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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

George M. McFaddin, Jr., Circuit Court Judge

Appellate Case No. 2024-001429
Case No. 2023-CP-10-02924

Antoinet Moore, Individually and as Personal Representative of the Estate of David J. Wilson,

Appellant,

v.

Green's Grocery, LLC and Mahmoud A. Yousef,

Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

The Shooting[1]

On September 28, 2020, the decedent, David J. Wilson ("Wilson"), entered Respondent Green's Grocery and convenience store ("Respondent Green's") in Charleston, South Carolina intending to buy a cell phone charger. At that time, Respondent Mahmoud Yousef ("Respondent Yousef") was not present. Instead, his nephew Suhib Yousef ("Yousef"), who was eighteen years old at the time, was working behind the store counter as clerk.

Wilson approached the counter and attempted to purchase a cell phone charger, handing the charger and his debit card to Yousef before jokingly feigning an attempt to walk away without paying for the item. However, Yousef became frustrated and told Wilson not to "play" with him. Wilson continued joking when replying to Yousef, who then shouted for Wilson to get out of the store instead of processing the payment for the phone charger. Wilson, likely under the impression that Yousef was humoring him, continued to smile and reached for the charger. Yousef pulled the charger back and screamed for Wilson to get out of the store. The two then engaged in a heated argument with Wilson telling Yousef to watch his tone. In response, Yousef retrieved a taser from behind the store counter and thrusted the taser in Wilson's direction while activating the device. The men continued to argue until Yousef went behind the counter again to retrieve a machete which he raised near his head and challenged Wilson to touch him. Wilson responded by knocking over some items on the register, at which point Yousef swung the machete at Wilson. Wilson then spit at Yousef before turning to exit the store.

[1] The facts are taken from Appellant's well-plead Complaint. Therefore, the Court must construe them in the light most favorable to Appellant and presume them to be true. *See Turner v. Daniels*, 404 S.C. 430, 431 n. 1, 746 S.E.2d 40, 41 n. 1 (2013) (noting under the standard of review applicable to Rule 12(b)(6) motions, we construe all of the facts in the appellant's well-pled complaint in the light most favorable to the appellant and presume those facts to be true); *see also Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014) (same).

At that time, Yousef put down the machete and retrieved a 9 mm handgun before walking around the counter towards the door that Wilson was exiting, pointing the firearm at Wilson's back. Yousef followed Wilson to the front door after Wilson had exited, held the door open with his foot, and continued to point the gun at Wilson. Wilson yelled at Yousef to stop pointing the gun at him, to which Yousef screamed at Wilson to get out of the store and discharged a round in Wilson's direction, missing him. Wilson then rushed Yousef in an attempt to disarm him; however, Yousef stepped aside and discharged several more rounds, hitting Wilson. Police responded and Wilson was taken to the hospital in critical condition. He died the next day.

Police Investigation

During law enforcement's investigation of the shooting it was noted that Yousef never attempted to call 911 or activate the store's silent alarm during the encounter with Wilson, nor did he attempt to lock the front door once Wilson had exited the store. Respondent Mahmoud Yousef spoke with officers from the Charleston County Police Department following the incident. He indicated that Yousef was his nephew from Amman, Jordan who had been stuck in Charleston after visiting family due to COVID lockdown and had been working with him at Green's. Respondent Yousef told officers that several months before the shooting, a robbery had occurred at Green's when Yousef was working. This was the first time Yousef had seen a gun as Respondents did not keep a gun in the store before the robbery. Respondent Yousef told officers he decided to take Yousef to a therapist after the robbery when Yousef began to behave oddly, including appearing afraid of others and waking up in the middle of the night to ensure the doors were locked. It is believed Yousef only went to therapy on one occasion. Respondent Yousef stated that Yousef no longer came in to work at the store following the robbery, so Respondent Yousef started forcing Yousef to work at the store again. After returning, Yousef jumped every time a

customer entered the store. Respondent Yousef also informed officers that he took Yousef to a gun range to show Yousef how to use a gun and obtained a gun for the store. Neither Respondent Yousef nor Yousef obtained a concealed weapons permit (CWP) for Yousef.

Immunity Proceedings

On June 3, 2021, the Honorable R. Markley Dennis, Jr. held a hearing to determine whether Yousef was entitled to immunity from criminal and civil prosecution for the shooting of Wilson under South Carolina's Protection of Person's and Property Act (the "Act"). Following the hearing, Judge Dennis issued an Order dated June 23, 2021, finding that Yousef was entitled to immunity from suit under section 16-11-440(C) of the Act.

Civil Case

On June 15, 2023, Appellant filed a Summons and Complaint in the Circuit Court for Charleston County against Respondents. (Compl.; R. 3.) Appellant's Complaint asserted causes of action for negligence, gross negligence, wrongful death, survival, negligent supervision, and negligent entrustment in connection with the September 28, 2020 shooting of Wilson at Respondent Green's convenience store in Charleston, South Carolina. (*Id.*) On August 31, 2023, Respondents moved to dismiss the Complaint, arguing that the criminal immunity granted to Yousef under the Act applied derivatively to shield Respondents from any civil liability related to the shooting. (Mot. to Dismiss; R. 34.) After further briefing from both parties, (Memorandum in Opp'n to Mot. to Dismiss; Reply in Supp. of Mot. to Dismiss; R. 56, 68), the Honorable George McFaddin, Jr., held a hearing on Respondents' motion to dismiss on April 18, 2024, (Tr. of Apr. 18, 2024 Hrg.; R. 73.) By Order dated June 12, 2024, Judge McFaddin granted Respondents' motion, dismissing the case. (Order; R. 89.) On June 14, 2024, Appellant filed a Motion to

Reconsider pursuant to Rule 59(e), SCRCP. (Mot. to Reconsider; R. 100.) The Court denied Appellant's motion via Form 4 Order on July 23, 2024. (Form 4 Order; R. 119.)

This appeal follows.

ARGUMENT

I. South Carolina's Protection of Persons and Property Act Does Not Provide Derivative Immunity to Third Parties.

The interpretation of a statute is a question of law, which an appellate court is free to decide without deference to the trial court. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court. *Ex parte Capital U–Drive–It, Inc*., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006); *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005).

This case concerns the novel legal question of whether immunity under South Carolina's Protection of Persons and Property Act applies derivatively to protect certain third parties from liability in separate civil actions. The circuit court erred in granting Respondents' motion to dismiss on this issue. By doing so, the court improperly expanded the operation and scope of the Act by creating a new category of immunity allowing an immunized defendant's employers, companions, and family members to share in the protections granted to the defendant without the third parties having to satisfy the conditions precedent for entitlement to immunity under the Act. This finding is contrary to the plain language of the Act and the intent of the legislature. This Court should reverse.

A. The plain language of the Act does not contemplate granting derivative immunity.

In 2006, the South Carolina General Assembly enacted the Protection of Persons and Property Act to provide immunity from prosecution to persons acting in defense of themselves or others if they are found to be justified in using deadly force. S.C. Code Ann. § 16-11-420, *et seq.* The Act codified the common law Castle Doctrine and extended its reach to include a person's vehicle and place of business. *See* S.C. Code Ann. § 16-11-420(A) ("It is the intent of the General

Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business."). The legislature adopted the Act based on its finding that "no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. § 16-11-420(E). Accordingly, a person may seek immunity under the Act by "demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence." *State v. Curry*, 406 S.C. 364, 372, 752 S.E.2d 263, 267 (2013). For immunity claims under this theory, "a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." *Id.* at 371, 752 S.E.2d at 266.

The circuit court erred in its construction of the Act's immunity provision, codified at S.C. Code Ann. § 16-11-450. "The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007); *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). In doing so, the court must give the words found in the statute their "plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Sloan*, 371 S.C. at 499, 640 S.E.2d at 459. Ultimately, "[i]f a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and the Court has no right to impose another meaning." *Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009); *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011); *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). Only when an act's language gives rise to doubt or uncertainty as to legislative intent may a court search for that intent beyond the borders of the act itself. *Smith*

v. Tiffany, 419 S.C. 548, 556, 799 S.E.2d 479, 483 (2017). As such, the best evidence of legislative intent is the text of the statute. *Wade v. State*, 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002); *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581.

Here, the question is simple, does the text of the statute provide that third parties are entitled to derivative immunity from suit based on an initial grant of immunity to an individual defendant? As detailed below, it does not.

When promulgating the Act's immunity provision, the General Assembly outlined the limited conditions permitting immunity as follows:

> **A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force**, unless the person against whom deadly force was used is a law enforcement officer acting in the performance of his official duties and he identifies himself in accordance with applicable law or the person using deadly force knows or reasonably should have known that the person is a law enforcement officer.

S.C. Code Ann. § 16-11-450(A) (emphasis added).[2] The text of the statute is unambiguous in its limited grant of immunity only to a person who "uses deadly force as permitted by the provisions of this article or another applicable provision of law and is justified in using deadly force. . ." *Id.* The plain language of the Act's immunity provision reveals nothing that supports an interpretation extending immunity to persons other than the individual directly responsible for using deadly force. In holding otherwise, the circuit court incorrectly forced a construction that directly conflicts with the clear language of the Act. *See e.g.*, *Wortman v. Spartanburg*, 310 S.C. 1, 425 S.E.2d 18

[2] Our Supreme Court has acknowledged that "another applicable provision of law" includes the common law of self-defense. *See State v. Scott*, 424 S.C. 463, 473, 819 S.E.2d 116, 120 (2018); *State v. Jones*, 416 S.C. 283, 300 n.8, 786 S.E.2d 132, 141 n.8 (2016).

(1992) (reversing grant of summary judgment when statutory immunity was inapplicable under facts of case).

Further, extending the Act to provide derivative immunity to third parties is inconsistent with the Act's design and purpose—that immunity be granted only to law-abiding citizens who were justified in using deadly force. *See* S.C. Code Ann. § 16-11-420(B). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers," and "the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013) (citation and quotation marks omitted). Underpinning modern Castle Doctrine and Stand Your Ground laws is the legal tradition of an individual's right to self-defense, which finds its origins dating back hundreds of years to the English common law.[3] Rooted in the conviction that "a man's home is his castle," the common law rule allowing deadly force against intruders eventually evolved into what is now known as the castle doctrine in the late nineteenth century American West. *Id.* at 530; *see also id.* at 549 ("[T]he fundamental goal of a castle doctrine law is to preserve life by guaranteeing the vulnerable home dweller the right to save him or herself in situations where the state is unable to intervene."). Today, the common law doctrine of self-defense has developed into an important exception for individuals, justifying contemporary defensive homicides.

At its core, the doctrine relies on a causal relationship between two components: (1) the occurrence of the conduct at issue (justified use of deadly force), and (2) the reciprocal grant of limited protections (immunity from suit). The causal nexus between these two components is

[3] *See* Benjamin Levin, *A Defensible Defense: Reexamining Castle Doctrine Statutes*, 47 Harv. J. On. Legis. 523 (Summer 2010).

critical, such that a grant of immunity in the second part is dependent on the occurrence of that person using deadly force in the first part. Offering immunity for use of deadly force as a legal protection exists ***solely*** because unjustified use of deadly force is unlawful and results in legal consequences against the actor.[4] Stated differently, if a person does not use deadly force in self-defense, then the legal consequences associated with that conduct do not arise, and thus, no immunity is needed.

The General Assembly designed the Act consistent with this historical framework. As a result, entitlement to immunity is a direct protection that only occurs under the narrow setting of an individual using justifiable deadly force. Any circumstance that falls outside these express requirements is incompatible with the statutory scheme and ineligible for the protections therein. Not only is expanding the scope of the Act to allow third parties to claim derivative immunity inconsistent with the Act's language and historical purpose, but it also conflicts with the basic tenants of the Act's design. Immunity from suit is not a benefit the law provides without first proving entitlement. Construing the Act to extend immunity derivatively would result in an absurd outcome in application where the principal shooter is held to a different standard than third parties who could claim the protections of immunity without first meeting the burdens required by the law. If the General Assembly had intended for immunity to be extended in any other way and to any other group, it would have stated so in the text of the statute, but it did not.[5]

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[4] "Deadly force" is defined as a "[v]iolent action known to create a substantial risk of causing death or serious bodily harm." FORCE, deadly force, Black's Law Dictionary (12th ed. 2024).

[5] *See Creswick v. Univ. of S.C.*, 434 S.C. 77, 82-83, 862 S.E.2d 706, 708-09 (2021) (recognizing that the legislature was "capable of drafting a provision prohibiting all mask mandates" when one proviso applying to public K-12 schools clearly demonstrated the legislature's intent to prohibit the use of state funds to require any mask mandate in those settings, but another provision applying to public institutions of higher education used different language that left "little doubt that [the higher education proviso] was not intended to prohibit all mask mandates at public institutions of higher education, but only, as its terms specifically provide, mask mandates for the unvaccinated");

For these reasons, the Court should find the lower court's dismissal on the basis of derivative immunity was erroneous and reverse and remand this case to proceed on the merits.

B. Only a natural person can be entitled to immunity under the Act.

Furthermore, regardless of whether the immunity at issue is direct or derivative, the provisions of the Act are inapplicable to Respondent Green's which is a corporation and not a natural person. Although the Act does not expressly define "person," consideration of the ordinary meaning of the term in its common usage and as evaluated in context with the rest of the Act clearly denotes a natural person or human being. "Words in a statute must be construed in context." *Sparks*, 406 S.C. at 128, 750 S.E.2d at 63. (citation and quotation marks omitted). "Thus, the [c]ourt may not, in order to give effect to particular words, virtually destroy the meaning of the entire context; that is, give the particular words a significance [that] would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent." *Id.* at 129, 750 S.E.2d at 63 (citation and quotation marks omitted).

Terms that are defined under the Act reinforce the conclusion that the General Assembly only considered natural persons as the contemplated eligible recipients of immunity. The purpose of the Act is to provide protections from criminal or civil action under circumstances where use of deadly force was justified to prevent death or great bodily injury. "Great bodily injury" is defined as "bodily injury which creates a substantial risk of death or which causes serious, permanent

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Byrd v. Irmo High Sch., 321 S.C. 426, 433-34, 468 S.E.2d 861, 865 (1996) (holding when one provision does not include a right that is included in a related provision, a right will not be implied when it does not exist); *Est. of Guide v. Spooner*, 318 S.C. 335, 338, 457 S.E.2d 623, 624 (Ct. App. 1995) (noting that a "provision expressly applie[d] to a 'formal testacy or appointment proceeding commenced in this state' as opposed to an informal proceeding" because "[i]t is reasonable to assume that if the legislature had intended the statute to apply to both formal and informal proceedings, it would have said so either by stating that it applied to any testacy or appointment proceeding, or by expressly including informal proceedings in the first sentence").

disfigurement, or protracted loss or impairment of the function of a bodily member or organ." S.C. Code Ann. § 16-11-430(2). The language used throughout the Act demonstrates that its provisions do not contemplate non-human entities as a "person" under its terms. The language used by the legislature is rooted in the human experience and explicitly includes human nouns and pronouns such as "themselves," "their families," along with gendered terminology such as "he," "his," and "him," which follow the term "person" in pertinent subsections. These terms are completely inapplicable to entities such as corporations which cannot have bodies, organs, families, or genders. Black's Law Dictionary defines "person" as "[a] human being," or "[t]he living body of a human being." PERSON, Black's Law Dictionary (12th ed. 2024).[6]

Limiting the scope of a "person" to natural persons is supported by the General Assembly's use of human-coded terminology throughout the Act. For example, the intent provision recognizes that "***a person's home*** is ***his*** castle and to extend the doctrine to include an occupied vehicle and ***the person's*** place of business." S.C. Code Ann. § 16-11-420(A) (emphasis added). The General Assembly found that it is proper for "law abiding citizens to protect ***themselves***, ***their families***, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of ***themselves*** and others." *Id.* § 16-11-420(B). Additionally, "***persons residing in or visiting*** this State have a right to expect to remain unmolested and safe within ***their homes***, businesses, and vehicles" and "***no person or victim of crime*** should be required to surrender ***his personal safety*** to a criminal, ***nor should a person or victim be required to needlessly retreat*** in the face of intrusion or attack." *Id.* §§ 16-11-420(D)-(E).

[6] Similarly, "self-defense" is defined as "[t]he use of force to protect oneself, one's family, or one's property from a real or threatened attack." SELF-DEFENSE, Black's Law Dictionary (12th ed. 2024). "Generally, a person is justified in using a reasonable amount of force in self-defense if he or she reasonably believes that the danger of bodily harm is imminent and that force is necessary to avoid this danger." *Id.*

The General Assembly's use of human-coded language in the Act clearly indicates its intent to provide the protections of the Act directly to a natural person who engaged in the conduct defined therein. Only a natural person can be a victim of death or great bodily injury in this context. "Since there is a presumption that a given term is used to mean the same thing throughout a statute, a presumption surely at its most vigorous when a term is repeated within a given sentence." *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (citation omitted). "[T]he language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Sparks*, 406 S.C. at 128, 750 S.E.2d at 63. The statutory context here strengthens—not undermines—the conclusion that the General Assembly intended to create protections for natural persons alone. Notably, the Act's provisions do not draw a distinction between the class of actors (*i.e.*, the defendant) that potentially could use deadly force—a "person"—and the class of victims against whom the deadly force is needed to prevent great bodily injury or death—"another person." *See* S.C. Code Ann. § 16-11-440(A) ("***A person*** is presumed to have a reasonable fear of imminent peril of death or great bodily injury to ***himself*** or ***another person*** when using deadly force that is intended or likely to cause death or great bodily injury to ***another person***.") (emphasis added).

The provisions of the Act clearly provide that only a "person" can be entitled to immunity. There is no reasonable textual support for the argument that non-human entities, such as Respondent Green's, qualify as a person under the Act to be eligible for immunity. As addressed above, the Act only authorizes immunity grated to "a *person*" who uses deadly force. S.C. Code Ann. § 16-11-440. Any argument that corporations are natural "persons" for purposes of the Act as opposed to "artificial persons" makes no sense in light of the statutory context and what the Act purports to protect. Textually and literally, only a natural person can use deadly force against another person. Corporations and non-human entities cannot act in self-defense, they cannot take

up arms, and cannot be imprisoned, thus, there is no grounds to support a finding that the legislature intended a "person" under § 16-11-450 to mean anything other than natural persons.

Therefore, at a minimum, dismissal of Appellant's action against Respondent Green's on the basis of derivative immunity was improper because Respondent Green's is precluded from eligibility under the Act entirely.

II. Even if Derivative Immunity is Cognizable Under the Act, Dismissal at the Rule 12(b)(6) Stage was Erroneous.

Appellant maintains that neither the plain text of the Act nor caselaw supports application of derivative immunity to a third party, and particularly, a non-human third party. However, even assuming, *arguendo*, that the Act permits application of derivative immunity, dismissal of the action at the Rule 12(b)(6) stage was error.

First, because this is a novel issue under South Carolina law, Appellant should have been afforded the opportunity for discovery. Second, even if the Act supports the possibility of derivative immunity, Respondents and the trial court failed to follow the prescribed procedure for filing a pretrial motion and requesting an immunity hearing to allow an independent determination of Respondents qualifications for immunity. Alternatively, absent an independent immunity hearing, the question of whether derivative immunity *should have applied* to Respondents in this case was a factual determination that should have been left to the jury. Accordingly, the lower court's dismissal was error and is ripe for reversal.

A. Extending immunity derivatively to third parties under the Act is a novel issue which should have proceeded to discovery.

"On appeal from the dismissal of a cause pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the complaint in a light

most favorable to the nonmovant and determine if the 'facts alleged and interferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.'" *Id.* (quoting *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001)). "If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006).

Viewing the facts as alleged in the Complaint in the light most favorable to the Appellant, Appellant sufficiently stated facts to constitute causes of action for negligence, gross negligence, negligent supervision, negligent entrustment, wrongful death, and survival. As explained above, the lower court's sole basis for barring Appellant's claims was application of derivative immunity to Respondents pursuant to the Act. By all accounts, it appears that the lower court is the first court in this State to have found that the Act supports application of derivative immunity to third parties. (*See* R. 91, Order, at 3 ("The question of whether PPPA immunity can extent to persons beyond the individual granted immunity for his use of lethal force is a matter of first impression for this Court."); R. 93, *id.* at 5 ("[T]his Court treats the issue of derivative immunity and the questions of its existence and application as matters of first impression and does not place any reliance on [*State v. Daniel*] *Calderon* [, No. 2018-001707, 2021 WL 4077014 (S.C. Ct. App. Sept. 8, 2021] in this opinion.").)

Because application of derivative immunity to third parties and non-actors under the Act is a novel issue under South Carolina law, the Appellant should have been given the benefit of the assumption that immunity did not apply to Respondents, and accordingly, should have received the benefit of discovery in this matter. *See B&A Dev., Inc. v. Georgetown Cnty.*, 361 S.C. 453,

462, 605 S.E.2d 551, 555 (Ct. App. 2004) ("As a general rule, our courts are reluctant to decide important questions of novel impression on a motion to dismiss before the parties have had an opportunity to fully develop the factual record." (citing *Evans v. State*, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001))); *Tyler v. Macks Stores of South Carolina, Inc.*, 275 S.C. 456, 459, 272 S.E.2d 633, 634 (1980) ("A novel issue . . . is best decided in light of the testimony to be adduced at trial."). Because Appellant has not been afforded this opportunity, the Court should reverse and remand the matter to allow the parties to develop the record through discovery.

B. Respondents and the circuit court failed to follow required procedures for a pretrial immunity determination.

The circuit court also erred by granting Respondents' motion to dismiss where they failed to follow the correct procedure for raising immunity. In order to obtain immunity under the Act, Respondents were required to file a pretrial motion requesting an immunity hearing before the trial court. This did not occur. Instead, Respondents avoided the burdens associated with an immunity hearing by couching their immunity argument in a motion to dismiss pursuant to Rule 12(b)(6). There, Respondents alleged derivative entitlement to the immunity granted to Yousef individually as the person who used deadly force against Wilson. Rather than requiring Respondents to proceed through the recognized immunity procedure, the trial court granted Respondents motion to dismiss, finding that Respondents received the derivative benefit of Yousef's immunity. This was a manifest error warranting reversal and remand by this Court.

Section 16-11-450 provides immunity to persons found to be justified in using deadly force under the Act's provisions. *See State v. Cervantes-Pavon*, 426 S.C. 442, 827 S.E.2d 564 (2019). "Circuit courts utilize pretrial hearings to determine whether a defendant is entitled to immunity under the Act, employing a preponderance of the evidence standard." *Id.* The trial court must sit as the fact-finder at the hearing, weigh the evidence presented, and reach a conclusion under the

Act. *Id.* 426 S.C. at 452 n. 4, 827 S.E.2d at 569 n.4 ("While the Act does not require a written order upon an immunity determination, specific findings of fact and conclusions of law are critical to reviewing courts, particularly given the gravity of the circumstances these cases necessarily involve."). Moreover, the trial court "in announcing its ruling, should at least make specific findings on the elements on the record." *State v. Glenn*, 429 S.C. 108, 123, 838 S.E.2d 491, 499 (2019).

Thus, to receive immunity under the Act, defendants must follow the same pretrial procedure regardless of whether they are facing criminal or civil liability. Although the Act is silent as to the procedure to be used when seeking immunity, South Carolina's courts have held that a party claiming immunity must first file a motion requesting the trial court conduct a pretrial determination immunity hearing. *Curry*, 406 S.C. at 370, 752 S.E.2d at 266; *State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). Additionally,

> To warrant immunity, a movant must show he was without fault in bringing on the difficulty, he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, and a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. He may also show that he actually was in imminent danger and the circumstances would have warranted a man of ordinary firmness and courage to strike the fatal blow to save himself from serious harm or death. Section 16-11-440(C) provides the movant has no duty to retreat if, at the time of the attack, he was in a place where he has a legal right to be.

Cervantes-Pavon, 426 S.C. at 449, 827 S.E.2d at 568 (citations omitted).

The requirement for a pretrial motion and immunity hearing exists equally for both criminal and civil cases. "[B]ased on our supreme court's interpretation of the Act in criminal proceedings, the only way immunity under the Act can be meaningfully enforced in a civil action is to require individuals seeking immunity to file a pretrial motion." *Singletary v. Shuler*, 433 S.C. 600, 608, 861 S.E.2d 591, 595 (Ct. App. 2021). When considering the underlying facts of a defendant's

motion for immunity under the Act, the trial court must "necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. This includes all elements of self-defense, save the duty to retreat." *Curry*, 406 S.C. at 371, 752 S.E.2d at 266. Moreover, while the Act may be considered "offensive" in the sense that the immunity operates as a bar to prosecution, "such immunity is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence." *Id.* at 372, 752 S.E.2d at 267. As outlined in *Shuler*, in order to obtain immunity under the Act, Respondents were first required to file a pretrial motion requesting an immunity hearing before the circuit court, which did not occur.

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which appellate courts review [for] abuse of discretion[.]" *State v. Ford*, 439 S.C. 261, 270–71, 886 S.E.2d 710, 715 (Ct. App. 2023), *reh'g denied* (May 18, 2023) (cleaned up) (citing *Cervantes-Pavon*, 426 S.C. at 449, 827 S.E.2d at 567-68). In determining whether an individual is entitled to immunity under the Act, the circuit court "must make specific findings that support its immunity decision." *Id*.

Even assuming hypothetically that the circuit court's hearing on Respondents' motion to dismiss was a procedural substitute for the immunity hearing required by case law, the circuit court's findings are still deficient. In its order, the circuit court failed to evaluate any of the elements of self-defense as related to Respondent Green's and Respondent Yousef. Because a failure to consider these elements constitutes an abuse of discretion, the circuit court's grant of immunity to Respondents was error and must be reversed. *See Glenn*, 429 S.C. at 123, 838 S.E.2d at 499 (reversing the circuit court and finding that a failure to make specific determinations on the elements of self-defense was reversible error); *id*. (citing *Cervantes-Pavon*, for the proposition that

an immunity ruling must be based solely on the evidence before the court. 426 S.C. at 452, 827 S.E.2d at 569).

A person is justified in using deadly force in self-defense when:

> (1) The defendant was without fault in bringing on the difficulty;
> (2) The defendant ... actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
> (3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief ...; and
> (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011). Here, however, the record is devoid of any consideration of these elements as they pertain to Respondents. A cursory review of the limited record before the circuit court demonstrates that Respondents cannot meet the burden of proving even the first of these elements. Respondent Mahmoud Yousef provided his nephew, who was unlicensed and therefore was statutorily barred from carrying a concealed weapon, with the firearm that killed Wilson. Respondents employed Yousef, who was in the United States on a temporary visa, possibly in violation of federal law governing non-immigrant employment, gave Yousef ready access to the firearm, again possibly in violation of federal law governing access to firearms by non-immigrants, and made Yousef work as a clerk in the store alone when Respondent Yousef knew that his nephew was uneasy being at the store due to a prior robbery. Based on the record before this Court and the circuit court, these facts preclude a finding of lawful self-defense because Respondents and Yousef: (1) created the dangerous situation by arming Yousef at work with a machete and a firearm; and (2) were potentially not acting lawfully at the time of Wilson's death by employing a non-immigrant alien in this manner and giving him access to a firearm.

Because of the early posture of this case, the Court should reverse and remand so that the parties can conduct discovery to find clear answers to these outstanding questions.

C. Whether derivative immunity applied in this case was a factual determination that should have been left to the jury.

Even if the Act permits granting derivative immunity to a third parties generally, whether derivative immunity ***should have applied*** to Respondents in this case is a separate, factual determination that should have been made by the jury. Instead, the determination was erroneously made by the lower court. *See Watford v. South Carolina State Highway Dep't*, 269 S.C. 130, 133, 236 S.E.2d 558, 559 (1977) ("A trial judge may not invade the province of the jury or substitute his verdict for theirs." (citing *Turner v. Carey*, 227 S.C. 298, 87 S.E.2d 871 (1955)).

The order granting immunity to Yousef does not discuss application of immunity to Respondents. Indeed, the order granting immunity is strictly limited to the immunity applicable to Yousef pursuant to the Act. (*See* R. 54-55, Immunity Order, Exhibit A to Defendants' Memorandum, at 8, 9 (finding that *Yousef* "is entitled to immunity under the provisions of the [Act]").) The lower court, in turn, took this order and, seemingly without any binding legal support, found that the immunity provided to Yousef pursuant to the Act also applies to Respondents, and pursuant to the immunity, Appellant's claims against Respondents were barred and should be summarily dismissed.

Thus, not only did the lower court find that the Act supports application of derivative immunity to third parties—a novel legal proposition under South Carolina law—but it also found that the application of derivative immunity was ***appropriate*** in this case. Stated differently, the lower court conducted a ***factual*** assessment and made a ***factual*** determination regarding the applicability of derivative immunity in this action. (*See* R. 95, Order, at 7 ("[Mr.] Yousef's grant of absolute immunity under the Act must also bar any civil prosecution of his uncle and his uncle's

store[.]").) Whether the facts supported application of derivative immunity in this matter—i.e. whether the party claiming derivative immunity is sufficiently related to the incident and the original grant of immunity—was a factual determination that should have been determined by the jury.

Moreover, the specific causes of action brought by Appellant for negligence, gross negligence, negligent supervision, and negligent entrustment are centered on questions of fact which must be resolved by a jury. *See e.g., Midland Mortg. Corp. v. Wells Fargo Bank, N.A.*, 926 F. Supp. 2d 780, 787 (D.S.C. 2013) ("Whether a defendant breached its duty of care is a question of fact."); *Player v. Thompson*, 259 S.C. 600, 606, 193 S.E.2d 531, 533 (1972) ("Proximate cause is normally a question of fact for determination by the jury."); *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 144, 638 S.E.2d 650, 661 (2006) ("In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury.").

"The law rather forbids [the] court [from] assuming to take upon itself the powers, duties, rights, and privileges of a jury." *Anderson v. Aetna Cas. & Sur. Co.*, 175 S.C. 254, 282, 178 S.E. 819, 829 (1934). South Carolina law is exceptionally clear that "[t]he jury and the trial court each have distinct roles and separate responsibilities . . ." with "[t]he jury serv[ing] as fact finder and . . . charged with the duty of weighing the evidence admitted at trial and reaching a verdict." *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010). On the other hand, the trial court "is charged with the duty of determining issues of law[.]" *Id.* Accordingly, "[i]f triable issues exist, those issues must go to the jury." *Mulherin–Howell v. Cobb*, 362 S.C. 588, 608 S.E.2d 587 (Ct. App. 2005). In conducting the factual analysis necessary to apply derivative immunity in this case, the lower court exceeded the authority of its role and invaded the province of the jury. Accordingly, the lower court's dismissal should be reversed.

III. The Circuit Court's Dismissal of Appellant's Claims Against Respondents is Inconsistent with Similar Precedent.

A. Appellant's claims against Respondents are as independent tortfeasors and Yousef's immunity is not applicable.

As argued above, the fact-specific allegations against Respondents include claims for negligence, gross negligence, wrongful death, survival, negligent entrustment, and negligent supervision. (*See generally* Compl.; R. 3.) Even if the Court were to find that Yousef's immunity was applicable to Respondents, Respondent Yousef was not present at the scene of the killing and the acts that Appellant alleges form the basis of these claims predate any facts that were considered in Yousef's immunity hearing. Thus, the circuit court erred when it retroactively applied the immunity generated from the events that took Wilson's life and muddled it with the events that Respondents undertook in the time leading up to Wilson's death.

Though an unappealed ruling becomes law of the case, it only becomes law of subsequent proceedings in *that* case, and are not blanketly applicable to additional, potential, first-in-time tortfeasors. *See E. Cherry Grove Co., LLC v. State*, 443 S.C. 617, 631, 905 S.E.2d 421, 429 (Ct. App. 2024), *reh'g denied* (Sept. 16, 2024) ("The law of the case doctrine ... applies only to subsequent proceedings in the same litigation following an appellate decision."); *Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 411 S.C. 506, 524, 769 S.E.2d 453, 463 (Ct. App. 2015) (finding that law of the case based on an unappealed ruling in a collateral case did not apply). The doctrine applies when a ruling or order determines a substantial right with finality but does not affect outstanding questions that the ruling left unanswered. *Id.*; *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 572, 776 S.E.2d 397, 403 (Ct. App. 2015) ("[P]rior adjudication does not preclude consideration on a subsequent appeal of questions expressly left open or reserved by the court.").

Here, no substantive rights of the Respondents have been decided by the prior criminal case and the circuit court readily acknowledged that the question of derivative immunity remained outstanding. (Order, at 5; R. at 93.) Respondents cannot rely on the unappealed grant of immunity in Yousef's collateral criminal proceeding to shield them from liability for claims that are independent of Yousef's actions that took Wilson's life, and which are based on theories of liability not decided by the court's Order. Moreover, Respondents' theory of dismissal based on derivative immunity from the shooting fails to consider that Appellant's complaint raised entirely distinct causes of action tied to Respondents' separate and independent duties and obligations under the law. In comparable cases involving claims of immunity, South Carolina's courts have found early dismissal of distinctive claims to be erroneous.

In *Woodell by Allen v. Marion Sch. Dist. One*, 307 S.C. 297, 298, 414 S.E.2d 794 (Ct. App. 1992), a student brought a gross negligence action against the Marion One School District after the student was assaulted at school by another student during school hours. The complaint alleged that the district was grossly negligent for failing to supervise the student and her attacker. *Id.* The school district moved for dismissal pursuant to Rule 12(b)(6), SCRCP, arguing that the South Carolina Tort Claims Act at section 15-78-60(2) immunized the district from liability for injuries caused by a third party's criminal actions. *Id.* The Court of Appeals reversed the lower court's dismissal, distinguishing that the complaint did not seek to "pin liability on the school district because of the alleged criminal action of the other student" but rather, "it focuse[d] on the school district's alleged gross negligence in supervising Woodell and the student who allegedly attacked Woodell." *Id.* Ultimately, the Court held that whether the student's loss "resulted from the school district's alleged grossly negligent supervision of Woodell and the other student or from the

alleged criminal action of the other student is not a question that the trial court should have decided on a motion to dismiss." *Id.*

Similarly, in *Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d 546 (1990), the South Carolina Supreme Court affirmed the denial of the auditorium's motion for a directed verdict based on its claim to immunity under S.C. Code Ann. § 15-78-60(20). The Court held,

> Here, respondent's complaint alleged appellant and its employees were negligent in adequately securing and maintaining the premises during the concert and this negligence created a reasonably foreseeable risk of such third party conduct. **Respondent's complaint did not allege appellant was liable because of the criminal act of a third party**. Consequently, Section 15–78–60(20) would not operate to exonerate appellant of liability for its own conduct.
>
> **Appellant cannot successfully defend that respondent's injuries were caused by the wrongful criminal act of a third party, where the very basis upon which appellant is claimed to be negligent is that appellant created a reasonably foreseeable risk of such third party conduct**. Consequently, the trial judge did not err in refusing to dismiss the action.

Id. at 246–47, 391 at 548–49. (emphasis added).

The complaint in this case is similar to those at issue in *Woodell* and *Martin*. Appellant does not attempt to hold Respondents liable for the criminal act of shooting of Wilson, instead it seeks to hold Respondents liable for ***Respondents'*** own negligence and gross negligence in the supervision and entrustment of weapons to Yousef during the scope of his employment. The claims and allegations in Appellant's complaint apply to Respondents irrespective of the criminal shooting. Respondents, as a business and business owner, owe certain duties and obligations under South Carolina law at all times. A principal who puts an agent in a position which enables the agent, while apparently acting within his authority, to commit a tort upon a third person is subject

to liability to that third person for the tort. *E.A. Prince & Son, Inc. v. Selective Ins. Co. of Se.*, 818 F. Supp. 910, 914 (D.S.C. 1993) (citing Restatement (Second) of Agency § 261 (1958)). Appellant merely seeks to hold Respondents accountable for their own liability, and consistent with *Martin* and its progeny, dismissal of Appellant's direct claims was improper. *See also Jeffords v. Lesesne*, 343 S.C. 656, 541 S.E.2d 847 (2000) (holding the trial court erred in directing a verdict on the basis of statutory immunity where factual issues were presented as to the negligence of the defendant in creating a reasonably foreseeable risk of harm); *S.H. v. Bd. of Trustees of Colleton Cnty. Sch. Dist*., No. 2:22-CV-243-RMG, 2022 WL 2276575 (D.S.C. June 22, 2022) (declining to dismiss plaintiff's state law claims holding, "The Supreme Court of South Carolina has permitted claims somewhat analogous to Plaintiff's to proceed where 'the very basis upon which appellant is claimed to be negligent is that appellant created a reasonably foreseeable risk of such third party conduct.").

"The modern doctrine of *respondeat superior* makes a master liable to a third party for injuries caused by the tort of his servant committed within the scope of the servant's employment." *Froneberger v. Smith*, 406 S.C. 37, 52, 748 S.E.2d 625, 633 (Ct. App. 2013) (quoting *S.C. Ins. Co. v. James C. Greene & Co.*, 290 S.C. 171, 179, 348 S.E.2d 617, 621 (Ct. App. 1986)). When determining whether the tortious acts of an employee can be attributable to the employer, and subsequently whether immunity of the employee would absolve the employer of liability, the court must first determine whether the tortfeasor was acting within the scope of his employment. *Id.* This requires the court to consider whether the tortious act was "reasonably necessary to accomplish the purpose of the [employee's] employment and was done in furtherance of the [employer's] business." *Id*.

Applicability of derivative liability and immunity in this case requires a fact intensive evaluation of whether Yousef's actions during the episode which led to Wilson's death were in within the scope of his (questionable) status as an employee; and if so, whether his fight with Wilson, where he brandished not only a firearm, but also a taser and a machete while shouting at Wilson, was in furtherance of Respondents' business. Because the circuit court failed to consider any of these requirements when it applied derivative immunity to Respondents, this case must be remanded so that proper factual evaluations can take place before either the circuit court in an independent immunity hearing or be sent to the jury as the ultimate finders of fact.

CONCLUSION

Based on the foregoing, Appellant respectfully requests this Court reverse the circuit court and remand this case to proceed with discovery and disposition on the merits.

Respectfully submitted,

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This 12th day of May 2025.