004). Petitioner made no such argument in its briefing or at the hearing and did not contest the fact that under the Tort Claim Act, courts analyze which sections are applicable rather than just those raised by the defendant, and therefore the issue was not preserved for appeal. *See* Pet. Feb. 6, 2024 Mem. in Supp.

Furthermore, Petitioner’s contention that merely because it did not assert exemptions under the Tort Claims Act in its Rule 12(b)(6) motion, the trial court should not have examined whether other applicable exemptions containing a gross negligence standard applied is against the clear holdings of this Court. This Court held in *Steinke* with respect to exceptions to the waiver of immunity under the Tort Claims Act, “that when an *applicable* exception contains the gross negligence standard, then any other relevant exception must be read in light of that standard.” *Steinke*, 336 S.C. at 404 (emphasis added). In *Plyler v. Burns*, 373 S.C. 637, 647 S.E.2d 188 (2007), relied upon by Petitioner, the Court reaffirmed that “[w]hen a governmental entity asserts an exception to the waiver of immunity and any other applicable exception contains a gross

negligence standard, the Court must read the gross negligence standard into all of the exceptions under which the entity seeks immunity.” 647 S.E.2d at 196. In *Plyler*, the governmental entity only asserted in its Rule 12(b)(6) motion to dismiss sections 15-78-60(1), (2), and (3), as a bar to the plaintiff’s claims. 647 S.E.2d at 196. The plaintiff alleged that additional sections containing a gross negligence standard, section 15-78-60(12) and (25) applied. *Id.* This Court then set about to examine whether these unasserted exceptions applied.

While the Court in *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010) did state that “the gross negligence standard does not apply because Respondent did not plead a section containing a gross negligence standard,” this Court has since abrogated that holding. 692 S.E.2d at 904. In *Repko v. Cnty. of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018), this Court reaffirmed that “the immunity provisions containing the gross negligence standard must actually apply to the case before it can be read into another immunity provision.” 424 S.C. at 504. The Court examined *Plyler* and emphasized both that the only subsections pled by the defendant did not “contain a gross negligence standard” and that the Court held, “the trial court did not err in refusing to read the gross negligence standard into subsections (1), (2), and (3) because subsection (12) had “*no applicability*” to the case and because subsection (25) was “*similarly inapplicable*.” 424 S.C. at 504 (emphasis in original). In analyzing the *Jones* decision, the Court held that “[w]hile we did conclude in *Jones* that the gross negligence standard in subsection 15-78-60(25) was not to be read into other applicable subsections because the sheriff did not plead subsection (25) as a basis for immunity, we emphasized our holding in *Steinke* that ‘the better practice is to allow the government to assert all relevant exceptions, and apply the gross negligence standard to all when it is contained in one applicable exception.’” 424 S.C. at 506 (emphasis in original). Courts have since recognized that *Repko* abrogated the *Jones* decision. See *Wayne’s Auto Ctr., Inc. v. S.C.*

*Dep't of Pub. Safety*, 431 S.C. 465, 480 n.6, 848 S.E.2d 56 (Ct. App. 2020).

Likewise, in *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 743 S.E.2d 109 (Ct. App. 2013), also decided after *Jones*, the defendant asserted it was immune from liability under S.C. Code Ann. §§15-78-60(2), (4), (23)—none of which contained a gross negligence standard. However, the Court of Appeals held that under Section 15-78-60(12), which deals with licensing decisions, “[a] potential licensee, licensee, or an injured third party may seek relief under this exception.” 743 S.E.2d at 113. The court then held, “It would make no sense to conclude Orangeburg may be found grossly negligent in a licensing decision, yet allow it to escape liability under one of these other exceptions. Because we find Orangeburg may be liable if it was grossly negligent in its licensing per section 15-78-60(12), and the trial court properly denied Orangeburg’s motion for a directed verdict for gross negligence, we also find the court properly denied Orangeburg’s motions for directed verdict based on sections 15-78-60(2), (4), and (23).” 743 S.E.2d at 115. Therefore, Petitioner cannot skirt liability by simply ignoring an applicable exemption containing a gross negligence exception under the Tort Claims Act in its pleading or motion.

In examining other applicable exemptions under 15-78-60, the trial court correctly found that sections 15-78-60(25) and (12), each containing a gross negligence exception, are applicable to Petitioner in this case. S.C. Code Ann. § 15-78-60(25), reads in full:

The governmental entity is not liable for a loss resulting from:

(25) responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, **except when the responsibility or duty is exercised in a grossly negligent manner.**

S.C. Code Ann. § 15-78-60(25) (emphasis added). Thus, when this exception applies, with respect to any other possible exceptions under the SCTCA, the Court of Appeals, in a decision affirmed

by this Court has held:

While Atkinson’s transfer was admittedly an act requiring the discretion and judgment of the Department, Section 15-78-60(25) provides an exception to immunity where the governmental entity exercises its responsibility or duty in a grossly negligent manner. Section 15-78-60(5) must be read in light of this exception. If discretion is exercised in a grossly negligent manner, the exception to the normal rule of immunity applies.

*Jackson v. S.C.D.C.*, 301 S.C. 125, 128, 390 S.E.2d 467, 469 (Ct. App. 1989), *aff’d* by *Jackson v. S.C.D.C.*, 302 S.C. 519, 397 S.E.2d 377 (1990).

In *Plyler*, this Court found that “[t]he unambiguous language of the statute clearly refers to the protection of the physical person.” *Plyler*, 373 S.C. at 637. Respondent has alleged “gross negligence on the part of SCDC” in the Complaint. Compl., at ¶ 16. The trial court analyzed the statutory duties in this case and explicitly found that “the essential purpose of S.C. Code Ann. §24-9-10, *et seq.* is to provide for the health, welfare, and **protection** of the detainees housed at the jail and places the duty on SCDC to ensure that these detainees are **protected**.” Mar. 1, 2024 Order, at 7 (emphasis added). Therefore, because § 15-78-60(25) of the SCTCA applies in this case, any other exceptions to liability under the SCTCA alleged by Petitioner have a gross negligence exception read into them, and SCDC is not immune from liability.

Likewise, S.C. Code Ann. § 15-78-60(12) provides:

The governmental entity is not liable for a loss resulting from:

(12) licensing powers or functions including, but not limited to, the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order, or similar authority **except when the power or function is exercised in a grossly negligent manner.**

S.C. Code Ann. § 15-78-60(12) (emphasis added). In *Steinke*, the South Carolina Supreme Court analyzed this exception along with § 15-78-60(13) dealing with inspection powers and held:

We hold the inspection powers exception must be read in conjunction with the key

exception at issue in this case, Section 15-78-60(12), the licensing powers exception. Department must inspect an amusement device before deciding whether to issue, suspend, or revoke a license. S.C. Code Ann. §§ 41-18-70 and 41-18-80. Department also has an implicit duty to investigate potentially hazardous substantial modifications when it learns of them. It would make no sense to say Department may be found grossly negligent in a licensing decision, yet allow Department to escape liability because the inspection powers exception does not contain a gross negligence standard. The logical way to read these closely related provisions when both are at issue is that a governmental entity may be liable if it is grossly negligent in licensing or inspecting a particular device or activity.

*Steinke*, 336 S.C. at 396. In analyzing this provision and the applicable case law, the trial court correctly found that “SCDC’s requirement to ensure that each jail conforms to minimum standards and ability to close the facility or take other corrective action is akin to an approval or licensing process under S.C. Code Ann. § 15-78-60(12)” and correctly held that the gross negligence exception from that section is also read into any other possible exemptions under the Tort Claims Act. Mar. 1, 2024 Order, at 9-10. Thus, the trial court’s order contained no error of law and was based on longstanding precedent from this Court.

**CONCLUSION**

For the reasons stated, Respondent asks the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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s/James A. Bradshaw

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