THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
William P. Keesley, Circuit Court Judge

Appellate Case No. 2023-000442
Case No. 2021-CP-02-02323

Mark Gregory Thompson and Jane Page Thompson, individually and behalf of all those similarly situated, ... Appellants,

v.

Clay Killian, in his official capacity as Aiken County Administrator, Jason Goings, in his official capacity as Treasurer of Aiken County, Aiken County Council, Aiken County, City of Aiken, Aiken Council, and Stuart Bedenbaugh, in his official capacity as City Manager of Aiken, ... Respondents.

RESPONDENTS' RETURN TO APPELLANTS' PETITION FOR REHEARING

The Appellants Mark Gregory Thompson and Jane Page Thompson have petitioned this Court for a rehearing of the published decision in *Thompson v. Killian,* Op. No. 28305 (S.C. S.Ct. filed November 5, 2025). The Appellants seek a rehearing limited to the dismissal of their unjust enrichment cause of action based on the bar of sovereign immunity for equitable claims.

In seeking a rehearing on that singular issue, the Appellants rely exclusively on the dissent authored by Justice Hill as joined by Justice James. Based on a historical analysis, the

dissent disputes whether sovereign immunity was reinstated in full with the enactment of the South Carolina Tort Claims Act in 1986.

In particular, the dissent traces the history of sovereign immunity and posits that the doctrine of sovereign immunity was subject to "exceptions" under English law, and hence, those exceptions were also adopted as part of South Carolina jurisprudence based on the reception statute. That analysis presents two distinct issues pertinent to the present litigation. First, while the Appellants are quick to adopt this analysis in their petition for rehearing, such an argument based on the reception statute was never asserted by the Appellants in the court below nor in the Appellants' arguments to this Court. Hence, the argument should not be deemed preserved for judicial review under even the most liberal of applications of our preservation rules. Second, however, the dissent's own analysis points out that the sovereign was still required to act on a "petition of right," which was, in essence, a request that the sovereign consent to be sued and waive its own immunity. *See*, Slip Op. at 17 (Hill, J., dissenting) ("Historically, English subjects could file petitions of right in chancery courts against their Sovereign to persuade him to consent to equitable courts' authority"). Despite the reception statute, there is no historical basis in South Carolina law for a similar "petition of right" to be filed against the sovereign to sue in a court of equity. And certainly, in the present case, there has been no "petition of right" or its equivalent filed against the governmental entities. For these reasons, the reliance on the reception statute and any historical precedent from pre-American independence England does not mandate a reversal of the majority's ruling.

Additionally, the dissent, as now eagerly argued by the Appellants, concludes that there is no historical precedent in our case law that supports the majority's decision that equitable claims seeking monetary relief are barred by sovereign immunity, that is, until such time as the General

Assembly provides for a waiver. *See*, *Sandel v. State*, 126 S.C. 1, 119 S.E. 776, 793 (1922) (recognizing that "[s]tatutes in derogation of the sovereignty of the state must be strictly construed, and a waiver of immunity from liability must be clearly expressed"). However, the historical precedent is there; the Appellants and the dissent just choose to re-interpret it. As the majority is correct to recognize, the historical background has been well stated by this Court in its 1995 decision in *Murphy v. Richland Memorial Hospital*, 317 S.C. 560, 455 S.E.2d 688 (1995). This Court wrote:

> Historically, all persons were banned from bringing tort claims against governmental entities. The doctrine of sovereign immunity began to come under fire as being "archaic and outmoded." The legislature subsequently passed various exceptions to the doctrine. We noted, however, the exceptions reflected "a scattered patchwork of sovereign liability that lack[ed] continuity, logic or fairness." Thus, in *McCall* we abolished the doctrine of sovereign immunity. ***In response to our decision in McCall, the legislature implemented a comprehensive act providing for the logical disposition of governmental liability. The Act first completely restores sovereign immunity.*** The Act then provides specific waivers and limitations on actions against governmental entities. Thus, the Tort Claims Act is a limited waiver of governmental immunity.

455 S.E.2d at 690. (Emphasis added) (Citations omitted).

While the dissent reasons that the provisions of the Tort Claims Act are strictly limited to tort law and have no further application, this Court has ruled otherwise, first in *Murphy* and again in the majority decision in this case. The majority here has not only correctly applied the history articulated in *Murphy*, but more importantly, has given effect to specific language in Section 15-78-20, which provide the legislative findings and the declarations of public policy.

First, as to the history, this Court in *Murphy* recognized that in response to the abrogation of sovereign immunity in *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985), the General Assembly enacted the Tort Claims Act in 1986. With the Act, the legislature first reinstated

sovereign immunity in full. In explicit terms, this Court stated, "The Act first completely restores sovereign immunity." *Murphy*, 455 S.E.2d at 690. This Court did not refer to sovereign immunity "for torts only." Accordingly, the General Assembly replaced common law sovereign immunity -- which was abrogated prospectively in order to give the General Assembly an opportunity "to address any problems or hardships created by the abrogation of sovereign immunity," *McCall*, 329 S.E.2d at 742 – with statutory sovereign immunity.

To that end, the General Assembly reinstated sovereign immunity and declared "the public policy of the State of South Carolina [to be] that the State, and its political subdivisions, are only liable *for torts* within the limitations of this chapter and in accordance with the principles established herein." S.C. Code Ann. § 15-78-20(a). (Emphasis added). The General Assembly did not, however, state that "sovereign liability" extended to non-torts. In fact, the General Assembly stated its intent as follows: "The General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, *only to the extent provided herein*." S.C. Code Ann. § 15-78-20(b). (Emphasis added). That was immediately followed with the pronouncement that "[a]ll other immunities applicable to a governmental entity, its employees, and agents are expressly preserved." *Id*.

The majority's well-reasoned opinion on this issue did not attempt to disregard the historical analysis in *Murphy* or the plain meaning of the language used in Section 15-78-20(b). As the majority writes, "[t]his framework restored sovereign immunity except where the General Assembly provides an exception." *See,* Slip Op. at 12. The majority, like the *Murphy* Court, recognizes that the Tort Claims Act is "a comprehensive act providing for the logical disposition of governmental liability." *Murphy*, 455 S.E.2d at 690. *See also*, Slip Op. at 12.

While the dissent and the Appellants attempt to read the provisions of Section 15-78-20 as limited to "torts," that quite simply is not a fair interpretation. In addition to the provisions discussed above and relied on by the majority to find that sovereign immunity was restored in full, there are other provisions that clearly are intended to apply beyond the realm of torts. First and foremost, as the trial court correctly recognized, the General Assembly included "an explicit carveout for actions arising in contract." (R. 30). Section 15-78-20(d) reads: "Nothing in this chapter affects liability based on contract nor does it affect the power of the State or its political subdivisions to contract." S.C. Code Ann. § 15-78-20(d). This demonstrates, as the trial court notes, that "the General Assembly considered the impact upon other remedies, including equitable remedies, in making its determination to reestablish sovereign immunity." (R. 30). The majority of this Court likewise agreed that "[o]ne exception allowed contract claims." *See*, Slip Op. at 12. There are other provisions that also have general applicability beyond simply tort cases. For instance, Section 15-78-20(e) states: "Nothing in this chapter is construed as a waiver of the state's or political subdivision's immunity from suit in federal court under the Eleventh Amendment to the Constitution of the United States nor as consent to be sued in any state court beyond the boundaries of the State of South Carolina." S.C. Code Ann. § 15-78-20(e). Thus, that provision reinstates or otherwise re-establishes other forms of sovereign immunity, namely Eleventh Amendment immunity applicable to suits against the state in federal courts and interstate sovereign immunity applicable to barring governmental entities of this state from being haled into foreign courts. Those immunities are not limited to tort cases. Instead, they apply to the full gamut of causes of action, including non-torts. Finally, Section 15-78-20(f) is also intended to have a general applicability beyond the realm of torts. That provision states: "The provisions of this chapter establishing limitations on and exemptions to the liability of the State,

its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the State." S.C. Code Ann. § 15-78-20(f). By its express language, that pronouncement is not limited to "tort liability" but to all governmental liability.

To that end, it should not be overlooked that Section 15-78-20(a) declares the public policy of the state with respect to the full range of "governmental liability." Section 15-78-20(a) states, in part, as follows: "The General Assembly further finds that each governmental entity has financial limitations within which it must exercise authorized power and discretion in determining the extent and nature of its activities. Thus, while total immunity from liability on the part of the government is not desirable, … neither should the government be subject to unlimited nor unqualified liability for its actions." S.C. Code Ann. § 15-78-20(a). Again, that pronouncement is not limited to tort liability alone. In sum, the majority is correct in its analysis of the sovereign immunity issue. The operative provisions of Section 15-78-20 are not limited to tort cases; they were enacted and intended in response to *McCall* and to reinstate sovereign immunity and then to provide for a "logical disposition of governmental liability." That logical disposition, as is the prerogative of the General Assembly, recognizes absolute sovereign immunity still exists for many causes of action, such as nuisance claims, actual fraud claims, many intentional torts where an element is an intent to harm such as sexual assault claims, claims involving crimes of moral turpitude, claims where the employees are acting outside the scope of their official duties, ordinary negligence claims against schools and prisons, and the list goes on. That is naming just a few. As pertinent to the case at bar, sovereign immunity also applies to equitable claims seeking monetary relief, such as unjust enrichment or quantum meruit. Again, the determination of which claims are subject to immunity falls within the prerogative of the

General Assembly, until that immunity is waived by legislative enactment. In this case, as the majority correctly recognizes, equitable claims seeking monetary relief, such as the Appellants' unjust enrichment claim, are barred by sovereign immunity.

Moreover, the Appellants and the dissent again make the point that there are reported decisions in this State where claims for unjust enrichment were allowed to proceed against the governmental entities with no suggestion that sovereign immunity barred such claims, or as the dissent puts it, "without a whisper about sovereign immunity." *See*, Slip Op. at 102 (Hill, J., dissenting). However, that analysis is flawed. It is axiomatic that an appellate courts' silence on an issue does not mean the issue does not exist or is not meritorious. As former Chief Judge Alex Sanders so aptly stated, "appellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *State v. Austin*, 306 S.C. 9, 409 S.E.2d 811,817 (Ct. App. 1991). A review of the cases cited by the Appellants and the dissent does not reflect that the defense of sovereign immunity was even raised, let alone addressed, on appeal in any of those cases. It is also well-settled that sovereign immunity is an affirmative defense, which if not raised, is waived. *See*, *Washington v. Whitaker*, 317 S.C. 108, 451 S.E.2d 894, 898 (1994) ("sovereign immunity is an affirmative defense that must be pled"). Therefore, if sovereign immunity was not raised in the cases cited by the Appellants and the dissent, then the appellate courts could not have addressed an unpled and waived defense. To suggest that the appellate courts implicitly ruled that an unjust enrichment claim is *not* barred by sovereign immunity simply lacks merit. In fact, as this Court and the Court of Appeals have acknowledged, "[i]t is an error of law for a court to decide a case on a ground not before it." *Grazia v. South Carolina State Plastering, LLC*, 390 S.C. 562, 703 S.E.2d 197, 204, n.6 (2010); *City of North Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 599 S.E.2d 462, 464 (Ct. App. 2004).

Finally, as an alternative position, the Appellants ask this Court to address whether "equitable remedies," which they attempt to distinguish from "equitable claims," are barred by sovereign immunity. That presents a question of semantics. An equitable claim is one for which there is an equitable remedy. Nonetheless, sovereign immunity applies as a bar on equitable claims seeking monetary relief, even where that monetary relief is equitable in nature. Obviously, sovereign immunity does not bar a non-monetary equitable remedy such as an injunction from being entered.[1]

For the foregoing reasons, the Respondents oppose the grounds for rehearing as articulated by the Appellants in their petition and respectfully ask that the Court not grant a rehearing of Section V of its opinion.

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[1] To that point, the Appellants' reliance on equitable estoppel cases such as *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 692 S.E.2d 499 (2010), and *Grant v. City of Folly Beach*, 346 S.C. 74, 551 S.E.2d 229 (2001), is misplaced. While equitable estoppel has been described as a "cause of action," it has also been deemed a "doctrine" and a defense. To the extent equitable estoppel is asserted as a theory to make a monetary recovery, it would be barred by sovereign immunity. However, in the two cases cited by the Appellants, equitable estoppel was asserted against a governmental entity not for a monetary recovery but to estop the entity from enforcing a particular zoning classification in *Quail Hill* and from enforcing an order of a building official in *Grant*. Notably, *Grant* is an appeal from a zoning board and is not even a civil action. It should also be pointed out that sovereign immunity as a defense was not at issue in either case.

Respectfully submitted,

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