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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
Michael S. Holt, Circuit Court Judge

Appellate Case No. 2024-00183
Case No. 2021-CP-17-0284

Elizabeth Denice McLeod..... Appellant

v.

Dillon County, City of Latta, Kernard Redmond and Derrick Cartwright .... Defendants,

Of which Dillon County is the..... Respondent.

RESPONDENT'S FINAL SUR-REPLY

The Respondent, Dillon County, respectfully moves this Court for leave to file a sur-reply to the Appellant's Reply Brief filed on August 12, 2024. This sur-reply is in response to a newly asserted argument raised for the first time in Appellant McLeod's Reply Brief. This brief is filed to point out that Appellant failed to realize that the issue he asserts has been adjudicated in a case subsequent to those she relies upon, and the new argument has been flatly rejected.

Appellant argued for the first time in its reply brief that Defendant's Counsel pled a gross negligence immunity (15-78-60 (25)) in its answer. Subsection 25 includes a gross negligence standard. Appellant then added the Answer to the Record on Appeal. Specifically, Appellant argued that "in Paragraph 20 Defendant asserted immunity from the suit '… pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-60(1), 2, 3, 4, 5, 6, 9, 17, 20, 21,

23, and 25…' S.C. Code Ann. § 15-78-60(25) does in fact include a gross negligence standard." See Appellant's Reply Brief, p. 2. Appellant then cited Faile v. South Carolina Department of Juvenile Justice, 250 S.C. 315, 333, 566 S.E.2d 536 (2002) for the proposition that when "when a governmental entity asserts various exceptions to the waiver of immunity … [the court] must read exceptions that do not contain the gross negligence standard in light of exceptions that do contain the standard." See Appellant's Reply Brief, pp. 2 – 3 (quoting Faile, supra).

Then, Appellant concludes that since S.C. Code Ann. 15-78-60(25) was merely *asserted* in this case, the gross negligence standard must be imputed to all other alleged immunities. See Appellant's Reply Brief, pp. 2 – 3. Appellant is incorrect on that conclusion and is citing dated law in South Carolina that is no longer operative in the determination of whether gross negligence can be imputed against a governmental entity raising S.C. Tort Claims Act immunities.

Respondent would point Appellant, and this Court, to Repko v. County of Georgetown, 424 S.C. 494, 818 S.E.2d 743 (2018) where our Supreme Court clarified that the *assertion* of immunities by the governmental entity is irrelevant in the determination as to whether gross negligence can be imputed to the S.C. Tort Claims act immunities, but rather it is the *applicability* of the immunities that is dispositive. See Repko, at 506 – 07, 818 S.E.2d at 750.

Our Supreme Court dealt with, and dispensed with, the same exact argument the Appellant makes in this case. The Court explained, "Repko also argues Proctor v. Department of Health & Environmental Control, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006), supports his argument that the gross negligence standard of subsection 15-78-60(12) should be read into the other subsections *simply because the County pled subsection (12)*." Repko, at 506, 818 S.E.2d at 750. The Court then held that Repko's argument was invalid because in Proctor gross

negligence was imputed because it was applicable to the facts of the case whereas no immunity containing a gross negligence standard was applicable to Repko's case. Id., at 506 – 07, 818 S.E.2d at 750.

Then the Court expounded beyond the specific facts of Repko to explain the cases of Plyler v. Burns, 373 S.C. 637, 647 S.E.2d 188 (2007) and Steinke v. South Carolina Dept. of Labor, Licensing, and Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999) "clearly dictate that in order for the gross negligence standard from one immunity provision to be read into an immunity provision that does not contain a gross negligence standard, the immunity provision containing *the gross negligence standard must first apply to the case.*" Repko, at 507, 818 S.E.2d at 750. The Court then explicitly "disavow[ed] any suggestion to the contrary." Id.

The Court then went on to describe the situation that this case presents and explicitly denied the argument that the Appellant now makes. Our Supreme Court averred:

> that a governmental entity may initially plead entitlement to immunity pursuant to a subsection containing a gross negligence standard. In many of those instances, *that particular immunity may ultimately not apply* to the facts of the case. *In such a case*, the *gross negligence* standard contained in that immunity *is not to be read into applicable immunity subsections that do not contain a gross negligence standard*. We reaffirm our holding in Steinke "that when an exception containing the gross negligence standard applies, that same standard will be read into any other applicable exception."

Repko, at 507, 818 S.E.2d at 750 (quoting Steinke, at 398, 520 S.E.2d at 155) (emphasis added). Accordingly, that the Respondent initially pled or asserted S.C. Code Ann. § 15-78-60(25) in its answer is irrelevant in the determination as to whether gross negligence can be imputed into the only two applicable immunities in this case, name S.C. Code Ann. § 15-78-60(1), (2). Since the only immunities that apply in this case are S.C. Code Ann. § 15-78-60(1), (2), a gross negligence standard cannot be imputed, and Appellant's litigation cannot be saved by this argument.

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v.

Dillon County, City of Latta, Kernard Redmond and Derrick Cartwright, Defendants,

Of which Dillon County is the Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondent, Dillon County, certifies that the Final Sur-Reply of Respondent Dillon County complies with Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings issued April 15, 2014.

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent, Dillon County, certifies that the Final Sur-Reply of Respondent Dillon County complies with Rule 211(b), SCACR.

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CERTIFICATE OF SERVICE

The undersigned employee of Morrison Law Firm, LLC, attorney for the Defendant, Dillon County, does hereby certify that service of the Respondent's Final Sur-Reply in the above-captioned action was made upon counsel of record by placing same in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 30th day of October, 2024 addressed as follows, and by email:

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