

RECEIVED

Aug 30 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

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 WRIT OF CERTIORARI

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
August 30, 2024

Other Counsel of Record:

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

*Attorneys for Plaintiff Ronald Zack, as Personal Representative of
the Estate of Allan Zack*

John Patrick Riordan, Esq.
Willson Jones Carter & Baxley, P.A.
325 Rocky Slope Road, Suite 101
Greenville, SC 29607
(864) 672-3711

Attorneys for Defendant Greenville County

TABLE OF CONTENTS

	Pages
TABLE OF AUTHORITIES	3-4
CERTIFICATION OF COUNSEL	6
QUESTIONS PRESENTED	6
STATEMENT OF CASE	6-10
ARGUMENT	10-20
I. The South Carolina Court of Appeals Improperly Dismissed Defendant’s Appeal	10-12
II. The Legislation Creating the Jail and Prison Inspection Program Does Not Create a Private Right of Action against SCDC	12-15
III. A Governmental Entity Defendant Has the Right to Select and Allege its Defenses	15-18
IV. This Court Should Grant Certiorari Because Exceptional Circumstances Exist in this Case	19-20
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

<i>Black v. Greenville County and SCDC</i> , C.A. No. 2023-CP-40-03639 (Richland Cnty., S.C, Ct. Com. Pl., June 9, 2023)	8
<i>Byers v. Greenville County and SCDC</i> , C.A. No. 2023-CP-40-02273 (Richland Cnty., S.C., Ct. Com. Pl., May 3, 2023).....	8
<i>Denson v. National Cas. Co.</i> , 439 S.C. 142, 886 S.E.2d 228 (2023).....	12-13
<i>Golden v. Sheriff of Spartanburg County and SCDC</i> , C.A. No. 2024-CP-40-04452 (Richland Cnty., S.C., Ct. Com. Pl., July 19, 2024).....	8
<i>In re Breast Implant Prod. Liab. Litig.</i> , 331 S.C. 540, 503 S.E.2d 445 (1998).....	19

<i>Jones v. Lott</i> , 387 S.C. 339, 692 S.E.2d 900 (2010).....	15-17
<i>Laffitte v. Bridgestone Corp.</i> , 381 S.C. 460, 674 S.E.2d 154 (2009).....	19-20
<i>Lambries v. Saluda Cnty. Council</i> , 409 S.C. 1, 760 S.E.2d 785 (2014).....	12
<i>Mid-State Distribs., Inc. v. Century Importers, Inc.</i> , 310 S.C. 330, 426 S.E.2d 777 (1993)	10-11
<i>Murphy v. Owens-Corning Fiberglas Corp.</i> , 356 S.C. 592, 590 S.E.2d 479 (2003).....	12
<i>Plyler v. Burns</i> , 373 S.C. 637, 647 S.E.2d 188 (2007).....	18
<i>Poole v. Sheriff of Spartanburg County and SCDC</i> , C.A. No. 2024-CP-40-03636 (Richland Cnty., S.C., Ct. Com. Pl., June 13, 2024).....	8
<i>Redding v. Greenville County and South Carolina Department of Corrections</i> C.A. No. 2024-CP-40-02768 (Richland Cnty., S.C., Ct. Com. Pl., May 3, 2024).....	8
<i>Repko v. County of Georgetown</i> , 424 S.C. 494, 818 S.E.2d 743 (2018).....	16-17
<i>Stone v. Thompson</i> , 426 S.C. 291, 826 S.E.2d 868 (2019)	10-11

STATUTES

S.C. Code Ann. § 14-3-330	6,10,20
S.C. Code Ann. § 15-78-60	9,11,15-18
S.C. Code Ann. § 24-9-10	6-8
S.C. Code Ann. § 24-9-20	6-8
S.C. Code Ann. § 24-9-30	6-8
S.C. Code Ann. § 24-9-35	6-8
S.C. Code Ann. § 24-9-40	6-8

S.C. Code Ann. § 24-9-50 6-8

OTHER AUTHORITIES

Rule 242 of the South Carolina Appellate Court Rules 12,19

CERTIFICATION OF COUNSEL

Counsel for Petitioner certifies that a Petition for Rehearing was filed and finally ruled upon by the South Carolina Court of Appeals on July 31, 2024.

QUESTIONS PRESENTED

1. Did the Court of Appeals fail to properly consider whether the Trial Court's order was immediately appealable because it decided novel questions of law: (1) 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 of Laws and (2) whether the gross negligence standard applies to SCDC's defenses when no subsection containing the gross negligence standard was asserted by SCDC 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. Did the Court of Appeals fail to properly consider whether the Trial Court's order was immediately appealable under Section 14-3-330(1) of the South Carolina Code of Laws because the decision involved the merits of SCDC's asserted defenses.
3. Did the Court of Appeals fail to properly consider this appeal given the exceptional circumstances presented?

STATEMENT OF CASE

This Court should grant the Petition of the South Carolina Department of Corrections because this case presents several important issues of first impression in South Carolina relating to whether SCDC, and other state agencies, are civilly liable to individuals detained at local jail facilities throughout the state because SCDC is tasked with conducting annual inspections of those jails. This case also presents the novel issue whether a governmental entity like SCDC is entitled to determine what immunities it may assert under the South Carolina Tort Claims Act or whether a plaintiff or the trial court has the right to summarily make that decision. As such, this case has far-reaching impact not only upon SCDC, but also on other state agencies with similar inspection responsibilities and all governmental entities which are entitled to assert defenses under the Act.

The Jail and Prison Inspection Program

The South Carolina Legislature first adopted the Jail and Prison Inspection Program in 1962. It has since amended the program thirteen times.¹ Pursuant to Section 24-9-10, the Legislature established a Jail and Prison Inspection Division under the jurisdiction of SCDC. The Jail and Prison Inspection Program currently provides that the Jail and Prison Inspection Division, together with the State Fire Marshall and the South Carolina Department of Health and Environmental Control, will inspect all local jail facilities annually. S.C. Code § 24-9-20.

The inspections by SCDC are based upon standards adopted by the South Carolina Association of Counties—the South Carolian Minimum Jail standards. *Id.* Upon receipt of SCDC’s annual report, the entity that operates the local facility, like Greenville County, shall “initiate” corrective action within ninety days. S.C. Code Ann. § 24-9-30. If the entity fails to initiate corrective action, the Director of SCDC **may** close all or a portion of a facility unless he determines that “the public interest is served by permitting the facility to remain open.” *Id.* (emphasis added.) If the Director orders all or any portion closed, the entity that operates the facility may appeal to the Circuit Court in the applicable County. *Id.*

¹ In 1962, the South Carolina Legislature enacted Acts 55-315, 55-316, and 55-217, which became Sections 24-9-10, 24-9-20, and 24-9-30, in the 1976 Code. In 1967, the Legislature enacted Act (55) 587 amending Acts 55-315 and 55-316. In 1970, the Legislature enacted Act 56 (2368) amending Act 55-317. In 1978, the Legislature enacted Act No. 571, Section 1 adding Code Section 24-9-35. In 1976, the Legislature enacted Act No. 132, Section 2 adding Code Section 24-9-40. In 1980, the Legislature enacted Act No. 419, Sections 1 and 2 amending Code Sections 24-9-20 and 24-9-30. That same year, the Legislature enacted Act No. 512, Section 2 amending Code Section 24-9-20. In 1993, the Legislature enacted Act No. 181, Sections 433, 434 and 435 amending Code Sections 24-9-10, 24-9-20, and 24-9-30. In 1995, the Legislature enacted Act No. 7, Part IV, Sections 72 and 73 amending Code Sections 24-9-20 and 24-9-30. In 2000, the Legislature enacted Act No. 308, Section 2 amending Code Section 24-9-20. That same year the Legislature enacted Act No. 388, Section 8 adding Code Section 24-9-50. In 2010, the Legislature enacted Act No. 237, Sections 61, 62, and 63 amending Code Sections 24-9-30, 24-9-35, and 24-9-40. In 2023, the Legislature enacted Act No. 60 amending Code Section 24-9-20.

The Jail and Prison Inspection Program also requires local facilities to report deaths to SCDC and includes a penalty against a local facility for the failure to report. S.C. Code Ann. §24-9-35. The Program requires that all design plans for new jail facilities be submitted to SCDC. S.C. Code Ann. § 29-9-40. The Program also mandates that certain information be reported to SCDC to be included in a statewide jail information system. S.C. Code Ann. § 24-9-50.

Notably, at no point during the sixty-year legislative history of the Jail and Prison Inspection Program has the South Carolina Legislature adopted any provision providing for a private right of action or other civil remedy against SCDC or the other state entities required to conduct inspections. Despite this, on June 9, 2023, Plaintiff initiated this novel action against SCDC contending that it owes a legal duty under the Jail and Prison Inspection Program to his Decedent, who is alleged to have committed suicide while in the custody of the Greenville County Detention Center. (Compl. June 9, 2023).

The Issues Presented Impact Other Pending Cases

Other plaintiffs, represented by the same counsel, are pursuing similar claims. To date, Plaintiff's counsel has filed at least five similar actions in the Court of Common Pleas for Richland County: *Ramona 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 (Richland Cnty., S.C., Ct. Com. Pl., May 3, 2023); *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 (Richland Cnty., S.C., Ct. Com. Pl., June 9, 2023); *Mary Redding, as Personal Representative of the Estate of Randy Eugene Broome v. Greenville County and the South Carolina Department of Corrections*, C.A. No. 2024-CP-40-02768 (Richland Cnty., S.C.

Ct. Com. Pl., May 3, 2024); *Ashley Poole, as Personal Representative of the Estate of Christopher Fortner v. Sheriff of Spartanburg County and South Carolina Department of Corrections*, C.A. No. 2024-CP-40-03636 (Richland Cnty., S.C. Ct. Com. Pl., June 13, 2024); and, *Maranda Golden, as Personal Representative of the Estate of Forrest Edward Taylor, III v. Sheriff of Spartanburg County and South Carolina Department of Corrections*, C.A. No. 2024-CP-40-04452 (Richland Cnty., S.C. Ct. Com. Pl., July 19, 2024). The plaintiffs in those cases also contend that SCDC owes a legal duty under the Jail and Prison Inspection Program to individuals housed in local jails.

Procedural History

Given the history of the Jail and Prison Inspection Program, on August 16, 2023, SCDC filed a motion to dismiss Plaintiff's claims. Specifically, SCDC contended 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). (Mot. August 16, 2023.)

On April 9, 2024, the trial court issued an order which decided the merits of several of SCDC's defenses and affected 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.

On May 31, 2024, Petitioner timely filed a notice of appeal from the Trial Court's order. (Notice of Appeal May 31, 2024). Seven days later, on June 7, 2024, the Court of Appeals 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. (Order June 7, 2024.) On June 21,

2024, Petitioner timely filed a petition for rehearing. (Pet. For Reh'g June 21, 2024.) On July 31, 2024, the Court of Appeals denied the petition for rehearing. (Order Jul. 31, 2024.)

ARGUMENT

The Court of Appeals Improperly Dismissed Defendant SCDC's Appeal

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).

In *Stone v. Thompson*, 426 S.C. 291, 826 S.E.2d 868 (2019), this 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. The Court of Appeals 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.

This Court disagreed and reversed. *Id.* at 293, 826 S.E.2d at 869. This 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. This 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 at 2, Apr. 9, 2024). The trial court unilaterally made this determination even though SCDC did not contend that any section that includes the gross negligence standard 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.

As the Court of Appeals did in *Stone*, it summarily found that the Trial Court’s order was interlocutory and improperly dismissed SCDC’s appeal even though the Trial Court’s order involves the merits of both claims and defenses and affects substantial rights of SCDC. The South Carolina Court of Appeals also overlooked the presence of at least two novel questions of law arising in connection with this case, including:

1. Whether the Jail and Prison Inspection Program creates a private right of action against SCDC.
2. Whether a governmental entity like SCDC is entitled to determine what immunities it may assert under the South Carolina Tort Claims Act or whether a plaintiff or the trial court has the right to summarily make that decision.

Therefore, this Court should grant certiorari to review the decision of the South Carolina Court of Appeals given the issues of first impression. Rule 242, SCACR.

The Legislation Creating the Jail and Prison Inspection Program does not create a Private Right of Action against SCDC

This Court has discretion to grant certiorari where, as here, the case presents important issues of first impression in South Carolina. Rule 242(b), SCACR. This Court has granted certiorari when presented with novel issues of law in cases involving statutory interpretation. *See Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 5, 760 S.E.2d 785, 787 (2014) (In a matter for first impression, this Court granted a petition for a writ of certiorari to consider the notice provision in Section 30-480 to determine whether Saluda County Council’s practice of amending its agenda during regularly scheduled meetings violated the statute); *Murphy v. Owens-Corning Fiberglas Corp.*, 356 S.C. 592, 594-97, 590 S.E.2d 479, 480-81 (2003) (granting certiorari to review novel issues presented when interpreting section 15-5-150 of the South Carolina Code); *F & D Elec. Contractors, Inc. v. Powder Coaters, Inc.*, 350 S.C. 454, 458, 567 S.E.2d 842, 844 (2002) (granting certiorari to consider the novel issue of the meaning of “consent” in the mechanic’s lien statute).

The Trial Court in this case erroneously determined that even though there is no legislative history or evidence of legislative intent to do so, the Jail and Prison Inspection Program imposes a statutory duty upon SCDC (and presumably the State Fire Marshall and SCDHEC) and creates a private right of action for detainees housed in local jails (and perhaps employees, visitor and others present in local jails). In so doing, the Trial Court disregarded this Court’s decision in *Denson v. National Cas. Co.*, 439 S.C. 142, 886 S.E.2d 228 (2023).

In *Denson*, the plaintiff's decedent died in an accident caused by a drunk driver who had been overserved at a bar. *Id.* at 145, 886 S.E.2d at 230. Although the bar previously had general liability insurance coverage and liquor liability coverage with National Casualty Company, it failed to renew its liquor liability coverage. *Id.* Section 61-2-145(c) of the Code required insurers offering liquor liability insurance to "notify the department in a manner prescribed by department regulation of the lapse or termination of the liquor liability insurance policy." *Id.* at 146, 886 S.E.2d at 230. The insurer failed to give such notice when the bar's liquor liability coverage lapsed. *Id.* at 145, 866 S.E.2d at 230. The plaintiff filed an action in federal court against the insurer asserting negligence based upon allegations that the insurer failed to notify the Department of Insurance as required by the statute. *Id.* at 145-46, 886 S.E.2d at 230. The insurer moved to dismiss arguing that the statute did not grant the plaintiff or any similarly injured party the right to assert a civil claim. *Id.* at 146, 866 S.E.2d at 230. On certified question from the district court, this Court considered whether the statute created a private right of action and ruled that it did not. *Id.* at 145, 886 S.E.2d at 229.

Because there was no common-law right of action against the insurer, this Court first considered whether the statute gives rise to a private cause of action. *Id.* at 151, 886 S.E.2d at 233. This Court reiterated long-standing South Carolina law that "[t]he main factor in determining whether a statute gives rise to a private cause of action is legislative intent," which must be gleaned from the statutory language. *Id.* This Court also stated that "[a] finding that the legislature intended to create a private right of action requires more than simply demonstrating a plaintiff may potentially benefit." *Id.* at 154, 866 S.E.2d at 235. Furthermore, "[t]he fact that a statute imposes a duty is not dispositive of a tortfeasor's liability under a negligence claim, for all statutes impose commands to do or refrain from doing something." *Id.* at 147, 886 S.E.2d at 231.

This Court also noted the general rule that when a statute does not expressly create civil liability – as the Jail and Prison Inspection Program does not - such liability should not be imposed unless the statute was enacted for a plaintiff’s special benefit. *Id.* at 151-52, 886 S.E.2d at 233.

Even though the statute at issue expressly required the insurer to report a lack of liquor liability coverage to the Department of Insurance, this Court found that the statute did not impose a legal duty upon the insurer to the plaintiff to do so. *Id.* at 147, 886 S.E.2d at 231. This Court held that its conclusion is supported by the statute’s failure to provide any consequence for the insurer. *Id.* at 154, 866 S.E.2d at 235. This Court noted that the fact that the legislature delineated consequences for insureds but did not do the same for the insurer supported the conclusion that the statute did not create an implied private right of action against the insurer. *Id.* This Court found that the enforcement mechanism provided in a statute can indicate whether the legislature intended to create civil liability as another means of enforcement. *Id.* at 155, 886 S.E.2d at 235. This Court found that the enforcement mechanism of that statute was the Department of Insurance’s authority to suspend or revoke a license, not to impose civil liability against the insurer. *Id.*

Any legislation which is in derogation of common law must be strictly construed and not extended beyond clear legislative intent. *Id.* at 152, 866 S.E.2d at 234. Given that at common law there was no right for a plaintiff to maintain a suit directly against an insurer unless there was privity of contract, this Court found a statutory right to maintain an action against the insurer would contravene common law. *Id.* at 153, 866 S.E.2d at 234.

This Court also considered whether the statute gave rise to a claim for negligence per se based upon the two-part *Rayfield* test. *Id.* at 154, 886 S.E.2d at 234. This Court found that the statute was part of a larger regulatory scheme intended primarily to promote public safety and

welfare by ensuring that certain businesses maintain liquor liability insurance, not to benefit a private party. *Id.* at 154, 866 S.E.2d at 234. This Court also found that the essential purpose of the statute was not to protect against the type of harm suffered by the decedent. *Id.*

The Trial Court misconstrued the Jail and Prison Inspection Program by determining that a private right of action existed for Plaintiff based upon the statute establishing the Jail and Prison Inspection Program. There is another reasonable interpretation, the correct interpretation, that the legislature intended for SCDC to provide advice and guidance to local jails who have fewer resources than the agency. The Trial Court should have determined that there was no legislative intent to enact the Jail and Prison Inspection Program for the special benefit of Plaintiff's Decedent, or any other individual detainee housed at any of the jails in South Carolina. This Court should grant certiorari to consider this important issue.

A Governmental Entity Defendant Has the Right to Select and Allege its Defenses

In addition to overlooking this novel question of law, the 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. Neither Plaintiff nor the Trial Court may raise an affirmative defense not raised nor relied upon by SCDC. *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010) is on point.

In *Jones*, the sheriff pled that he was entitled to immunity pursuant to Section 15-78-60(6) of the Tort Claims Act which does not include a gross negligence standard. *Id.* at 344, 692 S.E.2d at 903. The trial court granted the sheriff's motion for a directed verdict based in part upon the immunity afforded under Section 15-78-60(6). *Id.* at 344, 692 S.E.2d at 902. On appeal, the sheriff argued that he was entitled to immunity under Section 15-78-60(21), which

relates to the escape of persons in the custody of a governmental entity, as an additional sustaining ground. *Id.* at 345, 692 S.E.2d at 903.

The plaintiff petitioned this Court arguing that the sheriff was not entitled to immunity under Sections 15-78-60(5) and 15-78-60(21). *Id.* at 346, 692 S.E.2d at 903. Although the sheriff did not plead Section 15-78-60(25) (which relates to the protection of persons in the custody, control, or confinement of a governmental entity) as a basis for immunity, the plaintiff argued that Section 15-78-60(25) applied. *Id.* at 347-48, 692 S.E.2d at 904-05. Thus, the plaintiff posited that because multiple exceptions to the waiver of immunity were invoked and at least one of those exceptions contains a gross negligence standard, gross negligence should be grafted into the other exceptions. *Id.* at 347, 692 S.E.2d at 904.

This Court rejected the argument. *Id.* at 348, 692 S.E.2d at 904. This Court noted that because the sheriff “never raised an affirmative defense that contained a gross negligence standard,” the gross negligence standard should not be read into other sections of the Act. *Id.* at 348, 692 S.E.2d at 904-05. This Court emphasized that “the better practice is to allow the government to assert all relevant exceptions and apply the gross negligence standard when it is contained in one applicable exception.” *Id.* at 347, 692 S.E.2d at 904.

In *Repko v. County of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018), this Court revisited when it is appropriate to apply a gross negligence standard from one immunity provision of the South Carolina Tort Claims Act to another. There, the plaintiff asserted claims against the County for failing to comply with or enforce its rules, regulations, and written policies governing the handling of a letter of credit. *Id.* at 499, 818 S.E.2d at 746. The County alleged that it did not owe a duty of care to the plaintiff and that it was immune under Sections 15-78-60(1), (2), (4), (5), (12), and (13) of the Tort Claims Act. *Id.* The County moved for a

directed verdict under Sections (4), (5), (12), and (13) of the Act. *Id.* at 502, 818 S.E.2d at 747-48. The trial court granted the County's directed verdict motion, finding that the regulation did not create a duty of care by the County to the plaintiff and that the County was immune under Sections 15-78-60(4), (5), and (13) of the Act. *Id.* The trial court also found that Section 15-78-60(12) did not apply to the case. *Id.* This Court granted certiorari. *Id.* at 497, 818 S.E.2d at 745.

The plaintiff conceded that because Section 15-78-60(4) does not include a gross negligence standard, Section 15-78-60(4) would provide immunity from liability for failure to comply with or enforce the regulations at issue. *Id.* at 504, 818 S.E.2d at 749. Nonetheless, the plaintiff argued that the gross negligence standard contained in Section 15-78-60(12) should be read into Section 15-7860(4) simply because the County initially pled that it was entitled to immunity under Section (12). *Id.* This Court disagreed. *Id.* at 502, 818 S.E.2d at 748.

This Court noted the plaintiff's argument that *Jones v. Lott*, "stands for the proposition that when a governmental entity simply pleads an immunity provision containing a gross negligence standard, the gross negligence standard must be read into all other immunity subsections." *Id.* at 505, 818 S.E.2d at 749. This Court held that for the gross negligence standard from one immunity provision of the Act to be read into another provision that does not contain a gross negligence standard, the immunity provision containing the gross negligence standard must apply in the case. *Id.* at 507, 818 S.E.2d at 750. This Court explained that in many instances, a governmental entity may initially plead immunity pursuant to a section containing a gross negligence standard but that immunity section may ultimately not apply to the facts of the case. *Id.* Accordingly, "the gross negligence standard contained in that [inapplicable] immunity [subsection] is not to be read into applicable immunity subsections that do not contain a gross negligence standard." *Id.*

Thus, if any of **the asserted and applicable** exceptions to the waiver of sovereign immunity include a gross negligence standard, only then is the gross negligence standard grafted into other exemptions. In this case, SCDC contends that Section 15-78-60(13)² of the Tort Claims Act applies to its inspections of local jails. In this case, SCDC did not assert any exemptions that include a gross negligence standard.

Importantly, the Trial Court incorrectly decided that Section 15-78-60(25) applies in this case even though SCDC makes no such contention and it does not apply. (Order 3-4, Apr. 9, 2024.) Section 15-78-60(25) provides immunity for a loss resulting from a responsibility or duty concerning the protection of persons **in the custody, control, or confinement** of the entity. This Court has held that Section 15-78-60(25) “usually applie[s] in situations where a governmental entity is responsible for the actual physical accountability for the person.” *Plyler v. Burns*, 373 S.C. 637, 652, 647 S.E.2d 188, 196 (2007). “The unambiguous language of [Section 15-78-60(25)] clearly refers to the protection of the physical person.” *Id.* at 653, 647 S.E.2d at 197. As such, Section 15-78-60(25) does not apply in this case.

Thus, the Trial Court incorrectly grafted the gross negligence standard to Sections 15-78-60(13), even though SCDC did not assert immunity under any section that includes a gross negligence standard nor do the sections involving gross negligence apply in this case. (Order 3-4, Apr. 9, 2024.) The Trial Court incorrectly decided that it, not the governmental entity involved, determines what defenses to assert under the Act.

² Section 15-78-60(13) provides immunity for “regulatory inspection powers or functions, including 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.”

This Court Should Grant Certiorari Because Exceptional Circumstances Exist in this Case

Rule 242 provides that a writ of certiorari “will be granted only where there are special and important reasons.” Rule 242(b), SCACR. Rule 242 describes five situations to “indicate the character of reasons” the Court may consider which are “neither controlling nor fully measuring” of this Court’s discretion or power to grant certiorari. This Court has repeatedly granted certiorari where, as here, there are exceptional circumstances.

For example, in *In re Breast Implant Prod. Liab. Litig.*, 331 S.C. 540, 543, 503 S.E.2d 445, 447 (1998), this Court granted certiorari to review the denial of the defendant’s motion to dismiss the plaintiff’s claim for strict liability concerning physicians’ use of breast implant devices. This Court indicated that although it “will not generally accept matters on a writ of certiorari that can be entertained in the trial court or on appeal, a writ of certiorari may be issued when exceptional circumstances exist.” *Id.* at 543 n.2, 503 S.E.2d at 447 n.2. This Court found that “exceptional circumstances exist[ed]” where that case involved “[n]ovel questions of law concerning issues of significant public interest . . . contained in numerous state and federal actions,” and a ruling from this Court “would serve the interests of judicial economy by eliminating numerous inevitable appeals raising these issues.” *Id.*

Similarly, in *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154 (2009), this Court granted certiorari to review the trial court’s order granting of a motion to compel trade secret information. This Court held that a writ of certiorari may be issued when exceptional circumstances exist even if an order is not immediately appealable. *Id.* at 471-72, 674 S.E.2d at 160-61. This Court found that “[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.” *Id.*

The Trial Court’s ruling in this case has far-reaching implications. First, it creates statutory duties and potential financial liability for three state entities, SCDC, the State Fire Marshal and the South Carolina Department of Health and Environmental Control. Second, it impacts the right of every governmental entity entitled to assert immunity under the Tort Claims Act to decide which defenses to assert in a given case. Third, this case presents significant legal issues that are the subject of at least five other pending cases. A decision by the Court in this case would eliminate numerous inevitable appeals raising these issues in similar cases.

CONCLUSION

Based upon the foregoing authorities and arguments, Petitioner South Carolina Department of Corrections respectfully requests that the Court grant a Writ of Certiorari to consider and resolve the novel questions of law in this case. Petitioner respectfully petitions this Court to review the underlying Trial Court order pursuant to Sections 14-3-330(1). Petitioner also respectfully requests that this Court grant a writ of certiorari given the significant public interest involved in this case and in the interests of judicial economy.

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

August 30, 2024

RECEIVED

Aug 30 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2023-CP-40-03029

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.

PROOF OF SERVICE

I certify that I have this day caused to be served upon the persons named below the attached **PETITION FOR WRIT CERTIORARI** via e- mail to the AIS e-mail address of the following attorneys:

Kyle White, Esq.
Drew Bradshaw, Esq.
Sarah Tamura, Esq.
WHITE, DAVIS & WHITE LAW
FIRM
PO Box 1346
Anderson, SC 29622
kyle@wdwlawfirm.com
drew@wdwlawfirm.com
saraht@wdwlawfirm.com

Dan Pruitt, Esq.
DAN PRUITT INJURY LAW FIRM
300 Pettigru St., #100
Greenville, SC 29601
danlaw@bellsouth.net

Charles F. Turner, Jr., Esq.
John Patrick Riordan, Esq.
WILLSON JONES CARTER & BAXLEY, P.A.
325 Rocky Slope Road, Suite 201
Greenville, SC 29607
cfturner@wjcblaw.com
jpriordan@wjcblaw.com

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

Columbia, SC

August 30, 2024