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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM RICHLAND COUNTY
Court of Common Pleas**

Honorable William A. McKinnon, Circuit Court Judge

Appellate Case No. 2023-001424

Case No. 2021-CP-40-01276

WANDA WHETSTONE,.....Appellant,

v.

STATE OF SOUTH CAROLINA, OFFICE OF THE GOVERNOR,.....Respondent.

PETITION APPENDIX

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S. C. SUPREME COURT

Opinion Nos. 3053, 3145
Filed October 4, 1999 and April 3, 2000

APPEAL FROM THE COURT OF COMMON PLEAS
FOR BERKELEY COUNTY

HONORABLE R. MARKLEY DENNIS, Jr., CIRCUIT COURT JUDGE
Civil Action No. 95-CP-10-1281

Gerald D. Wade, Jr.,

Respondent,

v.

Berkeley County, South Carolina
and John Doe,
of whom Berkeley County,
South Carolina, is
and John Doe, is

Petitioner
Respondent.

**APPENDIX TO PETITION
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gerald D. Wade, Jr.,

Appellant,

v.

Berkeley County, South Carolina and John Doe,

Respondents.

Appeal From Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 3053
Heard September 9, 1999 - Filed October 4, 1999

REVERSED and REMANDED

**George J. Kefalos, of George J. Kefalos, P.A., of
Charleston, for Appellant.**

**Stephen P. Groves, Joseph E. DaPore and Stephen L.
Brown, all of Young, Clement, Rivers & Tisdale; and
Bonum S. Wilson, III, of Pratt-Thomas, Pearce, Epting &
Walker, all of Charleston, for Respondents.**

ANDERSON, J.: In this negligence action, Gerald D. Wade, Jr., appeals from the trial court's order granting summary judgment to Berkeley County pursuant to the Tort Claims Act.¹ We reverse and remand.

¹S.C. Code Ann. § 15-78-10, *et seq.* (Supp. 1998).

WADE v. BERKELEY COUNTY

FACTS/PROCEDURAL BACKGROUND

On the morning of June 1, 1995, Bobby Joe Pierce was driving his personal vehicle to his job as an animal control officer with Berkeley County. While on the way, Pierce stopped to determine if a dead dog on the side of the road was wearing a collar. The night before, Pierce received a phone call from a woman who informed him the dog had been run over and was dead. According to Pierce, after resuming his trip to work, he was forced to drive into the left hand lane to avoid a John Doe driver who suddenly stopped in front of him. Pierce's car collided head on with Wade's vehicle.

Wade filed a negligence action against Pierce and the John Doe driver. In the initial complaint, Wade made no allegation concerning Pierce's employment with the County. In his deposition, Pierce testified he stopped to check on the dead animal because that was his job and he considered himself on the job at the time. Subsequently, Pierce's personal liability insurance carrier paid Wade \$13,000 in exchange for a Covenant Not to Execute Judgment. At the time of this payment, Wade had made no claim against Berkeley County.

Thereafter, Wade filed an amended complaint against Berkeley County, pursuant to the South Carolina Tort Claims Act, and John Doe as a result of the same accident. Pierce was not a named party in the amended complaint. Wade alleged Pierce was acting as an agent and servant of the County at the time of the accident. The County denied this allegation and averred as an affirmative defense the action was barred under S.C. Code Ann. § 15-78-70(d) (Supp. 1998), which addresses the effect of a judgment or settlement. The County filed a motion for summary judgment² based upon this section.

In granting the motion, the trial court held Berkeley County was entitled to summary judgment as a matter of law "since there was a prior settlement of Wade's personal injury claims between Wade and an alleged tortfeasor--employee (i.e., Pierce) for the same occurrence." The court concluded "[t]his settlement constitutes a complete bar to any further action by Wade against the relevant governmental entity--employer (i.e., Berkeley County) pursuant to S.C. Code Ann. § 15-78-70(d)."

²This case was previously before the Court in *Wade v. Berkeley County*, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998). In that opinion, this Court concluded Wade was not collaterally estopped by a prior Workers' Compensation finding from litigating the issue of whether the County employee, Bobby Joe Pierce, was acting within the course and scope of his employment when his vehicle collided with Wade's vehicle. We ruled a material issue of fact existed concerning Pierce's scope of employment and reversed the trial court's grant of summary judgment in favor of the County. The case is now before us pursuant to a second motion for summary judgment on a different ground.

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ISSUES

- I. Did the trial court err in ruling there was a full settlement between Wade and Pierce?
- II. Did the trial court err in granting summary judgment based on his conclusion the execution of the document constituted "a settlement of a claim" initiated under the Tort Claims Act?

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mosteller v. County of Lexington*, Op. No. 24992 (S.C. Sup. Ct. filed August 23, 1999)(Shearouse Adv. Sh. No. 28 at 13); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); Rule 56(c), SCRPC. In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998); *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, Op. No. 3005 (S.C. Ct. App. filed June 1, 1999)(Shearouse Adv. Sh. No. 20 at 22). If triable issues exist, those issues must go to the jury. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991); *Young, supra*.

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Mosteller, supra*. All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. *Vermeer, supra*. Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Id.* Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991).

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LAW/ANALYSIS³

I. EFFICACY OF SETTLEMENT DOCUMENTS UNDER SOUTH CAROLINA JURISPRUDENCE

Without a jury verdict, order of judgment, or confession of judgment, cases are disposed of by way of amicable disposition under the aegis and ambit of three recognizable legal documents effectuating the settlement: (1) general release; (2) covenant not to sue; and (3) covenant not to execute. The bench and bar have great concernment in regard to the avenues of disposition available to party litigants, especially in the proliferating multi-party litigation, such as product liability, professional malpractice, and construction litigation. Attorneys representing litigants subsumed in multi-party litigation oftentimes seek to extricate a party while the remaining parties litigate to an ultimate resolution. A cardinal principle inherent in the settlement process is the utilitarian use of the proper document to achieve the desired result, i.e., the salvation of the party from further liability or exposure. We analyze with exactitude the precedent governing the documents to achieve the ultimate goals of the parties.

A. General Release

The term "release" has been defined as the "relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced." 76 C.J.S. *Release* § 2 (1994). A release is an agreement providing that a duty owed to the maker of the release is discharged immediately. *Id.* See also Black's Law Dictionary 1289 (6th ed. 1990) (a release is a writing or oral statement manifesting an intention to discharge another from an existing or asserted duty). A release is contractual in nature. 76 C.J.S. *Release* § 2. Whether a particular agreement constitutes a release is to be determined from the intent of the parties. *Id.*

Under the common law, the release of one of multiple joint tortfeasors, regardless of the intention of the parties, released all. *Bartholomew v. McCartha*, 255 S.C. 489, 179 S.E.2d 912 (1971). In *Bartholomew*, the Court rejected this common law rule and held:

³We initially note there is a question of fact as to whether Pierce was acting within the course and scope of his employment with Berkeley County at the time of the accident. Wade asserts this factual dispute prevents the grant of summary judgment. If Pierce was not acting in the course and scope of his employment, then the County would have no vicarious liability under the Tort Claims Act. However, assuming Pierce was acting in the course and scope of his employment at the time of the accident, the court would still be required to determine the legal issue of whether Wade's action against the County was barred based upon § 15-78-70(d). Thus, this factual dispute is not material so as to prevent disposition by summary judgment.

WADE v. BERKELEY COUNTY

Being untrammelled by the ancient rule which, in our view, tends to stifle settlements, defeat the intention of parties and extol technicality, we adopt the view that the release of one tort-feasor does not release others who wrongfully contributed to plaintiff's injuries unless this was the intention of the parties, or unless plaintiff has, in fact, received full compensation amounting to a satisfaction.

Bartholomew, 255 S.C. at 492, 179 S.E.2d at 914. See also *Scott by McClure v. Fruehauf Corp.*, 302 S.C. 364, 396 S.E.2d 354 (1990) (release of one tortfeasor does not constitute release of others who contributed to plaintiff's injuries unless parties intended such a release or plaintiff received full satisfaction).

B. Covenant Not to Sue

The covenant not to sue was developed at common law to permit the release of one or more joint tortfeasors without affecting the covenantor's rights against the other joint tortfeasors. A covenant not to sue is a covenant by one who had a right of action at the time of making it against another person, by which he agrees not to sue to enforce such right of action. 76 C.J.S. *Release* § 4 (1994). "Such covenant does not extinguish a cause of action and does not release other joint tort-feasors even if it does not specifically reserve rights against them." *Black's Law Dictionary* 364 (6th ed. 1990). However, one tortfeasor is entitled to credit for the amount paid by another tortfeasor for a covenant not to sue. See *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967).

A covenant not to sue is not a release. 76 C.J.S. *Release* § 4. "The difference is one of intent and grows out of the construction placed on the terms of the instrument, since a covenant not to sue is not a present abandonment or relinquishment of a right or claim but merely an agreement not to enforce an existing cause of action, and, although it may operate as a release between the parties to the agreement, it will not release a claim against joint obligors or joint tort-feasors." *Id.* (Footnotes omitted). In the case of a release, there is an immediate discharge, whereas, in the case of a covenant not to sue, there is merely an agreement not to prosecute a suit. 66 Am. Jur. 2d *Release* § 2 (1973). It is nothing but a contract and should be so construed. *Id.*

In *Ackerman v. Travelers Indemnity Co.*, 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995), this Court discussed the genesis of the covenant not to sue:

"At common law, a valid release of one joint tort-feasor was usually a release of all the joint wrongdoers and was a bar to a suit against any of them for the same wrong. At the base of this rule was the theory that there could be but one compensation for the joint wrong. If the injured party was paid by one of the wrongdoers for the injury he had suffered, each wrongdoer being responsible for the whole damage, his cause of action was satisfied in exchange for a release,

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and he could not proceed against the others. Thus a release of one joint wrongdoer released all. But when the consideration received for the release was not full compensation for the injury, the purpose for the harsh rule did not exist. To allow for this, the covenant not to sue was developed."

Ackerman, 318 S.C. at 146-47, 456 S.E.2d at 413.

C. Covenant Not to Execute

A covenant not to execute "is a promise not to enforce a right of action or execute a judgment when one had such a right at the time of entering into the agreement." 76 C.J.S. *Release* § 4 (1994). It is merely a contract and not a release. *Id.* A covenant not to execute is distinguishable from a covenant not to sue in that the former is normally executed when a settlement occurs after the filing of a lawsuit, while the latter is entered into before a lawsuit is filed. *Id.*

South Carolina courts have recognized the distinctions between a release, a covenant not to sue, and a covenant not to execute. In *Poston by Poston v. Barnes*, 294 S.C. 261, 363 S.E.2d 888 (1987), the Supreme Court explained:

Other jurisdictions hold that a Covenant Not To Execute is not a satisfaction or a release and that its legal effect is similar to that of a Covenant Not To Sue because it does not operate to release other joint tortfeasors. A Covenant Not To Execute is a promise not to enforce a right of action or execute a judgment when one had such a right at the time of entering into the agreement. A Covenant Not to Sue and a Covenant Not to Execute are so closely akin that a major distinguishing factor is that the latter is normally executed when a settlement occurs after the filing of a lawsuit, while the former is entered into before a lawsuit is filed. In South Carolina when a Covenant Not To Sue has been entered into, usually the covenanting tortfeasor is no longer a party to the litigation.

Poston, 294 S.C. at 263-64, 363 S.E.2d at 889-90 (citations omitted).

The intention of the parties governs in determining whether an instrument is a covenant not to execute or a release. *Ackerman v. Travelers Indemnity Co.*, 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995). See also *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997) (to determine whether instrument is covenant not to execute or release, this Court looks to intention of parties).

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II. VALIDITY AND IMPACT OF DOCUMENT UTILIZED IN CASE *SUB JUDICE*

In exchange for the payment of \$13,000, Wade and Pierce executed a document entitled "Covenant Not To Execute Judgment." The document acknowledged Wade's damages exceeded the amount of liability insurance coverage available to Pierce from his personal insurance carrier. The covenant contained the following language:

3. That Gerald D. Wade, Jr. and Shirley M. Wade do hereby **promise and covenant** for themselves, their heirs, personal representatives, administrators, legal representatives and assigns, **not to execute** against Bobby Joe Pierce or Government Employees Insurance Company, their heirs, personal representatives, administrators, legal representatives, successors or assigns, **on any judgment** that may be attained by Gerald D. Wade, Jr. and Shirley M. Wade on account of any and all claims, demands, damages, costs or expenses, including, but not limited to, any medical or hospital expenses, loss of services, actions and causes of action, arising from any act, omission or occurrence or resulting or to result from the automobile accident which occurred on June 1, 1995, in Berkeley County, South Carolina, when Gerald D. Wade, Jr. was involved in a motor vehicle collision with a vehicle driven by Bobby Joe Pierce.

4. That, furthermore, Gerald D. Wade, Jr. and Shirley M. Wade do further **covenant and promise** that **if they should attain a judgment against Bobby Joe Pierce or Government Employees Insurance Company, they will not execute on said judgment against Bobby Joe Pierce or Government Employees Insurance Company** and that, upon a final determination of whether any underinsured motorist benefits will be paid, they and their attorney, George J. Kefalos, will cause the judgment to be marked and entered as satisfied.

....

10. That Gerald D. Wade, Jr. and Shirley M. Wade, Bobby Joe Pierce and Government Employees Insurance Company furthermore agree and understand that **this instrument is not intended as a release or discharge, nor as an accord and satisfaction with any person whomsoever, but only as a Covenant Not to Execute** against Bobby Joe Pierce and Government Employees Insurance Company, their heirs, personal representatives, administrators, legal representatives, successors and assigns, and is executed simply to purchase freedom from the threat of execution upon any judgment that may be attained against Bobby Joe Pierce or Government Employees Insurance Company including any judgment in the

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lawsuit filed in the Court of Common Pleas for Berkeley County, South Carolina, and assigned Case No. 95-CP-08-1281. (Emphasis added).

Based upon its language, we conclude the document executed by Wade and Pierce was intended to be a covenant not to execute as opposed to a settlement agreement, release, or covenant not to sue. The document evidences no intent to release others from liability and, in fact, contemplates further litigation against other tortfeasors. The instrument recognizes Wade was not fully compensated for his injuries. It contemplates Wade's pursuit of underinsured motorist coverage. Further, the agreement explicitly states it does not operate as a release or discharge. As such, the document is very similar to the documents found by the Court to be covenants not to execute in the cases of *Ackerman v. Travelers Indemnity Co.*, 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995), and *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997).

Wade is still entitled to seek a judgment against Pierce and Government Employees Insurance Company (GEICO). He merely agreed not to legally enforce the judgment. In fact, the covenant not to execute expressly reserves Wade's right to obtain a judgment against Pierce.

III. SOUTH CAROLINA TORT CLAIMS ACT-- "SETTLEMENT OF A CLAIM UNDER THIS CHAPTER"

The trial judge concluded Wade's covenant not to execute constituted a "settlement" under S.C. Code Ann. § 15-78-70(d) (Supp. 1998). We disagree.

Section 15-78-70(d) of the South Carolina Tort Claims Act provides:

A settlement or judgment in an action or a settlement of a claim under this chapter constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence.

A. Statutory Construction

When construing a statute, the primary function of the court is to ascertain the intention of the legislature. See *Lester v. South Carolina Workers' Compensation Comm'n*, 334 S.C. 557, 514 S.E.2d 751 (1999). A statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. *Davis v. NationsCredit Financial Servs. Corp.*, 326 S.C. 83, 484 S.E.2d 471 (1997). If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning. *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 508 S.E.2d 16 (1998); *City of Columbia v. A.C.L.U. of South Carolina, Inc.*, 323 S.C. 384, 475 S.E.2d 747 (1996). Where the terms of a statute are clear, the court must apply

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those terms according to their literal meaning. *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand its scope. *Durham v. United Companies Financial Corp.*, 331 S.C. 600, 503 S.E.2d 465 (1998). Where a statute is ambiguous, however, the Court must construe the terms of the statute. *Lester, supra*. Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law. *City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck*, 330 S.C. 371, 498 S.E.2d 894 (Ct. App. 1998).

If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. *The Lite House, Inc. v. J.C. Roy, Co.*, 309 S.C. 50, 419 S.E.2d 817 (Ct. App. 1992). Where the legislature elects not to define the term in the statute, courts will interpret the term in accord with its usual and customary meaning. *Adoptive Parents v. Biological Parents*, 315 S.C. 535, 446 S.E.2d 404 (1994). In construing a statute, the court looks to its language as a whole in light of its manifest purpose. *Adams v. Texfi Indus.*, 320 S.C. 213, 464 S.E.2d 109 (1995).

B. Covenant Not to Execute Did Not Constitute a "settlement of a claim under this chapter"

The phrase "under this chapter" in § 15-78-70(d) refers to the Tort Claims Act and modifies the prior "settlement" phrases. Thus, a "settlement or judgment in an action" under the Tort Claims Act or the "settlement of a claim" under the Tort Claims Act "constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence." However, in the instant case, there is no "settlement or judgment in an action or a settlement of a claim" under the Tort Claims Act. The modifier mandates that the settlement or judgment activity be "under this chapter." The document executed by Wade is not "under this chapter."

The trial judge concluded the covenant not to execute constituted a "settlement" under § 15-78-70(d) "since an agreement ha[d] been reached between Wade and Pierce which settlement . . . fully resolved the matters between Wade and Pierce." We disagree.

Here, the covenant not to execute did not relate to an action or claim under the Tort Claims Act. The covenant was not a "settlement or judgment in an action or a settlement of a claim" under § 15-78-70(d). No claim had been made against the County at the time Pierce's personal liability insurance carrier paid \$13,000 in exchange for the covenant not to execute. The initial complaint alleged causes of action against Pierce personally. How can an action against Pierce in his individual capacity constitute an action under the Tort Claims Act?

The payment to Wade by Pierce and GEICO was effectuated so as to eliminate personal liability of Pierce in his status as an individual. If Pierce was not acting within the course and

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scope of his employment, he faced personal liability for damages caused to Wade. The County maintains Pierce was not acting within the course and scope of his employment at the time of the collision in which Wade was injured. Footnote 2 in the dissent avers the allegations in regard to the employment status of Pierce in the complaint must be accepted as true because this is a summary judgment motion. We disagree with this statement. The instant case is in the unusual posture of having been before the Court of Appeals on a prior occasion. In the first appeal, this Court ruled: "The facts of this case create a jury question as to whether Pierce was acting within the course and scope of his employment when he collided with Wade. . . . [B]ecause a genuine issue of material fact exists regarding whether Pierce was acting within the scope of his employment when the accident occurred, the law does not support the trial court's grant of summary judgment to County." *Wade v. Berkeley County*, 330 S.C. 311, 320-21, 498 S.E.2d 684, 689 (Ct. App. 1998)(emphasis added).

Pierce desired protection from his vulnerable status if it was decided at a later time that he was not within the course and scope of his employment. The document at issue only gave Pierce protection as an individual. It never contemplated any impact on the issue of his employment status.

Neither a "governmental entity," as defined in § 15-79-30(d), nor its insurer paid any funds for the covenant. Therefore, this case does not present a question of double recovery against a governmental entity. Further, the covenant not to execute recognized Wade had not been fully compensated for his injuries. The covenant explicitly stated it did not operate as a release or discharge. Simplistically put, there was no "settlement of a claim under this chapter."

The dissent asserts: "The majority's holding allows a plaintiff to sue an employee of a governmental entity first in his or her individual capacity, force the employee into settling the claim based on the employee's potential individual liability, and then subsequently amend the complaint to add the governmental entity as a defendant." Factually, this statement is not correct. Here, Wade only added the County after Pierce testified in his deposition that he was working on the job. In short, under the facts here, to refuse to let Wade end his lawsuit with GEICO would force him to go to trial against both parties—even though GEICO wanted out. As a matter of judicial policy, it would wreak havoc to adopt the position of the dissent. We refuse to countenance the use of a judicial straitjacket in this trial scenario.

Additionally, this is not an election of remedies issue. Rather, it is an analysis by the Court as to whether the covenant not to execute bars Wade's claim against the County. Wade did not elect a remedy. In this factual scenario, Wade contractually agreed with Pierce (private individual) and Government Employees Insurance Company (Pierce's private insurance company) *inter sese* not to execute on any judgment that may be obtained against Pierce as an individual.

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Finally, in contrariety to the dissent's assertion, we do not hold or suggest Pierce and the County are joint tortfeasors. Nothing in this opinion is bottomed and premised upon the notion that Pierce and the County are joint tortfeasors. There is no assumption that Pierce and Berkeley County are joint tortfeasors.

CONCLUSION

We hold § 15-78-70(d) does not bar Wade's action against the County under the Tort Claims Act. First, the covenant not to execute does not constitute a "settlement of a claim under this chapter." (Emphasis added). Second, Wade's claim against Pierce was not under the Tort Claims Act. It was an action against Pierce as an individual facing personal liability in an alleged non-governmental employment status. Accordingly, the Circuit Court's order granting summary judgment to the County is

REVERSED and REMANDED.

CONNOR, J., concurs. GOOLSBY, J., dissents in a separate opinion.

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GOOLSBY, J. (dissenting): I respectfully dissent.

The South Carolina Tort Claims Act is the exclusive civil remedy available in actions against governmental entities. Murphy v. Richland Memorial Hosp., 317 S.C. 560, 455 S.E.2d 688 (1995). The Act and its provisions relating to limitations and exemptions must be construed liberally in favor of limiting the liability of a governmental entity. S.C. Code Ann. § 15-78-200 (Supp. 1998). Thus, if the Act is capable of two interpretations, one favoring limiting liability and one favoring expanding liability, we must choose that interpretation that limits the liability of the government.

Under the Tort Claims Act, an employee of a governmental entity, except for limited, well-defined exceptions, enjoys immunity for torts committed by him or her while acting within the scope of his or her official duties. S.C. Code Ann. § 15-78-70(a) and (b) (Supp. 1998). Further, "[a] settlement . . . in an action or a settlement of a claim under this chapter [the Tort Claims Act] constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence." S.C. Code Ann. § 15-78-70(d) (Supp. 1998). The question before us then is whether a settlement obtained by a plaintiff with an employee of a governmental entity, irrespective of how the settlement documents are styled,¹ precludes the plaintiff from later bringing an action against the governmental entity where the complaint alleges the employee was acting within the scope of his or her official duties at the time the claim occurred.² The majority concludes it does not.

¹ A settlement concluded by a covenant not to execute is still a settlement, notwithstanding it may not be a release or covenant not to sue. See State ex rel. Missouri Cable Telecomm. Ass'n v. Missouri Pub. Serv. Comm'n, 929 S.W.2d 768, 773 (Mo. Ct. App. 1996) ("By its very nature, a settlement agreement is a compromise by each party to the agreement of certain rights in order to gain what it did not have an established right to claim."); BLACK'S LAW DICTIONARY Settlement, at 1538-39 (1968) (defining settlement, *inter alia*, as "[a]n adjustment between persons concerning their dealings or difficulties; an agreement by which parties having disputed matters between them reach or ascertain what is coming from one to the other"). Certainly, our supreme court has seen it that way. See Poston v. Poston v. Barnes, 294 S.C. 261, 264, 363 S.E.2d 888, 889 (1987) ("A Covenant Not to Sue and a Covenant Not to Execute are so closely akin that a major distinguishing factor is that the latter is normally executed when a settlement occurs after the filing of a lawsuit, while the former is entered into before a lawsuit is filed.") (emphasis mine). Indeed, both Gerald D. Wade, the claimant, and Bobby Joe Pierce, the employee of the governmental entity, gave up something and received something as a result of their agreement. Wade got \$13,000, and Pierce got a covenant not to execute.

² In reviewing the trial court's grant of summary judgment, we must view the facts in the light most favorable to Wade. Viewing the evidence that way, and for purposes of this appeal, Pierce was, therefore, an employee of Berkeley County.

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Because we must interpret the statute in favor of limiting liability, I would hold that where a plaintiff has pursued a claim against an employee of a governmental entity in the employee's individual capacity arising from a particular occurrence, a settlement of that claim bars a later action against the governmental entity based upon a claim arising from the same occurrence where, as here, the complaint in the later action alleges the employee acted within the scope of his or her official duties at the time of the occurrence.

The fact that at the time of the settlement between the plaintiff and the employee neither a claim had been made nor an action brought against the governmental entity does not make the settlement of the claim any less a settlement of a claim "under this chapter" where, as happened here, "the same occurrence" provides the basis for both the action against the employee and the action against the governmental entity. The point at which a claimant makes an allegation that an employee of a governmental entity acted within the scope of his or her official duties should make no difference as far as the limitation contained within Section 15-78-70(d) is concerned, particularly where, as in this case, the record does not show that either the claimant or the employee moved prior to settlement to join the governmental entity as a party defendant based on principles of respondeat superior. This is not a case where an employee, when sued in tort, alleged he or she acted within the scope of his or her official duties and the governmental entity in the same action responded to the allegation with a denial prior to the employee's settlement of the action with the plaintiff.³

In the present case, the only way the plaintiff Wade can recover from Berkeley County is if it is determined Pierce was acting within the scope of his official duties at the time of the occurrence. Should a jury determine that Pierce was acting within the scope of his official duties, Wade will have already settled with Pierce a claim based on the exact same occurrence, and Wade's claim against Berkeley County would therefore be barred.

The majority's holding allows a plaintiff to sue an employee of a governmental entity first in his or her individual capacity, force the employee into settling the claim based on the employee's potential individual liability, and then subsequently amend the complaint to add the governmental entity as a defendant. Moreover, the holding allows a plaintiff not only to assert two inconsistent theories of recovery (i.e., the employee was or the employee was not acting within the scope of his or her official duties), but allows the plaintiff to recover under both. If the Tort Claims Act does allow the procedure employed by the plaintiff here, then the Act is in serious need of

³ The trial court found as a fact that at the time Pierce's insurance carrier paid the settlement amount in exchange for a covenant not to execute "Wade had not yet made any claim against Berkeley County."

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amendment, for no plaintiff will hereafter pursue a claim under the Act in any other fashion—particularly where the claim involves a motor vehicle collision between a plaintiff and a governmental employee.

One other thing. Notwithstanding the majority's disclaimer toward the end of its opinion, and considering its discussion concerning joint tortfeasors and the result it reaches (allowing a claim against the master after the servant has settled a claim based on the same occurrence), the majority still treats Pierce and Berkeley County as joint tortfeasors. Clearly, at least at common law, they are not so. See Seaboard Air Line Ry. Co. v. Coastal Distrib. Co., 273 F. Supp. 340, 342 (D.S.C. 1967) ("Contrary to the argument of the railroad, [the master and servant], though suable jointly (Cravens v. Lawrence, 1936, 181 S.C. 165, 169, 186 S.E. 269; Parker v. Bissonette, 1943, 203 S.C. 155, 163, 26 S.E.2d 497, 147 A.L.R. 773; Davenport v. Southern Ry. Co., 4 Cir., 1905, 135 F. 960, 962-963;) are not strictly joint-tortfeasors."); Alvarez v. New Haven Register, Inc., 249 Conn. 709, 720 (1999) ("[A] principal whose liability rests solely upon the doctrine of respondeat superior and not upon any independent act of the principal is not a joint tortfeasor with the agent from whose conduct the principal's liability is derived."); cf. HUBBARD and FELIX, THE SOUTH CAROLINA LAW OF TORTS, at 630 (2d ed. 1997) ("[A] covenant not to sue the employee would also release the employer who was liable solely because of the doctrine of respondeat superior.")

I would affirm.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gerald D. Wade, Jr.,

Appellant,

v.

Berkeley County, South Carolina and John Doe,

Respondents.

Appeal From Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 3145
Heard January 13, 2000 - Filed April 3, 2000

REVERSED and REMANDED

**George J. Kefalos, of George J. Kefalos, P.A., of
Charleston, for Appellant.**

**Stephen P. Groves, Joseph E. DaPore and Stephen L.
Brown, all of Young, Clement, Rivers & Tisdale; and
Bonum S. Wilson, III, of Pratt-Thomas, Pearce, Epting &
Walker, all of Charleston, for Respondents.**

ANDERSON, J.: This case was heard en banc to determine the efficacy of a document entitled "Covenant Not To Execute Judgment" as juxtaposed to the South Carolina Tort Claims Act. In this negligence action, Gerald D. Wade, Jr., appeals from the trial court's order granting summary judgment to Berkeley County pursuant to the Tort Claims Act.¹ We reverse and remand.

¹S.C. Code Ann. § 15-78-10, et seq. (Supp. 1999).

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FACTS/PROCEDURAL BACKGROUND

On the morning of June 1, 1995, Bobby Joe Pierce was driving his personal vehicle to his job as an animal control officer with Berkeley County. While on the way, Pierce stopped to determine if a dead dog on the side of the road was wearing a collar. The night before, Pierce received a phone call from a woman who informed him the dog had been run over and was dead. According to Pierce, after resuming his trip to work, he was forced to drive into the left hand lane to avoid a John Doe driver who suddenly stopped in front of him. Pierce's car collided head on with Wade's vehicle.

Wade filed a negligence action against Pierce and the John Doe driver. In the initial complaint, Wade made no allegation concerning Pierce's employment with the County. In his deposition, Pierce testified he stopped to check on the dead animal because that was his job and he considered himself on the job at the time. Subsequently, Pierce's personal liability insurance carrier paid Wade \$13,000 in exchange for a Covenant Not to Execute Judgment. At the time of this payment, Wade had made no claim against Berkeley County.

Thereafter, Wade filed an amended complaint against Berkeley County, pursuant to the South Carolina Tort Claims Act, and John Doe as a result of the same accident. Pierce was not a named party in the amended complaint. Wade alleged Pierce was acting as an agent and servant of the County at the time of the accident. The County denied this allegation and averred as an affirmative defense the action was barred under S.C. Code Ann. § 15-78-70(d) (Supp. 1999), which addresses the effect of a judgment or settlement. The County filed a motion for summary judgment² based upon this section.

In granting the motion, the trial court held Berkeley County was entitled to summary judgment as a matter of law "since there was a prior settlement of Wade's personal injury claims between Wade and an alleged tortfeasor-employee (i.e., Pierce) for the same occurrence." The court concluded "[t]his settlement constitutes a complete bar to any further action by Wade against the relevant governmental entity-employer (i.e., Berkeley County) pursuant to S.C. Code Ann. §15-78-70(d)."

²This case was previously before the Court in *Wade v. Berkeley County*, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998). In that opinion, this Court concluded Wade was not collaterally estopped by a prior Workers' Compensation finding from litigating the issue of whether the County employee, Bobby Joe Pierce, was acting within the course and scope of his employment when his vehicle collided with Wade's vehicle. We ruled a material issue of fact existed concerning Pierce's scope of employment and reversed the trial court's grant of summary judgment in favor of the County. The case is now before us pursuant to a second motion for summary judgment on a different ground.

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ISSUES

- I. Did the trial court err in ruling there was a full settlement between Wade and Pierce?
- II. Did the trial court err in granting summary judgment based on his conclusion the execution of the document constituted "a settlement of a claim" initiated under the Tort Claims Act?

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mosteller v. County of Lexington*, 336 S.C. 360, 520 S.E.2d 620 (1999); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); Rule 56(c), SCRCP. In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998); *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). If triable issues exist, those issues must go to the jury. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991); *Young, supra*.

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Mosteller, supra*. All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. *Vermeer, supra*. Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Id.* Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991).

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LAW/ANALYSIS³

I. EFFICACY OF SETTLEMENT DOCUMENTS UNDER SOUTH CAROLINA JURISPRUDENCE

Without a jury verdict, order of judgment, or confession of judgment, cases are disposed of by way of amicable disposition under the aegis and ambit of three recognizable legal documents effectuating the settlement: (1) general release; (2) covenant not to sue; and (3) covenant not to execute. The bench and bar have great concernment in regard to the avenues of disposition available to party litigants, especially in the proliferating multi-party litigation, such as product liability, professional malpractice, and construction litigation. Attorneys representing litigants subsumed in multi-party litigation oftentimes seek to extricate a party while the remaining parties litigate to an ultimate resolution. A cardinal principle inherent in the settlement process is the utilitarian use of the proper document to achieve the desired result, i.e., the salvation of the party from further liability or exposure. We analyze with certitude the precedent governing the documents to achieve the ultimate goals of the parties.

A. General Release

The term "release" has been defined as the "relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced." 76 C.J.S. Release § 2 (1994). A release is an agreement providing that a duty owed to the maker of the release is discharged immediately. *Id.* See also Black's Law Dictionary 1289 (6th ed. 1990) (a release is a writing or oral statement manifesting an intention to discharge another from an existing or asserted duty). A release is contractual in nature. 76 C.J.S. Release § 2. Whether a particular agreement constitutes a release is to be determined from the intent of the parties. *Id.*

Under the common law, the release of one of multiple joint tortfeasors, regardless of the intention of the parties, released all. *Bartholomew v. McCartha*, 255 S.C. 489, 179 S.E.2d 912 (1971). In *Bartholomew*, the Court rejected this common law rule and held:

³We initially note there is a question of fact as to whether Pierce was acting within the course and scope of his employment with Berkeley County at the time of the accident. Wade asserts this factual dispute prevents the grant of summary judgment. If Pierce was not acting in the course and scope of his employment, then the County would have no vicarious liability under the Tort Claims Act. However, assuming Pierce was acting in the course and scope of his employment at the time of the accident, the court would still be required to determine the legal issue of whether Wade's action against the County was barred based upon § 15-78-70(d). Thus, this factual dispute is not material so as to prevent disposition by summary judgment.

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Being untrammelled by the ancient rule which, in our view, tends to stifle settlements, defeat the intention of parties and extol technicality, we adopt the view that the release of one tort-feasor does not release others who wrongfully contributed to plaintiff's injuries unless this was the intention of the parties, or unless plaintiff has, in fact, received full compensation amounting to a satisfaction.

Bartholomew, 255 S.C. at 492, 179 S.E.2d at 914. See also *Scott by McClure v. Fruehauf Corp.*, 302 S.C. 364, 396 S.E.2d 354 (1990) (release of one tortfeasor does not constitute release of others who contributed to plaintiff's injuries unless parties intended such a release or plaintiff received full satisfaction).

B. Covenant Not to Sue

The covenant not to sue was developed at common law to permit the release of one or more joint tortfeasors without affecting the covenantor's rights against the other joint tortfeasors. A covenant not to sue is a covenant by one who had a right of action at the time of making it against another person, by which he agrees not to sue to enforce such right of action. 76 C.J.S. Release § 4 (1994). "Such covenant does not extinguish a cause of action and does not release other joint tort-feasors even if it does not specifically reserve rights against them." Black's Law Dictionary 364 (6th ed. 1990). However, one tortfeasor is entitled to credit for the amount paid by another tortfeasor for a covenant not to sue. See *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967).

A covenant not to sue is not a release. 76 C.J.S. Release § 4. "The difference is one of intent and grows out of the construction placed on the terms of the instrument, since a covenant not to sue is not a present abandonment or relinquishment of a right or claim but merely an agreement not to enforce an existing cause of action, and, although it may operate as a release between the parties to the agreement, it will not release a claim against joint obligors or joint tort-feasors." *Id.* (Footnotes omitted). In the case of a release, there is an immediate discharge; where as, in the case of a covenant not to sue, there is merely an agreement not to prosecute a suit. 66 Am. Jur. 2d Release § 2 (1973). It is nothing but a contract and should be so construed. *Id.*

In *Ackerman v. Travelers Indemnity Co.*, 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995), this Court discussed the genesis of the covenant not to sue:

"At common law, a valid release of one joint tort-feasor was usually a release of all the joint wrongdoers and was a bar to a suit against any of them for the same wrong. At the base of this rule was the theory that there could be but one compensation for the joint wrong. If the injured party was paid by one of the wrongdoers for the injury he had suffered, each wrongdoer being responsible for

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the whole damage, his cause of action was satisfied in exchange for a release, and he could not proceed against the others. Thus a release of one joint wrongdoer released all. But when the consideration received for the release was not full compensation for the injury, the purpose for the harsh rule did not exist. To allow for this, the covenant not to sue was developed."

Ackerman, 318 S.C. at 146-47, 456 S.E.2d at 413.

C. Covenant Not to Execute

A covenant not to execute "is a promise not to enforce a right of action or execute a judgment when one had such a right at the time of entering into the agreement." 76 C.J.S. Release § 4 (1994). It is merely a contract and not a release. *Id.* A covenant not to execute is distinguishable from a covenant not to sue in that the former is normally executed when a settlement occurs after the filing of a lawsuit, while the latter is entered into before a lawsuit is filed. *Id.*

South Carolina courts have recognized the distinctions between a release, a covenant not to sue, and a covenant not to execute. In *Poston by Poston v. Barnes*, 294 S.C. 261, 363 S.E.2d 888 (1987), the Supreme Court explained:

Other jurisdictions hold that a Covenant Not To Execute is not a satisfaction or a release and that its legal effect is similar to that of a Covenant Not To Sue because it does not operate to release other joint tortfeasors. A Covenant Not To Execute is a promise not to enforce a right of action or execute a judgment when one had such a right at the time of entering into the agreement. A Covenant Not to Sue and a Covenant Not to Execute are so closely akin that a major distinguishing factor is that the latter is normally executed when a settlement occurs after the filing of a lawsuit, while the former is entered into before a lawsuit is filed. In South Carolina when a Covenant Not To Sue has been entered into, usually the covenanting tortfeasor is no longer a party to the litigation.

Poston, 294 S.C. at 263-64, 363 S.E.2d at 889-90 (citations omitted).

The intention of the parties governs in determining whether an instrument is a covenant not to execute or a release. *Ackerman v. Travelers Indemnity Co.*, 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995). See also *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997) (to determine whether instrument is covenant not to execute or release, this Court looks to intention of parties).

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II. VALIDITY AND IMPACT OF DOCUMENT UTILIZED IN CASE *SUB JUDICE*

In exchange for the payment of \$13,000, Wade and Pierce executed a document entitled "Covenant Not To Execute Judgment." The document acknowledged Wade's damages exceeded the amount of liability insurance coverage available to Pierce from his personal insurance carrier. The covenant contained the following language:

3. That Gerald D. Wade, Jr. and Shirley M. Wade do hereby **promise and covenant** for themselves, their heirs, personal representatives, administrators, legal representatives and assigns, **not to execute** against Bobby Joe Pierce or Government Employees Insurance Company, their heirs, personal representatives, administrators, legal representatives, successors or assigns, **on any judgment** that may be attained by Gerald D. Wade, Jr. and Shirley M. Wade on account of any and all claims, demands, damages, costs or expenses, including, but not limited to, any medical or hospital expenses, loss of services, actions and causes of action, arising from any act, omission or occurrence or resulting or to result from the automobile accident which occurred on June 1, 1995, in Berkeley County, South Carolina, when Gerald D. Wade, Jr. was involved in a motor vehicle collision with a vehicle driven by Bobby Joe Pierce.

4. That, furthermore, Gerald D. Wade, Jr. and Shirley M. Wade do further **covenant and promise** that **if they should attain a judgment against Bobby Joe Pierce or Government Employees Insurance Company, they will not execute on said judgment against Bobby Joe Pierce or Government Employees Insurance Company** and that, upon a final determination of whether any underinsured motorist benefits will be paid, they and their attorney, George J. Kefalos, will cause the judgment to be marked and entered as satisfied.

....

10. That Gerald D. Wade, Jr. and Shirley M. Wade, Bobby Joe Pierce and Government Employees Insurance Company furthermore agree and understand that **this instrument is not intended as a release or discharge, nor as an accord and satisfaction with any person whomsoever, but only as a Covenant Not to Execute** against Bobby Joe Pierce and Government Employees Insurance Company, their heirs, personal representatives, administrators, legal representatives, successors and assigns, and **is executed simply to purchase freedom from the threat of execution upon any judgment that may be attained against Bobby Joe Pierce or Government Employees Insurance Company** including any judgment in the

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lawsuit filed in the Court of Common Pleas for Berkeley County, South Carolina, and assigned Case No. 95-CP-08-1281. (Emphasis added).

Based upon its language, we conclude the document executed by Wade and Pierce was intended to be a covenant not to execute as opposed to a settlement agreement, release, or covenant not to sue. The document evidences no intent to release others from liability and, in fact, contemplates further litigation against other tortfeasors. The instrument recognizes Wade was not fully compensated for his injuries. It contemplates Wade's pursuit of underinsured motorist coverage. Further, the agreement explicitly states it does not operate as a release or discharge. As such, the document is very similar to the documents found by the Court to be covenants not to execute in the cases of *Ackerman v. Travelers Indemnity Co.*, 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995), and *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997).

Wade is still entitled to seek a judgment against Pierce and Government Employees Insurance Company (GEICO). He merely agreed not to legally enforce the judgment. In fact, the covenant not to execute expressly reserves Wade's right to obtain a judgment against Pierce.

III. SOUTH CAROLINA TORT CLAIMS ACT-- "SETTLEMENT OF A CLAIM UNDER THIS CHAPTER"

The trial judge concluded Wade's covenant not to execute constituted a "settlement" under S.C. Code Ann. § 15-78-70(d) (Supp. 1999). We disagree.

Section 15-78-70(d) of the South Carolina Tort Claims Act provides:

A settlement or judgment in an action or a settlement of a claim under this chapter constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence.

The original complaint against Pierce and John Doe was not a proceeding under the South Carolina Tort Claims Act. The lawsuit at this stage had not been initiated under the Act. Section 15-78-70(c) (Supp. 1999) provides:

[A] person, when bringing an action against a governmental entity under the provisions of this chapter, shall name as a party defendant only the agency or political subdivision for which the employee was acting and is not required to name the employee individually, unless the agency or political subdivision for which the employee was acting cannot be determined at the time the action is instituted.

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The gravamen of the entire controversy revolves around the determination of the status of Pierce. The statutory language "for which the employee was acting cannot be determined at the time the action is instituted" identifies the conundrum facing Pierce, GEICO, and Wade.

A. Statutory Construction

When construing a statute, the primary function of the court is to ascertain the intention of the legislature. See *Lester v. South Carolina Workers' Compensation Comm'n*, 334 S.C. 557, 514 S.E.2d 751 (1999). A statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. *Davis v. NationsCredit Financial Servs. Corp.*, 326 S.C. 83, 484 S.E.2d 471 (1997). If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning. *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 508 S.E.2d 16 (1998); *City of Columbia v. A.C.L.U. of South Carolina, Inc.*, 323 S.C. 384, 475 S.E.2d 747 (1996). Where the terms of a statute are clear, the court must apply those terms according to their literal meaning. *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand its scope. *Durham v. United Companies Financial Corp.*, 331 S.C. 600, 503 S.E.2d 465 (1998). Where a statute is ambiguous, however, the Court must construe the terms of the statute. *Lester, supra*. Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law. *City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck*, 330 S.C. 371, 498 S.E.2d 894 (Ct. App. 1998).

If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. *The Lite House, Inc. v. J.C. Roy, Co.*, 309 S.C. 50, 419 S.E.2d 817 (Ct. App. 1992). Where the legislature elects not to define the term in the statute, courts will interpret the term in accord with its usual and customary meaning. *Adoptive Parents v. Biological Parents*, 315 S.C. 535, 446 S.E.2d 404 (1994). In construing a statute, the court looks to its language as a whole in light of its manifest purpose. *Adams v. Texfi Indus.*, 320 S.C. 213, 464 S.E.2d 109 (1995).

B. Covenant Not to Execute Did Not Constitute a "settlement of a claim under this chapter"

The phrase "under this chapter" in § 15-78-70(d) refers to the Tort Claims Act and modifies the prior "settlement" phrases. Thus, a "settlement or judgment in an action" under the Tort Claims Act or the "settlement of a claim" under the Tort Claims Act "constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence." However, in the instant case, there is no "settlement or

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judgment in an action or a settlement of a claim" under the Tort Claims Act. The modifier mandates that the settlement or judgment activity be "under this chapter." The document executed by Wade is not "under this chapter."

The trial judge concluded the covenant not to execute constituted a "settlement" under § 15-78-70(d) "since an agreement ha[d] been reached between Wade and Pierce which settlement . . . fully resolved the matters between Wade and Pierce." We disagree.

Here, the covenant not to execute did not relate to an action or claim under the Tort Claims Act. The covenant was not a "settlement or judgment in an action or a settlement of a claim" under § 15-78-70(d). No claim had been made against the County at the time Pierce's personal liability insurance carrier paid \$13,000 in exchange for the covenant not to execute. The initial complaint alleged causes of action against Pierce personally. How can an action against Pierce in his individual capacity constitute an action under the Tort Claims Act?

The payment to Wade by Pierce and GEICO was effectuated so as to eliminate personal liability of Pierce in his status as an individual. If Pierce was not acting within the course and scope of his employment, he faced personal liability for damages caused to Wade. The County maintains Pierce was not acting within the course and scope of his employment at the time of the collision in which Wade was injured. Footnote 2 in the dissent avers the allegations in regard to the employment status of Pierce in the complaint must be accepted as true because this is a summary judgment motion. We disagree with this statement. The instant case is in the unusual posture of having been before the Court of Appeals on a prior occasion. In the first appeal, this Court ruled: "The facts of this case create a jury question as to whether Pierce was acting within the course and scope of his employment when he collided with Wade. . . . [B]ecause a genuine issue of material fact exists regarding whether Pierce was acting within the scope of his employment when the accident occurred, the law does not support the trial court's grant of summary judgment to County." *Wade v. Berkeley County*, 330 S.C. 311, 320-21, 498 S.E.2d 684, 689 (Ct. App. 1998)(emphasis added).

Pierce desired protection from his vulnerable status if it was decided at a later time that he was not within the course and scope of his employment. The document at issue only gave Pierce protection as an individual. It never contemplated any impact on the issue of his employment status.

Neither a "governmental entity," as defined in § 15-79-30(d), nor its insurer paid any funds for the covenant. Therefore, this case does not present a question of double recovery against a governmental entity. Further, the covenant not to execute recognized Wade had not been fully compensated for his injuries. The covenant explicitly stated it did not operate as a release or discharge. Simplistically put, there was no "settlement of a claim under this chapter."

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The dissent asserts: "The majority's holding allows a plaintiff to sue an employee of a governmental entity first in his or her individual capacity, force the employee into settling the claim based on the employee's potential individual liability, and then subsequently amend the complaint to add the governmental entity as a defendant." Factually, this statement is not correct. Here, Wade only added the County after Pierce testified in his deposition that he was working on the job. In short, under the facts here, to refuse to let Wade end his lawsuit with GEICO would force him to go to trial against both parties—even though GEICO wanted out. As a matter of judicial policy, it would wreak havoc to adopt the position of the dissent. We refuse to countenance the use of a judicial straitjacket in this trial scenario.

Additionally, this is not an election of remedies issue. Rather, it is an analysis by the Court as to whether the covenant not to execute bars Wade's claim against the County. Wade did not elect a remedy. In this factual scenario, Wade contractually agreed with Pierce (private individual) and Government Employees Insurance Company (Pierce's private insurance company) *inter sese* not to execute on any judgment that may be obtained against Pierce as an individual.

Finally, in contrariety to the dissent's assertion, we do not hold or suggest Pierce and the County are joint tortfeasors. Nothing in this opinion is bottomed and premised upon the notion that Pierce and the County are joint tortfeasors. There is no assumption that Pierce and Berkeley County are joint tortfeasors.

For the sake of clarity, we limit the efficacy of this opinion to the unique facts of this case.

CONCLUSION

We hold § 15-78-70(d) does not bar Wade's action against the County under the Tort Claims Act. First, the covenant not to execute does not constitute a "settlement of a claim under this chapter." (Emphasis added). Second, Wade's claim against Pierce was not under the Tort Claims Act. It was an action against Pierce as an individual facing personal liability in an alleged non-governmental employment status. Accordingly, the Circuit Court's order granting summary judgment to the County is

REVERSED and REMANDED.

CONNOR, HUFF, and HOWARD, JJ., concur.

HEARN, J., concurs in a separate opinion, joined by CURETON and STILWELL, JJ.

GOOLSBY, J., dissents in a separate opinion.

HOWELL, C.J., concurs in the opinion of Judge Goolsby.

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Hearn, J. (concurring),

This case has a protracted procedural history, having already been before this Court twice, and now a third time in this *en banc* rehearing. While I agree with the result reached by the majority, I feel compelled to express my concern that this decision be limited to its unique facts, and further, to accept the dissent's invitation to point specifically to those facts. Therefore, I separately concur.

In this case, the County placed both Wade and Pierce in the ultimate "catch-22." Wade initially proceeded against Pierce individually without knowledge that he was possibly acting within the scope of his official duties at the time of the accident. By the time Wade discovered that Pierce might have been acting in the scope of his employment with the County, the County had already asserted the opposite position in a workers' compensation claim filed by Pierce. Because the County denied Pierce was acting in the course and scope of his employment, Pierce realized that he faced substantial individual liability in Wade's civil suit. It was incumbent upon him, as well as his liability insurer, to attempt to reach an amicable disposition. Moreover, it is the policy of the courts of this state to foster settlements. Subsequent to execution of the covenant, the County altered its position, claiming that if Pierce *was* acting within the scope of official duties, it was entitled to the protection of the Tort Claims Act, specifically, the bar of further claims against a governmental entity after a settlement or judgment under the Act.

The dissent would place Pierce in the unenviable position of having to gamble on liability exposure. If the jury found he was not acting in his official duties at the time of the accident and awarded substantial damages to Wade, Pierce and his insurance carrier would be exposed to a judgment which they otherwise could have avoided by a reasonable settlement. Pierce and his insurance carrier are placed in a worse position than an ordinary tortfeasor simply by virtue of Pierce's employment with the County. Moreover, there is absolutely no suggestion that Wade was attempting a double recovery in this case. At oral argument, Wade's counsel conceded that any recovery against the County would be offset by his settlement with Pierce. Cast against these peculiar facts, the majority correctly holds that Wade's actions did not constitute a settlement "under the Act."

The County's ultimate liability in this case is still very much in question. A jury will have to determine the issue of Pierce's status at the time of the accident. I do not believe, however, that Wade should be denied the right to proceed against the County because of his prior covenant not to execute against Pierce. I agree with the majority that the covenant did not constitute a settlement under the Act since at that time whether Pierce was acting within the scope of his official duties was in serious dispute because of the position taken by the County.

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CURETON and STILWELL, JJ., concur.

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GOOLSBY, J. (dissenting): I respectfully dissent.

The South Carolina Tort Claims Act is the exclusive civil remedy available in actions against governmental entities. Murphy v. Richland Memorial Hosp., 317 S.C. 560, 455 S.E.2d 688 (1995). The Act and its provisions relating to limitations and exemptions must be construed liberally in favor of limiting the liability of a governmental entity. S.C. Code Ann. § 15-78-200 (Supp. 1998). Thus, if the Act is capable of two interpretations, one favoring limiting liability and one favoring expanding liability, we must choose that interpretation that limits the liability of the government.

Under the Tort Claims Act, an employee of a governmental entity, except for limited, well-defined exceptions, enjoys immunity for torts committed by him or her while acting within the scope of his or her official duties. S.C. Code Ann. § 15-78-70(a) and (b) (Supp. 1998). Further, "[a] settlement . . . in an action or a settlement of a claim under this chapter [the Tort Claims Act] constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence." S.C. Code Ann. § 15-78-70(d) (Supp. 1998). The question before us then is whether a settlement obtained by a plaintiff with an employee of a governmental entity, irrespective of how the settlement documents are styled,¹ precludes the plaintiff from later bringing an action against the governmental entity where the complaint alleges the employee was acting within the scope of his or her official duties at the time the claim occurred.² The majority concludes it does not.

¹ A settlement concluded by a covenant not to execute is still a settlement, notwithstanding it may not be a release or covenant not to sue. See State ex rel. Missouri Cable Telecomm. Ass'n v. Missouri Pub. Serv. Comm'n, 929 S.W.2d 768, 773 (Mo. Ct. App. 1996) ("By its very nature, a settlement agreement is a compromise by each party to the agreement of certain rights in order to gain what it did not have an established right to claim."); BLACK'S LAW DICTIONARY Settlement, at 1538-39 (1968) (defining settlement, *inter alia*, as "[a]n adjustment between persons concerning their dealings or difficulties; an agreement by which parties having disputed matters between them reach or ascertain what is coming from one to the other"). Certainly, our supreme court has seen it that way. See Poston by Poston v. Barnes, 294 S.C. 261, 264, 363 S.E.2d 888, 889 (1987) ("A Covenant Not to Sue and a Covenant Not to Execute are so closely akin that a major distinguishing factor is that the latter is normally executed when a settlement occurs after the filing of a lawsuit, while the former is entered into before a lawsuit is filed.") (emphasis mine). Indeed, both Gerald D. Wade, the claimant, and Bobby Joe Pierce, the employee of the governmental entity, gave up something and received something as a result of their agreement. Wade got \$13,000, and Pierce got a covenant not to execute.

² In reviewing the trial court's grant of summary judgment, we must view the facts in the light most favorable to Wade. Viewing the evidence that way, and for purposes of this appeal, Pierce was, therefore, an employee of Berkeley County.

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Because we must interpret the statute in favor of limiting liability, I would hold that where a plaintiff has pursued a claim against an employee of a governmental entity in the employee's individual capacity arising from a particular occurrence, a settlement of that claim bars a later action against the governmental entity based upon a claim arising from the same occurrence where, as here, the complaint in the later action alleges the employee acted within the scope of his or her official duties at the time of the occurrence.

The fact that at the time of the settlement between the plaintiff and the employee neither a claim had been made nor an action brought against the governmental entity does not make the settlement of the claim any less a settlement of a claim "under this chapter" where, as happened here, "the same occurrence" provides the basis for both the action against the employee and the action against the governmental entity. The point at which a claimant makes an allegation that an employee of a governmental entity acted within the scope of his or her official duties should make no difference as far as the limitation contained within Section 15-78-70(d) is concerned, particularly where, as in this case, the record does not show that either the claimant or the employee moved prior to settlement to join the governmental entity as a party defendant based on principles of respondeat superior.

In the present case, the only way the plaintiff Wade can recover from Berkeley County is if it is determined Pierce was acting within the scope of his official duties at the time of the occurrence. Should a jury determine that Pierce was acting within the scope of his official duties, Wade will have already settled with Pierce a claim based on the exact same occurrence, and Wade's claim against Berkeley County would therefore be barred.

The majority's holding allows a plaintiff to sue an employee of a governmental entity first in his or her individual capacity, force the employee into settling the claim based on the employee's potential individual liability, and then subsequently amend the complaint to add the governmental entity as a defendant. Moreover, the holding allows a plaintiff not only to assert two inconsistent theories of recovery (i.e., the employee was or the employee was not acting within the scope of his or her official duties), but allows the plaintiff to recover under both. If the Tort Claims Act does allow the procedure employed by the plaintiff here, then the Act is in serious need of amendment, for no plaintiff will hereafter pursue a claim under the Act in any other fashion -- particularly where the claim involves a motor vehicle collision between a plaintiff and a governmental employee.

Regarding any suggestion that this case will be limited to its particular facts, those facts that will trigger a future application of the rule announced by this case ought, in fairness, to be spelled out by someone in the majority, together with the rule itself. As I see the matter, the rule announced by this court in this case is as follows: any claimant may bring suit solely against an employee of a governmental entity who

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commits a tort while acting within the scope of his or her official duty, notwithstanding the tort does not involve actual fraud, actual malice, intent to harm, or a crime involving moral turpitude, and a settlement of the action or claim will not constitute a complete bar to any subsequent action by the claimant against the governmental entity by reason of the same occurrence provided the claimant did not allege in the earlier action that the employee acted within the scope of his or her official duty. Cf. S.C. Code Ann. § 15-78-70(a), (b) (Supp. 1998) (subsections under the South Carolina Tort Claims Act that limit employee liability); *id.* § 15-78-70 (d) (subsection that bars further action against an employee or governmental entity in the event of a settlement of a claim or action under the act).

One other thing: notwithstanding the majority's disclaimer toward the end of its opinion, and considering its discussion concerning joint tortfeasors and the result it reaches (allowing a claim against the master after the servant has settled a claim based on the same occurrence), the majority still treats Pierce and Berkeley County as joint tortfeasors. Clearly, at least at common law, they are not so. See Seaboard Air Line Ry. Co. v. Coastal Distrib. Co., 273 F. Supp. 340, 342 (D.S.C. 1967) ("Contrary to the argument of the railroad, [the master and servant], though suable jointly (Cravens v. Lawrence, 1936, 181 S.C. 165, 169, 186 S.E. 269; Parker v. Bissonette, 1943, 203 S.C. 155, 163, 26 S.E.2d 497, 147 A.L.R. 773; Davenport v. Southern Ry. Co., 4 Cir., 1905, 135 F. 960, 962-963;) are not strictly joint-tortfeasors."); Alvarez v. New Haven Register, Inc., 249 Conn. 709, 720 (1999) ("[A] principal whose liability rests solely upon the doctrine of respondeat superior and not upon any independent act of the principal is not a joint tortfeasor with the agent from whose conduct the principal's liability is derived."); cf. HUBBARD and FELIX, THE SOUTH CAROLINA LAW OF TORTS, at 630 (2d ed. 1997) ("[A] covenant not to sue the employee would also release the employer who was liable solely because of the doctrine of respondeat superior.").

I would affirm.

HOWELL, C.J., concurs.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC COURT OF APPEALS

Opinion No. 3053
Filed October 4, 1999

APPEAL FROM THE COURT OF COMMON PLEAS
FOR BERKELEY COUNTY

HONORABLE R. MARKLEY DENNIS, Jr., CIRCUIT COURT JUDGE
Civil Action No. 95-CP-10-1281

Gerald D. Wade, Jr.,

Appellant,

v.

Berkeley County, South Carolina
and John Doe,

Respondents/Petitioners.

PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

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TO THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

COMES now the Respondent/Petitioner, Berkeley County and files this petition for rehearing pursuant to SCACR 221. Petitioner respectfully asserts this Court of Appeals overlooked and misapprehended the law applicable to this case. Specifically, this Court of Appeals:

1. failed to apply the terms and provisions of the South Carolina Tort Claims Act ("SCTCA") as adopted by the Legislature;
2. failed to apply and interpret the terms of the SCTCA in favor of limiting liability of the State and its political subdivisions;
3. allowed the Appellant to recover twice on inconsistent theories without requiring any election of remedies; and
4. encouraged parties to seek double recovery on inconsistent theories in a manner totally inconsistent with the terms and conditions of the SCTCA.

As this case presents a novel issue of law of exceptional importance upon which there is a substantial disagreement, petitioner further seeks rehearing *en banc* pursuant to SCACR 219.

I. STATEMENT OF THE CASE

The Appellant, Gerald D. Wade, Jr., sued the Defendants, Bobby Joe Pierce and John Doe, in **August 1995**. (R.p.24, paras. 2-3). He asserted a cause of action for automobile negligence (R.pp.24-28, paras. 5-12) and sought actual and punitive damages. (R.p.28, para. 13). Wade later filed an Amended Complaint in **April 1996** (R.p.29), dropping Pierce as an individual defendant and naming Berkeley County instead. (R.p.29, paras. 1-4). He asserted the same claim as before and sought similar damages. (R.pp.29-33, paras. 5-15).

Berkeley County timely answered (R.p.35), denying Wade's material allegations (R.pp.35-37, paras. 1, 3, 6-7, 9-13), and asserting the affirmative defenses of lack of agency between Pierce and Berkeley County (R.pp.37-38, paras. 14-15), full and complete settlement under the South Carolina Tort Claims Act¹ (R.p.38, para. 16), Defendant Doe's sole negligence (R.pp.38-39, paras. 17-18),² and sudden emergency. (R.p.39, para. 19).

¹ See The South Carolina Tort Claims Act (the "SCTCA") as codified in S.C. Code Ann. § 15-78-10, et. seq. (West Group Supp. 1997). See especially S.C. Code Ann. § 15-78-10(d) (West Group Supp. 1997).

² See S.C. Code Ann. § 15-78-60(20) (West Group Supp.

Berkeley County filed its first Motion for Summary Judgment in September 1996 (R.pp.18-19), on the grounds Pierce was not acting as an agent for Berkeley County (R.pp.18-19, paras. 1-2) and that Wade had previously settled his claim. (R.p.19, para. 3). The Honorable A. Victor Rawl, Circuit Judge, heard and granted Berkeley County's motion on December 3, 1996. (R.p.2). Wade appealed and this Court of Appeals reversed Judge Rawl and remanded the case.³

On remand, Berkeley County filed a second Motion for Summary Judgment based on the previous monetary settlement Wade had reached with Pierce before he filed the Amended Complaint. (R.pp.21-23). Pursuant to a Consent Order (R.pp.9-10), Berkeley County filed a Third Amended Answer denying Wade's material allegations. (R.pp.41-43, paras. 1-13). Berkeley County also asserted the same affirmative defenses as before (R.pp.43-45, paras. 14-20), and added another. (R.p.46, para. 21).

1997).

³ See Wade v. Berkeley County, 330 S.C. 311, 498 S.E.2d 684 (Ct.App. 1998) ("Wade I"). In Judge Rawl's order granting summary judgment to Berkeley County in Wade I he noted "[Berkeley County's] alternative ground for summary judgment, that the [SCTCA] bars [Wade's] claim against [Berkeley County] as a matter of law [was] not reached." (R.p.8). It is this ground for summary judgment which gives rise to this appeal.

The Honorable R. Markley Dennis, Jr., Circuit Judge, considered Berkeley County's motion on June 29, 1998. (R.p.11). He subsequently granted the motion by written order dated July 13, 1998. (R.pp.11-17). This second appeal followed. This Court of Appeals issued its opinion on October 4, 1999, again reversing the decision of the trial court granting summary judgment.⁴

II. STATEMENT OF THE FACTS

Sometime in January 1993, Berkeley County hired Pierce as an animal control officer. (R.p.12).⁵ Among other duties, Pierce was required to travel throughout Berkeley County to pick-up stray domesticated animals, clean the kennels, and, when necessary, euthanize animals. He worked five days per week and his standard working hours were from 8:30 a.m. until 5:00 p.m.

Not long after Pierce was hired, Berkeley County assigned him an Animal Control vehicle to use when picking up animals. While he was permitted to drive the County Truck to and from work, Berkeley County withdrew the County Truck from Pierce in 1994 for cost-savings reasons. Pierce then began to drive his personal

⁴ See Wade v. Berkeley County, Opinion No. 3053 S.C. App. filed October 4, 1999 ("Wade II").

⁵ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

vehicle to and from work.⁶ While Pierce was working, he drove an Animal Control department vehicle and left his personal truck parked at the animal shelter.⁷

On the evening of May 31, 1995, Pierce received a citizen's telephonic report of a dead dog on U. S. Highway 17-A.⁸ The next morning, on June 1, 1995, Pierce set off for work in his personal vehicle and stopped by the dog's location.⁹ After checking on the dog, Pierce continued on to work.¹⁰

At approximately 7:55 a.m., while Pierce was still heading to work, he and Wade were involved in an automobile accident. (R.p.12, para. 1; R.p.30, para. 7; R.p.66, p.1).¹¹ Defendant Doe, driving a third automobile, reportedly cut Pierce off and caused him to cross the center-line and strike Wade virtually head-on. (R.p.12).¹²

⁶ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

⁷ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

⁸ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

⁹ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

¹⁰ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

¹¹ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

¹² Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

Prior to when Wade sued Berkeley County for his injuries (R.p.29, paras. 1-4), he sued Pierce and Doe for the same injuries arising from the same accident. (R.p.24, paras. 2-3; R.pp.69-70, paras. 10-11). Wade ultimately dismissed Pierce from this matter after they reached a settlement. (R.pp.69-70, pp.4-5, paras. 10-11). Pierce's private automobile insurance carrier, Government Employees Insurance Company, paid Wade \$13,000.00 to settle his personal injury claims against Pierce. (R.pp.66-67, para. 1). Wade, in turn, granted Pierce and GEICO a *Covenant Not To Execute Judgment* for the \$13,000.00 payment. (R.pp.66-71). At the time GEICO made this payment to Wade on Pierce's behalf, Wade had not yet made any claim against Berkeley County. (R.p.12). After Wade settled with GEICO, he filed an amended complaint alleging Pierce was acting in the course and scope of his employment with Berkeley County.

Based on the Wade/Pierce Settlement and GEICO's \$13,000.00 payment, Berkeley County moved for summary judgment under the South Carolina Tort Claims Act.¹³ Berkeley County asserted:

. . . if the Court or [the jury] . . .
determine[s] . . . Pierce was an employee of

¹³ See S.C. Code Ann. §§ 15-78-10, et seq. (West Group Supp. 1997).

. . . Berkeley County . . . at the time of the alleged occurrence . . . [S.C.Code Ann.] § 15-78-70[(d) (West Group Supp. 1997)] is a complete bar to [Wade's] action.

(R.p.22, para. 1). Berkeley County also asserted:

[it] underst[oo]d[] a settlement by [Wade] as against . . . Pierce [had taken] place in this action [and] said settlement was of a claim which arose out of the same occurrence. [Consequently, such] settlement would amount to a complete bar [to Wade] bringing any action pursuant to [S.C. Code Ann.] § 15-78-70[(d)]

(R.p.22, para. 2). Judge Dennis agreed and granted Berkeley County's motion. (R.pp.11-17). Wade then appealed. This Court of Appeals reversed the grant of summary judgment.

III. ARGUMENT AND CITATION OF AUTHORITY

THIS COURT OF APPEALS ERRED IN REVERSING JUDGE DENNIS' GRANT OF SUMMARY JUDGMENT, AS WADE HAD FULLY SETTLED HIS CLAIMS AGAINST PIERCE AND HIS CLAIMS AGAINST BERKELEY COUNTY WERE BARRED BY S.C CODE ANN. § 15-78-70(d) (WEST GROUP SUPP. 1997)

1. Basic Legal Principles Were Overlooked And Misapprehended By This Court of Appeals.

Undisputedly, Wade settled his personal injury claims with Pierce pursuant to GEICO's payment of \$13,000.00. (R.pp.66-71). This Court of Appeals opinion is inconsistent on the issue of

whether the covenant not to execute would in fact constitute a settlement as that term is used in the Act. While this Court states the document in issue was "intended to be a covenant not to execute as opposed to a settlement agreement..." Wade II at p.8. Yet this Court of Appeals noted in this same opinion that there are "three recognizable legal documents" which can be used to effectuate a **settlement**, one of which is a covenant not to execute. Wade II at p.4(emphasis added). This Court goes to great lengths to analyze and explain the differences between a general release, a covenant not to sue and a covenant not to execute. It fails, however, to explain or cite any authority in support of the proposition that a covenant not to execute is not a method of reaching a settlement in a case. This was clearly erroneous, especially in light of the fact that our Supreme Court has acknowledged a covenant not to execute is one method of settling a case. See Poston by Poston v. Barnes, 294 S.C. 261, 264, 363 S.E.2d 888, 889 (1987).

To the extent this Court of Appeals reversed Judge Dennis' grant of summary judgment finding the settlement with Pierce was not a settlement consummated "under this chapter" of the SCTCA; such ruling was clearly erroneous. This ruling ignores the fact that the SCTCA "is the exclusive civil remedy available for any

tort committed by a governmental entity, its employees, or its agents" S.C. Code Ann. § 15-78-20(b) (West Group Supp. 1997). See Knoke v. South Carolina Department of Parks, Recreation and Tourism, 324 S.C. 136, 144, 478 S.E.2d 256, 260 (1996). Consequently, it is fundamental that the "[p]rovisions [of the SCTCA] relating to limitations and exemptions are to be liberally construed to limit the state's liability." Wade, 330 S.C. 311, 319, 498 S.E.2d 684, 688. See also Summer v. Carpenter, 328 S.C. 36, 44, 492 S.E.2d 55, 59 (1997); Strother v. Lexington County Recreation Commission, 324 S.C. 611, 619, 479 S.E.2d 822, 826 (Ct.App. 1996) (citing Rice v. School District of Fairfield, 317 S.C. 87, 452 S.E.2d 352 (Ct.App. 1994)) (" . . . [t]he 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.").

With regard to government employees, the SCTCA is also "the exclusive civil remedy for any tort committed by an employee of a governmental entity." S.C. Code Ann. § 15-78-70(a) (West Group Supp. 1997). See Proveaux v. Medical University of South

Carolina, 326 S.C. 28, 32, 482 S.E.2d 774, 776 (1997). In fact the SCTCA provides:

On or after January 1, 1989, a person, when bringing an action against a governmental entity under the provisions of [the SCTCA], shall name as a party defendant only the agency or political subdivision for which the employee was acting and is not required to name the employee individually, unless the agency or political subdivision for which the employee was acting cannot be determined at the time the action is instituted. In the event . . . the employee is individually named, the agency or political subdivision for which the employee was acting must be substituted as the party defendant.

S.C. Code Ann. § 15-78-70(c) (West Group Supp. 1997) (Emphasis added). In this vein, the Supreme Court noted:

. . . government agencies generally act through their employees. Thus, when an agency is sued because of the alleged tort of an employee acting within the scope of his or her employment, the [SCTCA] provides . . . only the agency shall be named as a party. S.C.Code Ann. § 15-78-70(c). Governmental employees who commit torts while acting in their official capacity are immune from personal liability unless their conduct constitutes actual fraud, actual malice, intent to harm or a crime of moral turpitude.

Jensen v. Anderson County Department of Social Services, 304 S.C. 195, 205 n.4, 403 S.E.2d 615, 620 n.4 (1991) (citing S.C. Code Ann. §§ 15-78-70(a) and (b) (West Group Supp. 1997)) (Emphasis added).

The SCTCA is designed to permit claimants to sue governmental entities for the acts of their employees -- not the employee personally -- since "[a]n employee of a governmental entity who commits a tort while acting within the scope of his official duty in not liable therefor except [under certain circumstances]." S.C. Code Ann. § 15-78-70(a). Under the SCTCA an "employee of a governmental entity [does not have] immunity from suit and liability if it is proved . . . the employee's conduct was not within the scope of his official duties or . . . it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-70(b) (West Group Supp. 1997). As noted by the authorities, the SCTCA "confers personal immunity upon any governmental employee 'who commits a tort while acting within the scope of his official duty'" C. Tolbert Goolsby, Jr. and Ginger D. Goforth, The South Carolina Tort Claims Act: A Primer and Then Some, 25 (2d ed. SCBar CLE Div. 1997)

With these basic principles in mind, it becomes evident the majority of the panel deciding this case simply ignored controlling case law and statutes in an effort to expand the Appellant's potential recovery. In this case, Wade originally sued Pierce, **individually**, in August 1995. (R.pp.24-28). He did not assert Pierce committed either fraud, actual malice, or a crime, or intended to hurt Wade. (R.pp.24-28).¹⁴ Moreover, Wade did not add Berkeley County as a party-defendant until April 1996, **after he had settled his claims against Pierce's personal automobile insurance company.** (R.p.16, para. 6; R.pp.66-71). Assuming Wade, in August 1995, did not know Pierce was an employee of a governmental entity, Wade correctly sued Pierce personally. See S.C. Code Ann. § 15-78-70(c). Nevertheless, once Wade determined Pierce worked for Berkeley County and, in turn, Berkeley County might theoretically be liable, as Pierce's employer, for Wade's injuries, then Wade was required to dismiss

¹⁴ Wade did assert the standard automobile accident allegations made in an "auto negligence" case:

. . . the injuries and damages suffered by [Wade] were due to and caused by the negligence, carelessness, recklessness, willfulness, wantonness[,] and heedlessness of [the Defendants Pierce and Doe]

(R.pp.26-27, para. 12).

Pierce from the case. S.C. Code Ann. § 15-78-70(c) ("In the event the employee is individually named, the agency or political subdivision for which the employee was acting must be substituted as the party[-]defendant."). Appellant cannot sue Pierce individually and Berkeley County as his employer. Under the facts of this case and the mandate of the SCTCA, they are not and cannot be joint tortfeasors. Although the majority acknowledges this fact, it ignores it in an effort to allow a potential double recovery.

Wade discovered Berkeley County employed Pierce and, under the facts, Berkeley County theoretically had potential liability when Wade took Pierce's deposition on February 1, 1996. (R.p.48, lines 1-11; R.p.49, line 3 - R.p.59, line 25; R.p.60, line 2 - R.p.65, line 25). Even though Wade was aware Pierce was claiming he was at work at the time of the accident, Wade did not immediately dismiss Pierce as a party-defendant and substitute Berkeley County but, instead, waited until he had settled with GEICO, on Pierce's personal behalf, for \$13,000.00. (R.p.15-16, paras. 5, 7; R.pp.66-71).

The majority inquired "[h]ow can an action against Pierce in his individual capacity constitute an action under the Tort Claims Act?" Wade II at p.9. The answer is evident and found in the terms of the SCTCA. As a matter of law, Pierce cannot be sued in his individual capacity under the facts alleged in this case once he testified he was acting in the course and scope of his employment. Again, the majority simply ignored the provisions of the SCTCA which stand in the way of Appellant's potential double recovery.

As Judge Goolsby aptly noted, the ruling of this Court of Appeals opens the door for every injured party to sue a governmental employee individually before proceeding against the governmental entity just in case the employee was acting outside the scope of his employment. This is completely contrary to the SCTCA. It further allows a plaintiff to proceed on inconsistent theories and allows multiple recoveries for one harm without requiring any election of remedies. Cf. Taylor v. Mount Vernon-Woodberry Mills, Inc., 211 S.C. 414, 45 S.E.2d 809 (1947). There is no support for such a haphazard and whimsical interpretation of the SCTCA.¹⁵

¹⁵ Rather than "wreak havoc" and "countenance the use of a judicial straightjacket" as the majority predicts, Appellant could have preserved his right to proceed against Pierce in the event he was acting outside the scope of his employment by way

The inconsistency in the majority's reasoning is evident in its ruling that it need not accept the Appellant's own allegations regarding Pierce's employment status in his complaint as true in reviewing the grant of summary judgment. The majority cites not one shred of authority in support of this position. This simply underscores the inconsistent theories which the majority allows Appellant to proceed under. In the first appeal in this case, the Appellant argued vigorously that Pierce was acting in the course and scope of his employment with Berkeley County. In this second appeal, Appellant is allowed to argue that even though he alleges Pierce was acting in the course and scope of his employment, that need not be the case. Under the SCTCA Pierce either is or is not acting in the course and scope of his employment. This Court allows Appellant to have it both ways. This constitutes reversible error and demonstrates a clear misapplication of the SCTCA to the facts of this case.

of a tolling agreement relating to the applicable statute of limitations.

2. This Court Of Appeals Ignored And/Or Failed To Apply The SCTCA As Mandated By The Legislature And Controlling Precedents.

This Court of Appeals has repeatedly held the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Elmore v. Ramos, 327 S.C. 507, 489 S.E.2d 663 (Ct.App. 1997). In construing a statute, its words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Adkins v. Comcar Industries, Inc., 323 S.C. 409, 475 S.E.2d 762 (1996). In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Hitachi Data Systems Corp. v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992). The court should review . . . statutory language as a whole in light of its manifest purpose. Simmons v. City of Columbia, 280 S.C. 163, 311 S.E.2d 732 (1984). City of Sumter Police Department, 330 S.C. 371, 376-377, 498 S.E.2d 894, 897. The Court failed to do so in this case.

No one disputes the fact that the SCTCA seeks to limit a governmental entity's tort liability as much as possible. (R.p.15, paras. 1-2). Consequently, the SCTCA specifically provides as follows:

A settlement or judgment in an action or a settlement of a claim under this chapter constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence.

S.C. Code Ann. § 15-78-70(d) (Emphasis added). This provision has been viewed as the "kind of limitation [designed to] prevent[] a claimant from recovering twice." Goolsby and Goforth, 23 (citing James Martin, *Common Law Sovereign Immunity and the Maine Tort Claims Act: A Rose by Another Name*, 35 Me.L.Rev. 265, 283 (1983)) (Emphasis added).

This Court of Appeals ignored the controlling law which mandates that the SCTCA must be liberally construed in favor of limiting the state's potential liability. Rather, this Court of Appeals relied on a forced interpretation of the SCTCA which it in turn construed liberally in favor of expanding the state's potential liability. This is contrary to the very terms of the SCTCA which this Court of Appeals must apply. Greenville Hospital System v. Provident Life and Accident Insurance Co., 330 S.C. 436, 441-442, 499 S.E.2d 232, 235 (Ct.App. 1998) (citing Koenig v. South Carolina Department of Public Safety, 325 S.C. 400, 403-404, 480 S.E.2d 98, 99 (Ct.App. 1996)). The interpretation offered by the dissent is the correct one in that it is based on the language

of the statute and the mandate that the SCTCA be interpreted to the benefit of the state. The majority's interpretation does neither.

The SCTCA specifically provides:

A settlement or judgment in an action or a settlement of a claim under this chapter constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence.

S.C. Code Ann. § 15-78-70(d) (Emphasis added). Since the Covenant between Wade and Pierce\GEICO constitutes a settlement under S.C. Code Ann. § 15-78-70(d), the Covenant acts as "a complete bar to any further action by [Wade] against [Pierce] or [Berkeley County for Wade's personal injuries since the Covenant and this action against Berkeley County arose from] the same occurrence." S.C. Code Ann. § 15-78-70(d).

As this Court of Appeals has stated when "construing a statute, its words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Smith, 330 S.C. 237, 240-241, 498 S.E.2d 648, 649-650 (citing Adkins, 323 S.C. 409, 475 S.E.2d 762). Moreover, when "a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for

employing rules of statutory interpretation and the court has no right to look for or impose another meaning." Smith, 330 S.C. 237, 241, 498 S.E.2d 648, 650 (citing City of Camden, 326 S.C. 556, 486 S.E.2d 492).

The language in S.C. Code Ann. § 15-78-70(d) is plain and unambiguous. When there has been a settlement of a claim under the SCTCA, then neither the employee nor the governmental entity has any further liability to the claimant. Wade chose to sue Pierce first and, in turn, to settle with Pierce and GEICO. He then sued Berkeley County seeking, in essence "a second bite at the apple". The SCTCA, pursuant to S.C. Code Ann. § 15-78-70(d), is clearly designed to prevent such a situation as that "kind of limitation prevents a claimant from recovering twice." Goolsby and Goforth, 23 (citing Martin, 35 Me.L.Rev. 265, 283). Wade could have avoided his present dilemma by initially substituting Berkeley County for Pierce, S.C. Code Ann. § 15-78-70(c); or by suing Berkeley County and Pierce, individually, through asserting the required allegations against Pierce in his individual capacity. S.C. Code Ann. § 15-70-70(b).

Unfortunately for Wade, he did neither and his attempt to avoid the consequences of his decision is without merit. Judge Dennis properly concluded Berkeley County was entitled to summary

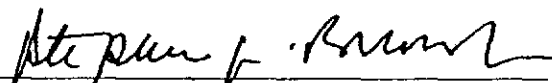
judgment as a matter of law since Wade had settled with Pierce and his claims against Berkeley County were therefore barred.

IV. CONCLUSION

Based upon the foregoing arguments and citation of authority, the Respondent, Berkeley County, South Carolina, respectfully requests this Court of Appeals grant rehearing and affirm Judge Dennis' decision in all respects.

Respectfully submitted:

YOUNG, CLEMENT, RIVERS & TISDALE, LLP

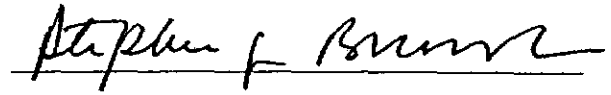
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Charleston, South Carolina

October 18, 1999

Petitioner respectfully asserts this case satisfies the requirements of SCACR 219 and therefore requests that this court grant rehearing en banc.

A handwritten signature in cursive script, reading "Stephen L. Brown", is written over a horizontal line.

Stephen L. Brown

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Opinion No. 3145
Filed April 3, 2000

SC COURT OF APPEALS

APPEAL FROM THE COURT OF COMMON PLEAS
FOR BERKELEY COUNTY

HONORABLE R. MARKLEY DENNIS, Jr., CIRCUIT COURT JUDGE
Civil Action No. 95-CP-10-1281

Gerald D. Wade, Jr.,

Appellant,

v.

Berkeley County, South Carolina
and John Doe,

Respondents/Petitioners.

PETITION FOR REHEARING

Stephen P. Groves, Sr., Esquire
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*Attorneys for Respondents/Petitioners
Berkeley County, South Carolina*

TO THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

COMES now the Respondent/Petitioner, Berkeley County and files this petition for rehearing pursuant to SCACR 221. Petitioner respectfully asserts this Court of Appeals overlooked and misapprehended the law applicable to this case. Specifically, this Court of Appeals:

1. failed to apply the terms and provisions of the South Carolina Tort Claims Act ("SCTCA") as adopted by the Legislature;
2. failed to apply and interpret the terms of the SCTCA in favor of limiting liability of the State and its political subdivisions;
3. allowed the Appellant to recover twice on inconsistent theories without requiring any election of remedies;
4. encouraged parties to seek double recovery on inconsistent theories in a manner totally inconsistent with the terms and conditions of the SCTCA; and
5. failed to consider that its ruling conflicts with well-settled common law of respondeat superior in this state.

Unfortunately, limiting the efficacy of this opinion to the unique facts of this case did little to illuminate or elucidate the bench and bar as to how this Court was able to reach the result which it sought. Likewise, the allegedly peculiar facts cited in the concurrence to the plurality opinion do nothing to change the fact that, as the dissent properly notes, this case opens the door to an additional mode of recovery under the Tort Claims Act and totally ignores the mandate that it be strictly construed against expanding the state's liability.

I. STATEMENT OF THE CASE

The Appellant, Gerald D. Wade, Jr., sued the Defendants, Bobby Joe Pierce and John Doe, in **August 1995**. (R.p.24, paras. 2-3). He asserted a cause of action for automobile negligence (R.pp.24-28, paras. 5-12) and sought actual and punitive damages. (R.p.28, para. 13). Wade later filed an Amended Complaint in **April 1996** (R.p.29), dropping Pierce as an individual defendant and naming Berkeley County instead. (R.p.29, paras. 1-4). He asserted the same claim as before and sought similar damages. (R.pp.29-33, paras. 5-15).

Berkeley County timely answered (R.p.35), denying Wade's material allegations (R.pp.35-37, paras. 1, 3, 6-7, 9-13), and asserting the affirmative defenses of lack of agency between Pierce and Berkeley County (R.pp.37-38, paras. 14-15), full and complete settlement under the South Carolina Tort Claims Act¹ (R.p.38, para. 16), Defendant Doe's sole negligence (R.pp.38-39, paras. 17-18),² and sudden emergency. (R.p.39, para. 19).

Berkeley County filed its first Motion for Summary Judgment in September 1996 (R.pp.18-19), on the grounds Pierce was not acting as an agent for Berkeley County (R.pp.18-19, paras. 1-2) and that Wade had previously settled his claim. (R.p.19, para. 3). The Honorable A. Victor Rawl, Circuit Judge, heard and granted Berkeley County's motion on December 3, 1996. (R.p.2). Wade appealed and this Court of Appeals reversed Judge Rawl and remanded the case.³

¹ See The South Carolina Tort Claims Act (the "SCTCA") as codified in S.C. Code Ann. § 15-78-10, et. seq. (West Group Supp. 1997). See especially S.C. Code Ann. § 15-78-10(d) (West Group Supp. 1997).

² See S.C. Code Ann. § 15-78-60(20) (West Group Supp. 1997).

³ See Wade v. Berkeley County, 330 S.C. 311, 498 S.E.2d 684 (Ct.App. 1998) ("Wade I"). In

On remand, Berkeley County filed a second Motion for Summary Judgment based on the previous monetary settlement Wade had reached with Pierce before he filed the Amended Complaint. (R.pp.21-23). Pursuant to a Consent Order (R.pp.9-10), Berkeley County filed a Third Amended Answer denying Wade's material allegations. (R.pp.41-43, paras. 1-13). Berkeley County also asserted the same affirmative defenses as before (R.pp.43-45, paras. 14-20), and added another. (R.p.46, para. 21).

The Honorable R. Markley Dennis, Jr., Circuit Judge, considered Berkeley County's motion on June 29, 1998. (R.p.11). He subsequently granted the motion by written order dated July 13, 1998. (R.pp.11-17). This second appeal followed. This Court of Appeals issued its opinion on October 4, 1999, again reversing the decision of the trial court granting summary judgment.⁴ Petitioner thereafter filed a motion for reconsideration and a suggestion for rehearing en banc. These motions were granted by this Court of Appeals. This case was reheard by the Court en banc on January 13, 2000. On April 3, 2000 this Court issued its opinions in this case reversing the decision of the trial court.⁵

Judge Rawl's order granting summary judgment to Berkeley County in Wade I he noted "[Berkeley County's] alternative ground for summary judgment, that the [SCTCA] bars [Wade's] claim against [Berkeley County] as a matter of law [was] not reached." (R.p.8). It is this ground for summary judgment which gives rise to this appeal.

⁴ See Wade v. Berkeley County, Opinion No. 3053 S.C. App. filed October 4, 1999 ("Wade II").

⁵ See Wade v. Berkeley County, Opinion No. 3145 S.C. App. (en banc) filed April 3, 2000 ("Wade III").

II. STATEMENT OF THE FACTS

Sometime in January 1993, Berkeley County hired Pierce as an animal control officer.

(R.p.12).⁶ Among other duties, Pierce was required to travel throughout Berkeley County to pick-up stray domesticated animals, clean the kennels, and, when necessary, euthanize animals. He worked five days per week and his standard working hours were from 8:30 a.m. until 5:00 p.m.

Not long after Pierce was hired, Berkeley County assigned him an Animal Control vehicle to use when picking up animals. While he was permitted to drive the County Truck to and from work, Berkeley County withdrew the County Truck from Pierce in 1994 for cost-savings reasons. Pierce then began to drive his personal vehicle to and from work.⁷ While Pierce was working, he drove an Animal Control department vehicle and left his personal truck parked at the animal shelter.⁸

On the evening of May 31, 1995, Pierce received a telephone call from a citizen reporting a dead dog on U. S. Highway 17-A.⁹ The next morning, on June 1, 1995, Pierce set off for work in his personal vehicle and stopped by the dog's location.¹⁰ After checking on the dog, Pierce continued on to work.¹¹

⁶ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

⁷ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

⁸ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

⁹ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

¹⁰ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

¹¹ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

At approximately 7:55 a.m., while Pierce was still heading to work, he and Wade were involved in an automobile accident. (R.p.12, para. 1; R.p.30, para. 7; R.p.66, p.1).¹² Defendant Doe, driving a third automobile, reportedly cut Pierce off and caused him to cross the center-line and strike Wade virtually head-on. (R.p.12).¹³

Prior to when Wade sued Berkeley County for his injuries (R.p.29, paras. 1-4), he sued Pierce and Doe for the same injuries arising from the same accident. (R.p.24, paras. 2-3; R.pp.69-70, paras. 10-11). Wade ultimately dismissed Pierce from this matter after they reached a settlement. (R.pp.69-70, pp.4-5, paras. 10-11). Pierce's private automobile insurance carrier, Government Employees Insurance Company, paid Wade \$13,000.00 to settle his personal injury claims against Pierce. (R.pp.66-67, para. 1). Wade, in turn, granted Pierce and GEICO a *Covenant Not To Execute Judgment* for the \$13,000.00 payment. (R.pp.66-71). At the time GEICO made this payment to Wade on Pierce's behalf, Wade had not yet made any claim against Berkeley County. (R.p.12). After Wade settled with GEICO, he filed an amended complaint alleging Pierce was acting in the course and scope of his employment with Berkeley County.

Based on the Wade/Pierce Settlement and GEICO's \$13,000.00 payment, Berkeley County moved for summary judgment under the South Carolina Tort Claims Act.¹⁴ Berkeley County asserted:

... if the Court or [the jury] ... determine[s] ... Pierce was an employee of ... Berkeley County ... at the time of the alleged

¹² Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

¹³ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

¹⁴ See S.C. Code Ann. §§ 15-78-10, et seq. (West Group Supp. 1997).

occurrence . . . [S.C.Code Ann.] § 15-78-70[(d) (West Group Supp. 1997)] is a complete bar to [Wade's] action.

(R.p.22, para. 1). Berkeley County also asserted:

[it] underst[oo]d[] a settlement by [Wade] as against . . . Pierce [had taken] place in this action [and] said settlement was of a claim which arose out of the same occurrence. [Consequently, such] settlement would amount to a complete bar [to Wade] bringing any action pursuant to [S.C. Code Ann.] § 15-78-70[(d)]

(R.p.22, para. 2). Judge Dennis agreed and granted Berkeley County's motion. (R.pp.11-17).

Wade then appealed. This Court of Appeals reversed the grant of summary judgment and affirmed such ruling when this matter was reheard en banc.

III. ARGUMENT AND CITATION OF AUTHORITY

THIS COURT OF APPEALS ERRED IN REVERSING JUDGE DENNIS' GRANT OF SUMMARY JUDGMENT, AS WADE HAD FULLY SETTLED HIS CLAIMS AGAINST PIERCE AND HIS CLAIMS AGAINST BERKELEY COUNTY WERE BARRED BY S.C CODE ANN. § 15-78-70(d) (WEST GROUP SUPP. 1997).

1. Basic Legal Principles Were Overlooked And Misapprehended By This Court of Appeals.

Undisputedly, Wade settled his personal injury claims with Pierce pursuant to GEICO's payment of \$13,000.00. (R.pp.66-71). This Court of Appeals opinion is inconsistent on the issue of whether the covenant not to execute would in fact constitute a settlement as that term is used in the Act. While this Court states the document in issue was "intended to be a covenant not to execute as opposed to a settlement agreement..." Wade III at p.8. Yet this Court of Appeals noted in this same opinion that there are "three recognizable legal documents" which can be used to effectuate a

settlement, one of which is a covenant not to execute. Wade III at p.4(emphasis added). This Court goes to great lengths to analyze and explain the differences between a general release, a covenant not to sue and a covenant not to execute. It fails, however, to explain or cite any authority in support of the proposition that a covenant not to execute is not a method of reaching a settlement in a case. This was clearly erroneous, especially in light of the fact that our Supreme Court has acknowledged a covenant not to execute is one method of settling a case. See Poston by Poston v. Barnes, 294 S.C. 261, 264, 363 S.E.2d 888, 889 (1987).

To the extent this Court of Appeals reversed Judge Dennis' grant of summary judgment finding the settlement with Pierce was not a settlement consummated "under this chapter" of the SCTCA; such ruling was clearly erroneous. This ruling ignores the fact that the SCTCA "is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents" S.C. Code Ann. § 15-78-20(b) (West Group Supp. 1997). See Knoke v. South Carolina Department of Parks, Recreation and Tourism, 324 S.C. 136, 144, 478 S.E.2d 256, 260 (1996). Consequently, it is fundamental that the "[p]rovisions [of the SCTCA] relating to limitations and exemptions are to be liberally construed to limit the state's liability." Wade, 330 S.C. 311, 319, 498 S.E.2d 684, 688. See also Summer v. Carpenter, 328 S.C. 36, 44, 492 S.E.2d 55, 59 (1997); Strother v. Lexington County Recreation Commission, 324 S.C. 611, 619, 479 S.E.2d 822, 826 (Ct.App. 1996) (citing Rice v. School District of Fairfield, 317 S.C. 87, 452 S.E.2d 352 (Ct.App. 1994)) (" . . . [t]he 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. ").

With regard to government employees, the SCTCA is also "the exclusive civil remedy for any tort committed by an employee of a governmental entity." S.C. Code Ann. § 15-78-70(a) (West Group Supp. 1997). See Proveaux v. Medical University of South Carolina, 326 S.C. 28, 32, 482 S.E.2d 774, 776 (1997). In fact the SCTCA provides:

On or after January 1, 1989, a person, when bringing an action against a governmental entity under the provisions of [the SCTCA], shall name as a party defendant only the agency or political subdivision for which the employee was acting and is not required to name the employee individually, unless the agency or political subdivision for which the employee was acting cannot be determined at the time the action is instituted. In the event . . . the employee is individually named, the agency or political subdivision for which the employee was acting must be substituted as the party defendant.

S.C. Code Ann. § 15-78-70(c) (West Group Supp. 1997) (Emphasis added). In this vein, the Supreme Court noted:

. . . government agencies generally act through their employees. Thus, when an agency is sued because of the alleged tort of an employee acting within the scope of his or her employment, the [SCTCA] provides . . . only the agency shall be named as a party. S.C. Code Ann. § 15-78-70(c). Governmental employees who commit torts while acting in their official capacity are immune from personal liability unless their conduct constitutes actual fraud, actual malice, intent to harm or a crime of moral turpitude.

Jensen v. Anderson County Department of Social Services, 304 S.C. 195, 205 n.4, 403 S.E.2d 615, 620 n.4 (1991) (citing S.C. Code Ann. §§ 15-78-70(a) and (b) (West Group Supp. 1997)) (Emphasis added).

The SCTCA is designed to permit claimants to sue governmental entities for the acts of their employees -- not the employee personally -- since "[a]n employee of a governmental entity who commits a tort while acting within the scope of his official duty in not liable therefor except [under certain circumstances]." S.C. Code Ann. § 15-78-70(a). Under the SCTCA an "employee of a governmental entity [does not have] immunity from suit and liability if it is proved . . . the employee's conduct was not within the scope of his official duties or . . . it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-70(b) (West Group Supp. 1997). As noted by the authorities, the SCTCA "confers personal immunity upon any governmental employee 'who commits a tort while acting within the scope of his official duty . . .'" C. Tolbert Goolsby, Jr. and Ginger D. Goforth, The South Carolina Tort Claims Act: A Primer and Then Some, 25 (2d ed. SCBar CLE Div. 1997).

With these basic principles in mind, it becomes evident the majority of the Court deciding this case simply ignored controlling case law and statutes in an effort to expand the Appellant's potential recovery. In this case, Wade originally sued Pierce, **individually**, in August 1995. (R.pp.24-28). He did not assert Pierce committed either fraud, actual malice, or a crime, or intended to hurt Wade. (R.pp.24-28).¹⁵ Moreover, Wade did not add Berkeley County as a party-defendant

¹⁵ Wade did assert the standard automobile accident allegations made in an "auto negligence" case:

. . . the injuries and damages suffered by [Wade] were due to and caused by the negligence, carelessness, recklessness, willfulness, wantonness[,] and heedlessness of [the Defendants Pierce and Doe] .

...

(R.pp.26-27, para. 12).

until April 1996, after he had settled his claims against Pierce's personal automobile insurance company. (R.p.16, para. 6; R.pp.66-71). Assuming Wade, in August 1995, did not know Pierce was an employee of a governmental entity, Wade correctly sued Pierce personally. See S.C. Code Ann. § 15-78-70(c). Nevertheless, once Wade determined Pierce worked for Berkeley County and, in turn, Berkeley County might theoretically be liable, as Pierce's employer, for Wade's injuries, then Wade was required to dismiss Pierce from the case. S.C. Code Ann. § 15-78-70(c) ("In the event the employee is individually named, the agency or political subdivision for which the employee was acting must be substituted as the party[-]defendant."). Appellant cannot sue Pierce individually and Berkeley County as his employer. Under the facts of this case and the mandate of the SCTCA, they are not and cannot be joint tortfeasors. Although the majority acknowledges this fact, it ignores it in an effort to allow a potential double recovery.

Wade discovered Berkeley County employed Pierce and, under the facts, Berkeley County theoretically had potential liability when Wade took Pierce's deposition on February 1, 1996. (R.p.48, lines 1-11; R.p.49, line 3 - R.p.59, line 25; R.p.60, line 2 - R.p.65, line 25). Even though Wade was aware Pierce was claiming he was at work at the time of the accident, Wade did not immediately dismiss Pierce as a party-defendant and substitute Berkeley County but, instead, waited until he had settled with GEICO, on Pierce's personal behalf, for \$13,000.00. (R.p.15-16, paras. 5, 7; R.pp.66-71).

The plurality opinion majority inquired how can an action against Pierce in his individual capacity constitute an action under the Tort Claims Act? Wade III at pp.8-9. The answer is evident and found in the terms of the SCTCA. Lawsuits brought under the Act are not the same as these generally brought by litigants. Such claims proceed under their own set of rules. As a matter of

law, Pierce cannot be sued in his individual capacity under the facts alleged in this case once he testified he was acting in the course and scope of his employment. Again, the majority simply ignored the provisions of the SCTCA which stand in the way of Appellant's potential double recovery.

As Judge Goolsby aptly noted, the ruling of this Court of Appeals opens the door for every injured party to sue a governmental employee individually before proceeding against the governmental entity just in case the employee was acting outside the scope of his employment. This is completely contrary to the SCTCA. It further allows a plaintiff to proceed on inconsistent theories and allows multiple recoveries for one harm without requiring any election of remedies. Cf. Taylor v. Mount Vernon-Woodberry Mills, Inc., 211 S.C. 414, 45 S.E.2d 809 (1947). There is no support for such a haphazard and whimsical interpretation of the SCTCA.¹⁶

The inconsistency in the majority's reasoning is evident in its ruling that it need not accept the Appellant's own allegations regarding Pierce's employment status in his complaint as true in reviewing the grant of summary judgment. The majority cites not one shred of authority in support of this position. This simply underscores the inconsistent theories which the majority allows Appellant to proceed under. In the first appeal in this case, the Appellant argued vigorously that Pierce was acting in the course and scope of his employment with Berkeley County. In this second appeal, Appellant is allowed to argue that even though he alleges Pierce was acting in the course and scope of his employment, that need not be the case. Under the SCTCA Pierce either is or is not acting in the course and scope of his employment. This Court allows Appellant to have it both

¹⁶ Rather than "wreak havoc" and "countenance the use of a judicial straightjacket" as the majority predicts, Appellant could have preserved his right to proceed against Pierce in the event he was acting outside the scope of his employment by way of a tolling agreement relating to the

ways. This constitutes reversible error and demonstrates a clear misapplication of the SCTCA to the facts of this case.

Interestingly, at the en banc oral argument, a member of the Court stated several Judges were "profoundly concerned" with the impact the original panel ruling would have on common law respondeat superior liability. Although the dissent addresses this issue, both the plurality opinion and the concurrence completely ignore it. Applying the rationale of the majority, a litigant can pursue a claim against the master after settling with the servant, even when the complaint alleges the servant was acting on behalf of the master. There is no support for such a proposition anywhere in the law of this state.

2. This Court Of Appeals Ignored And/Or Failed To Apply The SCTCA As Mandated By The Legislature And Controlling Precedents.

This Court of Appeals has repeatedly held the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Elmore v. Ramos, 327 S.C. 507, 489 S.E.2d 663 (Ct.App. 1997). In construing a statute, its words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Adkins v. Comcar Industries, Inc., 323 S.C. 409, 475 S.E.2d 762 (1996). In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Hitachi Data Systems Corp. v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992). The court should review . . . statutory language as a whole in light of its manifest purpose. Simmons v. City of Columbia, 280 S.C. 163, 311 S.E.2d 732 (1984). City of Sumter Police Department, 330 S.C. 371, 376-377, 498 S.E.2d 894, 897. The Court failed to do so in this case.

applicable statute of limitations.

No one disputes the fact that the SCTCA seeks to limit a governmental entity's tort liability as much as possible. (R.p.15, paras. 1-2). Consequently, the SCTCA specifically provides as follows:

A settlement or judgment in an action or a settlement of a claim under this chapter constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence.

S.C. Code Ann. § 15-78-70(d) (Emphasis added). This provision has been viewed as the "kind of limitation [designed to] prevent[] a claimant from recovering twice." Goolsby and Goforth, 23 (citing James Martin, *Common Law Sovereign Immunity and the Maine Tort Claims Act: A Rose by Another Name*, 35 Me.L.Rev. 265, 283 (1983)) (Emphasis added).

This Court of Appeals ignored the controlling law which mandates that the SCTCA must be liberally construed in favor of limiting the state's potential liability. Rather, this Court of Appeals relied on a forced interpretation of the SCTCA which it in turn construed liberally in favor of expanding the state's potential liability. This forced interpretation is further evidenced by the plurality and concurring opinions repeated attempts to limit their ruling to the unique facts of this case. This is contrary to the very terms of the SCTCA which this Court of Appeals must apply. Greenville Hospital System v. Provident Life and Accident Insurance Co., 330 S.C. 436, 441-442, 499 S.E.2d 232, 235 (Ct.App. 1998) (citing Koenig v. South Carolina Department of Public Safety, 325 S.C. 400, 403-404, 480 S.E.2d 98, 99 (Ct.App. 1996)). The interpretation offered by the dissent is the correct one in that it is based on the language of the statute and the mandate that the SCTCA be interpreted to the benefit of the state. The majority's interpretation does neither.

The SCTCA specifically provides:

A settlement or judgment in an action or a settlement of a claim under this chapter constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence.

S.C. Code Ann. § 15-78-70(d) (Emphasis added). Since the Covenant between Wade and Pierce\GEICO constitutes a settlement under S.C. Code Ann. § 15-78-70(d), the Covenant acts as "a complete bar to any further action by [Wade] against [Pierce] or [Berkeley County for Wade's personal injuries since the Covenant and this action against Berkeley County arose from] the same occurrence." S.C. Code Ann. § 15-78-70(d).

As this Court of Appeals has stated when "construing a statute, its words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Smith, 330 S.C. 237, 240-241, 498 S.E.2d 648, 649-650 (citing Adkins, 323 S.C. 409, 475 S.E.2d 762). Moreover, when "a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." Smith, 330 S.C. 237, 241, 498 S.E.2d 648, 650 (citing City of Camden, 326 S.C. 556, 486 S.E.2d 492).

The language in S.C. Code Ann. § 15-78-70(d) is plain and unambiguous. When there has been a settlement of a claim under the SCTCA, then neither the employee nor the governmental entity has any further liability to the claimant. Wade chose to sue Pierce first and, in turn, to settle with Pierce and GEICO. He then sued Berkeley County seeking, in essence "a second bite at the apple". The SCTCA, pursuant to S.C. Code Ann. § 15-78-70(d), is clearly designed to prevent such a situation as that "kind of limitation prevents a claimant from recovering twice." Goolsby and Goforth, 23 (citing Martin, 35 Me.L.Rev. 265, 283). Wade could have avoided his present dilemma

by initially substituting Berkeley County for Pierce, S.C. Code Ann. § 15-78-70(c); or by suing Berkeley County and Pierce, individually, through asserting the required allegations against Pierce in his individual capacity. S.C. Code Ann. § 15-70-70(b).

Unfortunately for Wade, he did neither and his attempt to avoid the consequences of his decision is without merit. Judge Dennis properly concluded Berkeley County was entitled to summary judgment as a matter of law since Wade had settled with Pierce and his claims against Berkeley County were therefore barred.

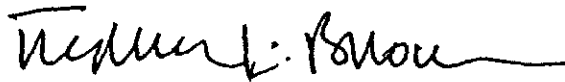
IV. CONCLUSION

Based upon the foregoing arguments and citation of authority, the Respondent, Berkeley County, South Carolina, respectfully requests this Court of Appeals grant rehearing and affirm Judge Dennis' decision in all respects.

Respectfully submitted:

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By: _____



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April 13th, 2000

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*Attorneys for Respondent
Berkeley County, South Carolina*

I hereby certify on April 13, 2000, I served copies of the Respondent's Petition for Rehearing, on all counsel involved in this appeal in this matter by United States Mail, postage prepaid, addressed as follows:

George J. Kefalos, Esquire
George J. Kefalos, P.A.
2850 Ashley Phosphate Road
North Charleston, SC 29418

Bonum S. Wilson, III, Esquire
Pratt-Thomas, Pearce, Epting & Walker, P.A.
P. O. Drawer 22247
Charleston, SC 29413-2247

Stephen L. Brown, Sr.
Stephen L. Brown, Sr., Esquire

Charleston, South Carolina



The South Carolina Court of Appeals

KENNETH A. RICHSTAD
CLERK

IDA R. CARSON
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, S. C. 29211
(803) 734-1890

November 23, 1999

Stephen P. Groves, Esquire
Joseph E. DaPore, Esquire
Stephen L. Brown, Esquire
Young Clement Rivers & Tisdale
P O Box 993
Charleston, SC 29402

Re: Wade, Gerald v. Berkeley County

Dear Counsel:

Your Petition for Rehearing en banc has been granted in the following Order:

"Granted.

s/ William T. Howell, J.
s/ Jasper M. Cureton, J.
s/ C. Tolbert Goolsby, Jr., J.
s/ Kaye G. Hearn, J.
s/ Thomas E. Huff, J.
s/ H. Samuel Stilwell, J.

Deny

s Carol Connor, J.
s/ Ralph K. Anderson, Jr., J.
s/ William L. Howard, J.

Columbia, South Carolina
November 23, 1999."

This case is scheduled to be heard en banc at the January 2000 term of court. Court will be set for January 11, 12 and 13. The parties are instructed to file six additional copies of the records and briefs within 15 days.

Sincerely,

A handwritten signature in cursive script, appearing to read "Penny Baskin", is written over a horizontal line.

Penny Baskin
Administrative Assistant

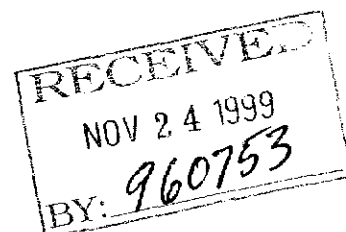
Handwritten initials "KAR" in a stylized, cursive font.

KAR/pb

071

cc: George J. Kefalos Esq
Bonum S. Wilson, III, Esquire

Pet.App.73





The South Carolina Court of Appeals

KENNETH A. RICHSTAD
CLERK

IDA R. CARSON
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, S. C. 29211
(803) 734-1890

May 19, 2000

Stephen P. Groves, Esquire
Joseph E. DaPore, Esquire
Stephen L. Brown, Esquire
Young Clement Rivers & Tisdale
P O Box 993
Charleston, SC 29402

Re: Wade, Gerald v. Berkeley County

Dear Counsel:

Your Petition for Rehearing has been denied in the following Order:

"En banc denied.

s/ Kaye G. Hearn, C. J.
s/ Jasper M. Cureton, J.
s/ C. Tolbert M. Goolsby, J.
s/ Carol Connor, J.
s/ Ralph K. Anderson, Jr., J.
s/ Thomas E. Huff, J.
s/ H. Samuel Stilwell, J.
s/ William L. Howard, J.
s/ M. D. Shuler, J.

Columbia, South Carolina
May 19, 2000."

The Remittitur in this case will be held in this Court only so long as required by Appellate Court Rule 221 (b).

Please notify this office, in writing, within ten (10) days from the date of this letter, whether or not you want any of the remaining Records on Appeal and briefs we may have in this case. Also enclose a check payable to the S. C. Court of Appeals, in the amount of \$7.50, to cover mailing costs. If we have not heard from you within ten (10) days, the Record on Appeal and briefs will be disposed of.

Sincerely,

A handwritten signature in cursive script, appearing to read "Penny Baskin", is written over the word "Sincerely,".

Penny Baskin
Administrative Assistant

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

R. Dennis Markley, Jr., Circuit Court Judge

Case No. 95-CP-08-1281

Gerald D. Wade, Jr.,

Appellant,

v.

Berkeley County, South Carolina
and John Doe,

Respondents.

RECORD ON APPEAL

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Stephen P. Groves, Esquire
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Attorneys for Berkeley County,
South Carolina, a Respondent

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Attorneys for John Doe
a Respondent.

George J. Kefalos, Esquire
George J. Kefalos, P.A.
2850 Ashley Phosphate Road
Charleston, SC 29418

Attorney for Appellant.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

R. Dennis Markley, Jr., Circuit Court Judge

Case No. 95-CP-08-1281

Gerald D. Wade, Jr.,

Appellant,

v.

Berkeley County, South Carolina
and John Doe,

Respondents.

RECORD ON APPEAL

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Attorneys for John Doe,
a Respondent

George J. Kefalos, Esquire
George J. Kefalos, P.A.
2850 Ashley Phosphate Road
Charleston, SC 29418

Attorney for Appellant.

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STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 95-CP-08-1281

GERALD D. WADE, JR.,
Plaintiff,

-versus-

BERKELEY COUNTY, SOUTH
CAROLINA, and JOHN DOE,
Defendant.

ORDER GRANTING SUMMARY
JUDGMENT IN FAVOR OF
BERKELEY COUNTY

FILED
7 JAN 13 PM 3:45
CLERK OF COURT
BERKELEY COUNTY, S.C.

The motion of Defendant, BERKELEY COUNTY, SOUTH CAROLINA, for summary judgment came on for hearing before this Court on December 3, 1996. The Defendant's Motion argues alternatively that Defendant's employee was not acting in the course and scope of his employment, and that the claim is barred by the South Carolina Tort Claims Act. After consideration of the briefs, affidavits and other evidence presented, as well as the oral arguments of counsel, and all other matters presented to the Court, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

The Court finds that the key facts in this matter are undisputed.

A. Undisputed Facts

Those facts which are undisputed and which are agreed upon by the parties are as follows:

At approximately 7:55 a.m. on June 1, 1995, the Plaintiff, GERALD D. WADE, JR., was involved in an automobile accident on U.S.

Highway 17-A near Moncks Corner with a pick-up truck driven by Bobby Joe Pierce.

Pierce was on his way to work as an animal control officer for Defendant, BERKELEY COUNTY. Pierce was traveling on his normal route to work when this accident occurred, was driving his own vehicle, was not being paid by BERKELEY COUNTY for mileage, was not under any direction by BERKELEY COUNTY, and had not been requested to perform any other errands or business for his employer during his commute to work.

B. Disputed Facts Alleged By Plaintiff Viewed In Light Most Favorable To Non-Moving Party

The facts which are alleged by the Plaintiff and disputed by the Defendant, which are not found as facts by this Court but instead are viewed in the light most favorable to the non-moving Plaintiff for purposes of this Motion, are as follows:

On the morning of the accident, Pierce received a report by telephone from some individual citizen that there was a dead dog beside Highway 17-A, a state highway.

The location of the dead dog beside Highway 17-A was on Pierce's regular route to work. On his way to work, Pierce stopped his truck and checked on the identity of the dead dog. Pierce then re-entered his pick-up truck and continued on his normal route toward work.

A dispute exists as to Bobby Joe Pierce's duty to check on the identity of the dog along the State highway where the dog allegedly was located. The Court finds for purposes of this hearing that Bobby Joe Pierce did have a duty to check out the identity of the dog. The accident occurred approximately a mile and a half down the road toward Plaintiff's work from where he had checked on the dead dog after he had re-entered his truck and continued his normal route to work.

C. Facts Determined By This Court

The facts which have been determined by this Court are as follows:

The Court finds that any actions Pierce allegedly took relating to the dead dog were not inherently dangerous, and that the place where the injury took place was not in such close proximity to the work place that the accident was brought within the scope of Pierce's employment.

APPLICABLE LAW

3 For BERKELEY COUNTY to be liable in this case, Pierce must have been "acting within the scope of his official duty." S.C. Code Ann. § 15-78-30(i). The Plaintiff has pled in paragraph 6 of his Complaint against BERKELEY COUNTY that "at all times relevant hereto Bobby Jo Pierce was acting as the agent, servant and employee of the Defendant, BERKELEY COUNTY, acting in the scope and course of his employment as an animal control officer."

"Liability under the Act extends only for actions of employees acting within the scope of their official duties." Benekritis v. Johnson, 882 F.Supp. 521 (D.S.C. 1995). The Act itself defines "scope of official duty" as "(1) acting in and about the official business of a governmental entity; and (2) performing official duties." S.C. Code Ann. § 15-78-30(i).

South Carolina follows the "going and coming rule" regarding tort liability for the principal when the agent or employee is traveling to and from work. Under that rule, the act of travelling to and from work is not within the scope of employment as a matter of law. Eadie v. H.A. Sack Co., 470 S.E.2d 397, 399 (S.C.App. 1996). South Carolina recognizes only five exceptions to the "going and coming rule:"

- 1) if the employer provides the means of transportation or pays travel time;
- 2) if the employee performs duties during his commute;
- 3) if the way used is inherently dangerous;
- 4) if the place where the injury occurs is in such close proximity to the workplace that it is brought within the scope of employment; and
- 5) if the injury occurs while the employee is on a special errand for the employer.

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Id. at 400.

WORKERS COMPENSATION HEARING

Based upon the same facts as are presented here, Pierce sought and was denied Workers Compensation benefits from BERKELEY COUNTY following the accident. The issue whether Pierce was acting in the course and scope of his employment at the time of the accident was

fully litigated in a hearing before the South Carolina Workers' Compensation Commission.

In denying his claim, the Commissioner reviewed the facts, took testimony and found as a matter of law that Pierce "did not sustain an injury by accident arising out of and in the course of his employment with BERKELEY COUNTY on June 1, 1995." August 22, 1996 Decision and Order of the South Carolina Workers' Compensation Commission at page 8. This Court is informed that the August 22, 1996 Decision and Order has not been appealed.

ISSUE PRECLUSION

The issue whether Pierce was acting in the course and scope of his employment at the time of the accident has already been decided in the negative. Plaintiff is precluded from re-litigating that issue in the case at bar.

Where an issue previously has been litigated, issue preclusion (collateral estoppel) properly is invoked in subsequent litigation to bar re-litigation of the same issue. Graham v. State Farm Fire & Cas. Ins. Co., 277 S.C. 389, 287 S.E.2d 495 (1982) (defensive issue preclusion; South Carolina Property & Cas. Ins. Guar. Assoc. v. Wal-Mart Stores, Inc., 304 S.C. 210, 403 S.E.2d 625 (1991) (offensive issue preclusion).

Where an issue of fact or law is both litigated and essential to the final judgment, its determination in the final judgment is conclusive in subsequent actions. South Carolina Property & Cas. Ins. Guar. Assoc. v. Wal-Mart Stores, Inc., 403 S.E.2d at 627.

CONCLUSIONS OF LAW

This Court concludes as a matter of law that Pierce was not acting in the course and scope of his employment at the time of the accident. In so concluding, the Court gives issue preclusion effect to the August 22, 1996 Decision and Order of the South Carolina Workers' Compensation Commission, finding that Pierce was not acting in the course and scope of his employment at the time of the accident.

The two-part test for issue preclusion is satisfied here, as laid out by the South Carolina Supreme Court in South Carolina Property & Cas. Ins. Guar. Assoc. v. Wal-Mart Stores, Inc., supra. The issue whether Pierce was acting in the course and scope of his employment was litigated before the Workers' Compensation Commission, and the litigated issue was essential to that tribunal's judgment. In the apropos words of the Graham court, "This matter having been fully and fairly adjudicated, [Plaintiff] is collaterally estopped by prior judgment from bringing this action to adjudicate the same issue. . . ." Graham v. State Farm Fire & Cas. Ins. Co., 287 S.E.2d at 496.

AM
6
The Court further concludes as a matter of law that Bobby Joe Pierce's actions do not come within any exception to the coming and going rule enunciated in the case of Eadie v. Sack supra. At the point and time of the accident, Bobby Joe Pierce had resumed his normal route to work when the accident occurred some one and one half miles from where he had checked on the dog. He was not

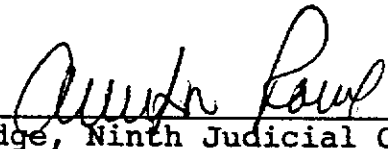
performing any further duties for his employer Berkeley Co. at the point in time when the accident occurred. Further, the auto accident itself had no causal connection with his employment.

This Court concludes that Plaintiff's claim against BERKELEY COUNTY must fail as a matter of law, as such claim is predicated upon Pierce having been acting within the course and scope of his employment at the time of the accident.

ORDER

Defendant, BERKELEY COUNTY, SOUTH CAROLINA'S, Motion For Summary Judgment is hereby GRANTED. Defendant's alternative ground for summary judgment, that the South Carolina Tort Claims Act bars Plaintiff's claim against BERKELEY COUNTY as a matter of law is not reached.

IT IS SO ORDERED!



Judge, Ninth Judicial Circuit

Charleston, South Carolina

Dated: 1/6/97

96-0753\PLEADING\ORDER-2.J

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

GERALD D. WADE, JR.,

Plaintiff,

-versus-

BERKELEY COUNTY, SOUTH
CAROLINA, and JOHN DOE,

Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 95-CP-08-1281

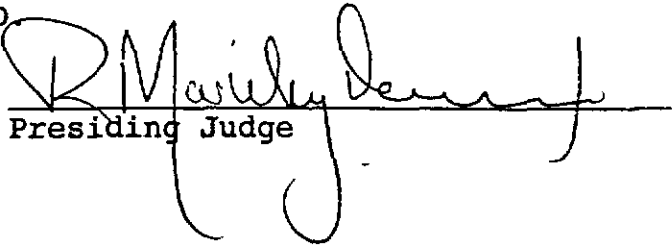
CONSENT ORDER
ALLOWING BERKELEY COUNTY
TO AMEND ANSWER

FILED
APR 13 PM 3:42
CLERK OF COURT
BERKELEY COUNTY S.C.
JSD

On motion of Young, Clement, Rivers & Tisdale, attorneys for the Defendant, Berkeley County, South Carolina, and with the consent of George J. Kefalos, attorney for the Plaintiff, and Bonum Wilson, III, Esquire, attorney for Co-Defendant John Doe, it is hereby

ORDERED that the Defendant, Berkeley County, South Carolina be allowed to file and serve the proposed Third Amended Answer (attached hereto) in the above matter.

AND IT IS SO ORDERED

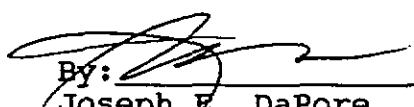

Presiding Judge

Charleston, South Carolina

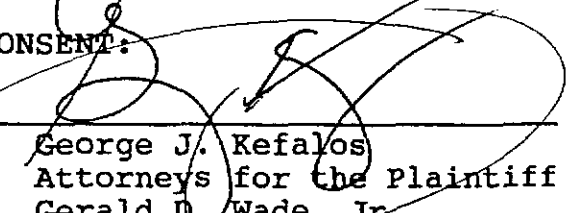
Dated: April 9, 1998

WE MOVE:

YOUNG, CLEMENT, RIVERS
& TISDALE, LLP

By: 
Joseph E. DaPore
Attorneys for Defendant,
Berkeley County, South Carolina

I CONSENT:

By: 
George J. Kefalos
Attorneys for the Plaintiff
Gerald D. Wade, Jr.

Bonum Wilson, III, Esquire
Attorney for the Co-Defendant
John Doe

Pet.App.85

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

GERALD D. WADE, JR.,
Plaintiff,

-versus-

BERKELEY COUNTY, SOUTH
CAROLINA, and JOHN DOE,
Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 95-CP-08-1281

CONSENT ORDER
ALLOWING BERKELEY COUNTY
TO AMEND ANSWER

FILED
APR 13 11 3:13
CLERK OF COURT
BERKELEY COUNTY S.C.

On motion of Young, Clement, Rivers & Tisdale, attorneys for the Defendant, Berkeley County, South Carolina, and with the consent of George J. Kefalos, attorney for the Plaintiff, and Bonum Wilson, III, Esquire, attorney for Co-Defendant John Doe, it is hereby

ORDERED that the Defendant, Berkeley County, South Carolina be allowed to file and serve the proposed Third Amended Answer (attached hereto) in the above matter.

AND IT IS SO ORDERED.

S. R. Markley Dennis
Presiding Judge

Charleston, South Carolina

Dated: April 9, 1998

WE MOVE:

YOUNG, CLEMENT, RIVERS
& TISDALE, LLP

By: _____
Joseph E. DaPore
Attorneys for Defendant,
Berkeley County, South Carolina

I CONSENT:

By: _____
George J. Kefalos
Attorneys for the Plaintiff
Gerald D. Wade, Jr.

Bonum Wilson
Bonum Wilson, III, Esquire
Attorney for the Co-Defendant
John Doe

Pet.App.86

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
) CASE NO. 95-CP-08-1281

GERALD D. WADE, JR.,
Plaintiff,

-versus-

BERKELEY COUNTY, SOUTH
CAROLINA, and JOHN DOE,
Defendant.

ORDER GRANTING SUMMARY
JUDGMENT AS TO DEFENDANT
BERKELEY COUNTY

FILED
JUN 15 1998
CLERK OF COURT
J.S.C.
150

This matter came before the undersigned on Monday, June 29, 1998, to consider a Motion for Summary Judgment filed by the Defendant, Berkeley County. Based on the evidence and the law, the undersigned hereby grants the motion and dismisses the Complaint of the Plaintiff, Gerald D. Wade, as to Berkeley County.

Berkeley County asserted it was not a proper party-defendant in this action as a result of a prior settlement of claims between Wade and Bobby Joe Pierce whom Wade claims, in this action, was a Berkeley County employee at the time of the June 1, 1995, accident which gave rise to Wade's injuries.

Wade asserted herein that Pierce was (a) employed by Berkeley County, (b) "in the course and scope of his employment", and (c) on his way to work at the time of the accident. In order for Wade to prevail under his current theory, he would have to prove this asserted employment relationship. On the other hand, Berkeley County asserted Wade's claims against it were barred by the South

Carolina Tort Claims Act¹ as a matter of law because of the prior settlement between Wade and Pierce which involved the same accident.

Based on the evidence and pleadings, the undersigned makes the following *Findings of Fact*:

FINDING OF FACTS

The underlying facts of the accident case are undisputed. At approximately 7:55 a.m. on June 1, 1995, Wade's vehicle was struck head on by Pierce's personal pickup truck on U.S. Highway 17A near Moncks Corner. Pierce contended he was forced to drive into the left hand lane to avoid a John Doe driver who suddenly stopped in Pierce's lane. At the time of the accident Pierce was on his ^{way} to work as an animal control officer with Berkeley County.

As a result of the accident, Pierce's personal liability insurance carrier paid Wade \$13,000.00 Dollars in exchange for a Covenant Not to Execute. At the time Pierce made this payment, Wade had not yet made any claim against Berkeley County.

1. An automobile accident involving Wade's vehicle and Pierce's personal pickup truck took place at approximately 7:55 a.m. on June 1, 1995, on U.S. Highway 17A near Moncks Corner.

2. There is a question of fact as to whether Pierce was, at the time of the accident, acting "in the course and scope of his employment" with Berkeley County.

¹ See S.C. Code Ann. §§ 15-58-10, et seq. (West Group Supp. 1997).

3. Prior to this claim against Berkeley County Wade asserted claims against Pierce and John Doe. Wade gave a Covenant Not to Execute to Pierce in exchange for Pierce's personal insurance carrier's payment of \$13,000.00. Wade subsequently asserted claims against Berkeley County for the same personal injuries which were the subject of his prior claims against Pierce.

4. Assuming Pierce was acting "in the course and scope of his employment" at the time of the accident, this Court must still decide, as a question of law, whether the SCTCA bars Wade's claim against Berkeley County under S.C. Code Ann. § 15-78-70(d) since Wade previously settled his claim against Wade an employee of a governmental entity.

Based on the evidence and pleadings, as well as, the aforementioned *Findings of Fact*, the undersigned makes the following *Conclusions of Law*:

CONCLUSIONS OF LAW

The South Carolina Court of Appeals has previously established the applicable standard for granting summary judgment in this case as follows:

Summary judgment should be granted only when no genuine issue as to any material fact exists, and the moving party is entitled to summary judgment as a matter of law. Middleborough Horizontal Property Regime Council of Co-Owners v. Montedison, 320 S.C. 470, 465 S.E.2d 765 (Ct.App. 1995) (citing Rule 56, SCRCP). Summary judgment is inappropriate when further inquiry into the facts is desirable to clarify proper application of the law. [Montedison, 320 S.C. 470, 465 S.E.2d 765]. Summary judgment is not appropriate if facts are conflicting, or if

the inferences to be drawn from the facts are doubtful. Alston v. Blue Ridge Transfer Co., 308 S.C. 292, 417 S.E.2d 631 (Ct.App. 1992). Summary judgment should not be granted even when the evidentiary facts are not in dispute, if there is dispute as to the conclusions to be drawn from those facts. Carolina Prod. Maintenance, Inc. v. United States Fidelity and Guar. Co., 310 S.C. 32, 425 S.E.2d 39 (Ct.App. 1992). In deciding a motion for summary judgment, the evidence and all of its inferences must be viewed in the light most favorable to the non-moving party.

Wade v. Berkeley County, ___ S.C. ___, ___, 498 S.E.2d 684, 687 (Ct.App. 1998) (citing Pryor v. Northwest Apts., Ltd., 321 S.C. 524, 469 S.E.2d 630 (Ct.App. 1996)).

The Court of Appeals has already determined it is a question of fact as to whether Pierce was "in the course and scope of his employment" with Berkeley County at the time of the accident. See Wade, ___ S.C. ___, ___, 498 S.E.2d 684, 687-689. Nevertheless, even if the trier of fact herein determined, at trial, Pierce was acting "in the course and scope of this employment" with Berkeley County then this Court would still be required to decide whether the SCTCA barred Wade's claim against Berkeley County as a matter of law based on the provisions of S.C. Code Ann. § 15-78-70(d) (West Group Supp. 1997).²

The SCTCA provides, in pertinent part, as follows:

. . . a settlement or judgment in an action or a settlement of a claim under this chapter constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence.

² Berkeley County raised S.C. Code Ann. § 15-78-70(d) as an affirmative defense in its Answer.

S.C. Code Ann. § 15-78-70(d).

1. The SCTCA, pursuant to S.C. Code Ann. § 15-78-10 reserves traditional sovereign immunity to governmental entities except as provided by the SCTCA itself. The SCTCA provides the State of South Carolina and its political subdivisions are liable only for torts within the limitations of the act in accordance with the principles established therein. S. C. Code Ann. § 15-78-20 (West Group Supp. 1997). See also Summers v. Harrison Construction, 298 S.C. 451, 381 S.E.2d 493 (Ct.App. 1989).

2. The SCTCA must be liberally construed in favor of limiting liability of the State. S.C. Code Ann. § 15-78-20 (West Group Supp. 1997). See Browning vs. Hartvigson, 307 S.C. 122, 126, 414 S.E.2d 115, 117 (1992).

3. A "settlement" has taken place previously between Wade and Pierce who Wade was an employee of Berkeley County at the time of the occurrence and alleged injuries.

4 Wade asserted claims against Pierce, individually, for the same accident which underlies this action.

5. Wade's suit against Pierce was concluded within the definition of "settlement" as contemplated in S.C. Code Ann. § 15-78-70(d) since an agreement has been reached between Wade and Pierce which settlement was fully resolved the matters between Wade and Pierce (i.e.; it has been ascertained with certainty what was coming from one to the other). Settlement has been defined as follows:

Act or process of adjusting or determining an adjusting; and adjustment between persons concerning their dealings or difficulties; an agreement by which parties having disputed matters between them reach or ascertain what is coming from one to the other; arrangement of difficulties; composure of doubts or differences; determination by agreement; and liquidation. Sowers v. Robertson, 144 Kan. 273, 58 P.2d 1105, 1107 (1981). Payment or satisfaction. Ledbetter v. Hall, 191 Ark. 791, 87 S.W.2d 996, 999 (1945). In legal parlance, implies meeting of minds of parties to the transaction or controversy; an adjustment of differences or accounts; a coming to an agreement. Ezmirlian v. Otto, 139 Cal.App. 486, 34 P.2d 774, 778 (1941).

Black's Law Dictionary, 1372 (6th. ed. West 1990).

6. For Wade to prevail against Berkeley County, he would have to prove an agency relationship between Pierce and Berkeley County. Nevertheless, even if Wade proved Pierce was a Berkeley County employee, Pierce would be immune from liability under the SCTCA and, in addition, Wade's previous settlement with Pierce bars any subsequent action against Berkeley County. See S.C. Code Ann. § 15-58-70(d).

7. Wade first sued Pierce individually for the same accident and injuries and the prior action resulted in the Wade-Pierce settlement for \$13,000.00. Only after that settlement did Wade bring this action against Berkeley County.

8. Berkeley County is entitled to summary judgment, as a matter of law, since there was a prior settlement of Wade's personal injury claims between Wade and an alleged tort feisor - employee (i.e.; Pierce) for the same occurrence. This settlement constitutes a complete bar to any further action by Wade against

the relevant governmental entity - employer (i.e.; Berkeley County) pursuant to S.C. Code Ann. § 15-78-70(d).

NOW THEREFORE, based on the evidence and pleadings, as well as, the afore-mentioned *Findings of Fact* and *Conclusions of Law*, the undersigned orders as follows:

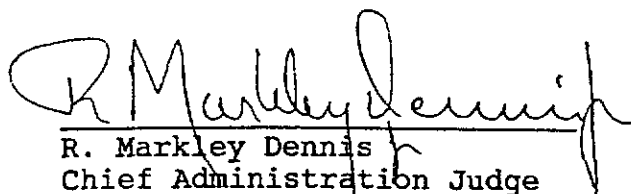
ORDER

IT IS ORDERED that the Motion for Summary Judgment of the Defendant, Berkeley County, be and hereby is granted; and it is

FURTHER ORDERED that the Complaint of the Plaintiff, Gerald P. Wade, be and hereby is dismissed as to the Defendant, Berkeley County, and it is

FURTHER ORDERED that the remaining claims of the Plaintiff Gerald P. Wade, be and hereby are stayed as against the Defendant, John Doe, pending any appeal of this decision; and it is

SO ORDERED!


R. Markley Dennis
Chief Administration Judge
Ninth Judicial Circuit

Charleston, South Carolina

July 13, 1998

R. Markley Dennis 7

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 95-CP-08-1281

GERALD D. WADE, JR.,)
)
Plaintiff,)

-versus-

BERKELEY COUNTY, SOUTH)
CAROLINA, and JOHN DOE,)

Defendant.)

MOTION FOR SUMMARY JUDGMENT

FILED
SEP 20 PM 12:51
CLERK OF COURT
BERKELEY COUNTY, S.C.

TO: GEORGE J. KEFALOS, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that ten (10) days after service hereof, or as soon thereafter as counsel may be heard, the Defendant, Berkeley County, South Carolina, by and through its undersigned attorney, will move before the Presiding Judge of the Ninth Judicial Circuit for an Order granting the Defendant, Berkeley County, South Carolina, Summary Judgment and dismissing the Complaint of the Plaintiff against the Defendant, Berkeley County, South Carolina pursuant to South Carolina Rules of Civil Procedure, Rule 56, on the grounds that pleadings and depositions previously taken, or taken hereto, and any affidavits that may be served upon counsel prior to the hearing show that there is no genuine issue as to any material fact which would entitle the Plaintiff to a recovery against the Defendant, Berkeley County, South Carolina, and therefore, the Defendant, Berkeley County, South Carolina is entitled to Summary Judgment as a matter of law.

The motion is based on the following:

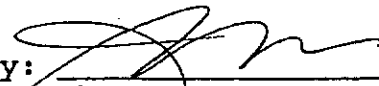
1. At the time of said accident, Bobby Jo Pierce was not acting as an agent, servant, or employee of Defendant, Berkeley

County, South Carolina and was not in the course and scope of his employment as an animal control officer with Defendant, Berkeley County, South Carolina, on or about June 1, 1995, when this accident allegedly occurred.

2. As such Bobby Joe Pierce was not in any agency relationship with Defendant, Berkeley County, South Carolina, and, therefore, Defendant, Berkeley County, South Carolina, could not be vicariously liable for any alleged tort committed by Bobby Joe Pierce as alleged in the Plaintiff's Amended Complaint.

3. That even if the Court would determine that Bobby Joe Pierce was an agent or employee of Defendant, Berkeley County, South Carolina, at the time of the alleged occurrence, which Defendant, Berkeley County, South Carolina, denies, § 15-78-70, subsection D, is a complete bar to bringing this action. Upon information and belief, Defendant, Berkeley County, South Carolina, understands a settlement by Plaintiff as against Bobby Joe Pierce took place in this action and said settlement was of a claim which arose out of the same occurrence. As such, said settlement would amount to a complete bar in Plaintiff bringing any action pursuant to § 15-78-70, subsection D, of the South Carolina Tort Claims Act.

YOUNG, CLEMENT, RIVERS & TISDALE, LLP

By: 

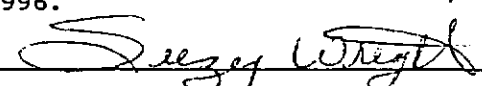
Joseph E. DaPore
28 Broad Street, P. O. Box 993
Charleston, SC 29402
(803) 577-4000
Attorneys for the Defendant
Berkeley County, South Carolina

Charleston, South Carolina

Dated: 9.18.96

CERTIFICATE OF MAILING

I HEREBY CERTIFY THAT A TRUE COPY OF THE
FOREGOING PLEADING HAS BEEN SERVED UPON
OPPOSING COUNSEL BY MAILING A COPY PROPERLY
ADDRESSED WITH SUFFICIENT POSTAGE AFFIXED
THERE TO THIS 19 DAY OF September,
1996.



FILED
96 SEP 20 PM 12:57
CLERK OF COURT
BERKELEY COUNTY, S.C.

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

GERALD D. WADE, JR.,
Plaintiff,

-versus-

BERKELEY COUNTY, SOUTH
CAROLINA, and JOHN DOE,
Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 95-CP-08-1281

MOTION FOR SUMMARY JUDGMENT

FILED
MAR 12 PM 12:38
CLERK OF COURT
BERKELEY COUNTY S.C.

TO: GEORGE J. KEFALOS, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

Upon consideration of the recent Appellate court ruling in this case and Judge Rawls declination to rule on the South Carolina Tort Claims Act that bars Plaintiff's claim against Berkeley County, the Defendant, Berkeley County, South Carolina, hereby reinstates their Motion for Summary Judgement.

This Motion will be supported by an affidavit(s) to be filed prior to hearing, and may be supported by such other affidavits, memoranda, briefs and evidence which may be received and/or required by the Court.

PLEASE TAKE NOTICE that ten (10) days after service hereof, or as soon thereafter as counsel may be heard, the Defendant, Berkeley County, South Carolina, by and through its undersigned attorney, will move before the Presiding Judge of the Ninth Judicial Circuit for an Order granting the Defendant, Berkeley County, South Carolina, Summary Judgment and dismissing the Complaint of the Plaintiff against the Defendant, Berkeley County, South Carolina pursuant to South Carolina Rules of Civil Procedure, Rule 56, on the grounds that pleadings and depositions

previously taken, or taken hereto, and any affidavits that may be served upon counsel prior to the hearing show that there is no genuine issue as to any material fact which would entitle the Plaintiff to a recovery against the Defendant, Berkeley County, South Carolina, and therefore, the Defendant, Berkeley County, South Carolina is entitled to Summary Judgment as a matter of law.

The motion is based on the following:

1. That if the Court or Jury would determine that Bobby Joe Pierce was an employee of Defendant, Berkeley County, South Carolina, at the time of the alleged occurrence, which Defendant, Berkeley County, South Carolina, denies, § 15-78-70, subsection d, is a complete bar to Plaintiff's action.

2. Upon information and belief, Defendant, Berkeley County, South Carolina, understands a settlement by Plaintiff as against Bobby Joe Pierce took place in this action. said settlement was of a claim which arose out of the same occurrence. Said settlement would amount to a complete bar in Plaintiff bringing any action pursuant to § 15-78-70, subsection d, of the South Carolina Tort Claims act.

This Defendant respectfully requests the Court issue an order dismissing Defendant Berkeley County by granting its Summary Judgment on the above basis.

YOUNG, CLEMENT, RIVERS & TISDALE, LLP

By: 

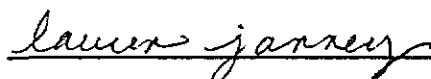
Joseph E. DaPore
28 Broad Street, P. O. Box 993
Charleston, SC 29402
(803) 577-4000
Attorneys for the Defendant
Berkeley County, South Carolina

Charleston, South Carolina

Dated: 3 - 4 - 98

CERTIFICATE OF MAILING

I HEREBY CERTIFY THAT A TRUE COPY OF THE
FOREGOING PLEADING HAS BEEN SERVED UPON
OPPOSING COUNSEL BY MAILING A COPY PROPERLY
ADDRESSED WITH SUFFICIENT POSTAGE AFFIXED
THERE TO THIS 4th DAY OF March,
1998.



FILED
98 MAR 12 PM 12:38
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY S.C.

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)
GERALD D. WADE, JR.,)
Plaintiff,)
-versus-)
BOBBY JOE PIERCE AND JOHN)
DOE,)
Defendants.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO. 95-CP-08- 1281

COMPLAINT
(Auto Negligence)

95 AUG 25 PM 12:47
CLERK OF COURT
BERKELEY COUNTY, S.C.

FILED

The Plaintiff above named, complaining of the Defendants above named, alleges and says as follows:

1. That the Plaintiff is an individual and a resident of Berkeley County, South Carolina.
2. That the Defendant Pierce is an individual and a resident of Berkeley County, South Carolina.
3. That the Defendant John Doe is an unknown individual and this action against John Doe is brought pursuant to S.C. Code Ann. 38-77-170.
4. That the parties hereto, the subject matter hereof, and all things and matters hereinafter alleged are within the jurisdiction of this Honorable Court.
5. That on or about June 1, 1995, at approximately 7:55 a.m., the Plaintiff was driving his 1983 Ford Pickup in a northerly direction on US Highway 17-A near Moncks Corner, in Berkeley County, South Carolina.
6. That at approximately the same time, the Defendant was operating his 1993 Chevrolet Pickup in a southerly direction on US Highway 17-A near Moncks Corner, in

Berkeley County, South Carolina approaching Plaintiff's oncoming truck.

7. That at approximately the same time the Defendant John Doe was operating a black vehicle, model unknown, in a southerly direction on US Highway 17-A near Moncks Corner, in Berkeley County, South Carolina traveling in front of Defendant Pierce and approaching Plaintiff's oncoming truck.

8. That as the Plaintiff was traveling as aforesaid, Defendant John Doe slowed and stopped his vehicle suddenly and without warning on the traveled portion of the highway.

9. That the Defendant Pierce then attempted to pass the stopped vehicle being driven by John Doe, and drove his vehicle suddenly and without warning around the stopped vehicle, out of his lane of travel and directly into the path of Plaintiff's oncoming vehicle, causing it to collide with great force and violence head-on into Plaintiff's vehicle.

10. That as a direct and proximate result of the collision as aforesaid the Plaintiff has suffered, and upon information and belief, will continue to suffer serious injuries in the following respects:

- (a) he injured his head, face, chest, arms, back and legs;
- (b) he suffered a closed head injury;
- (c) he suffered a fractured and crushed foot;
- (d) he suffered with a liver contusion;
- (e) he suffered a complex facial laceration;
- (f) he suffered with numerous fractures;
- (g) he has suffered pain and suffering and emotional distress;
- (h) he has suffered shock and injury to his nerves and nervous system;

- (i) and he has suffered other serious and severe injuries, all of which may be of a permanent nature.

11. That as a direct and proximate result of the collision as aforesaid the Plaintiff has suffered, and upon information and belief will in the future continue to suffer, serious damages in the following respects:

- (a) he has been required to expend great sums of money for medical care, attention, and attendant services;
- (b) he has been unable to work and has been deprived of his income;
- (c) he has suffered a diminution in his ability to earn an income; and
- (d) he has suffered pain and suffering and lost his enjoyment of life.

12. That the injuries and damages suffered by the Plaintiff were due to and caused by the negligence, carelessness, recklessness, willfulness, wantonness and heedlessness of the Defendants, combining and concurring, in one or more of the following respects:

- (a) In failing and neglecting to keep their vehicles under proper control or to so control the same as to have avoided the collision;
- (b) In failing and neglecting to keep a proper lookout for other vehicular traffic on the public highway, and the vehicle of the Plaintiff in particular;
- (c) In driving and operating their vehicles at a speed greater than was reasonable and prudent under the existing circumstances and without regard to the actual and potential hazards then existing, in violation of the applicable ordinances and statutes in such cases made and provided;
- (d) In failing and neglecting to have their vehicles equipped with good and

efficient brakes; or if so equipped, in failing and omitting to timely apply the same;

(e) In driving and operating said vehicle upon a public highway without using the degree of care required at the time and place and under the existing circumstances;

(f) In driving and operating said vehicle upon a public highway in such a manner as to indicate either a willful or wanton disregard for the safety of others and of this Plaintiff in particular;

(g) In failing and neglecting to drive said vehicle at an appropriate reduced speed or at a rate of speed commensurate with safety under the conditions prevailing at the time and place of the collision;

(h) In driving and operating said vehicle upon a public highway without exercising the degree of care that a reasonable and prudent person would have exercised at the time and place and under the existing conditions;

As to the Defendant Pierce

(i) In driving his vehicle left of the center line and into the lane of oncoming traffic when it was not safe or prudent to do so;

(j) in attempting to pass a stopped vehicle when it was not safe or prudent to do so;

As to the Defendant John Doe

(k) in stopping his vehicle suddenly and without warning on the traveled portion of the highway;

(l) in failing to properly signal an intention to stop or turn.

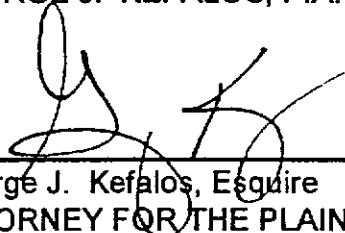
Each of these being contrary to the common and statutory laws of the State of South

Carolina.

13. That Plaintiff is informed and believes that he is entitled to a judgment against the Defendants in an amount of, actual and punitive damages, as may be awarded by this Honorable Court.

WHEREFORE, Plaintiff demands judgment against the Defendants in an amount in actual and punitive damages, to be determined by this Honorable Court.

GEORGE J. KEFALOS, P.A.

BY: 

George J. Kefalos, Esquire
ATTORNEY FOR THE PLAINTIFF
2850 Ashley Phosphate Road
N. Charleston, SC 29418
(803) 572-5000

Charleston, South Carolina

Dated: Aug 24, 1995

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY) FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 95-CP-08-1281

GERALD D. WADE, JR.,

Plaintiff,

-versus-

BERKELEY COUNTY, SOUTH
CAROLINA, and JOHN DOE,

Defendants.

AMENDED COMPLAINT
(Auto Negligence)
(Jury Trial Demanded)

FILED
96 APR 16 AM 10:34
MARY E. BROWN
CLERK OF COURT
BERKELEY COUNTY

The Plaintiff above named, complaining of the Defendants above named,
alleges and says as follows:

1. That the Plaintiff is an individual and a resident of Berkeley County, South Carolina.
2. That the Defendant Berkeley County, South Carolina is a governmental entity and political subdivision of the State of South Carolina which at all times relevant hereto was engaged in, among other things the business of animal control.
3. That this action against the Defendant Berkeley County South Carolina is brought pursuant to the S.C. Code Ann. §15-78-10 et seq commonly known as the South Carolina Tort Claims Act.
4. That the Defendant John Doe is an unknown individual and this action against John Doe is brought pursuant to S.C. Code Ann. §38-77-170.
5. That the parties hereto, the subject matter hereof, and all things and matters

hereinafter alleged are within the jurisdiction of this Honorable Court.

6. That at all times relevant hereto Bobby Joe Pierce was acting as the agent servant and employee of the Defendant Berkeley County acting in the scope and course of his employment as an animal control officer.

7. That on or about June 1, 1995, at approximately 7:55 a.m., the Plaintiff was driving his 1983 Ford Pickup in a northerly direction on US Highway 17-A near Moncks Corner, in Berkeley County, South Carolina.

8. That at approximately the same time, the Defendant Berkeley County was operating a 1993 Chevrolet Pickup in a southerly direction on US Highway 17-A near Moncks Corner, in Berkeley County, South Carolina approaching Plaintiff's oncoming truck.

9. That at approximately the same time the Defendant John Doe was operating a black vehicle, model unknown, in a southerly direction on US Highway 17-A near Moncks Corner, in Berkeley County, South Carolina traveling in front of Defendant Pierce and approaching Plaintiff's oncoming truck.

10. That as the Plaintiff was traveling as aforesaid, Defendant John Doe suddenly and without warning slowed and may have stopped his vehicle on the traveled portion of the highway.

11. That the Defendant Berkeley County then attempted to pass the stopped or slowed vehicle being driven by John Doe, and drove its vehicle suddenly and without warning around the stopped vehicle, out of his lane of travel and directly into the path of Plaintiff's oncoming vehicle, causing it to collide with great force and

violence head-on into Plaintiff's vehicle.

12. That as a direct and proximate result of the collision as aforesaid the Plaintiff has suffered, and upon information and belief, will continue to suffer serious injuries in the following respects:

- (a) he injured his head, face, chest, arms, back and legs;
- (b) he suffered a closed head injury;
- (c) he suffered a fractured and crushed foot;
- (d) he suffered with a liver contusion;
- (e) he suffered a complex facial laceration;
- (f) he suffered with numerous fractures;
- (g) he has suffered pain and suffering and emotional distress;
- (h) he has suffered shock and injury to his nerves and nervous system;
- (i) and he has suffered other serious and severe injuries, all of which

may be of a permanent nature.

13. That as a direct and proximate result of the collision as aforesaid the Plaintiff has suffered, and upon information and belief will in the future continue to suffer, serious damages in the following respects:

- (a) he has been required to expend great sums of money for medical care, attention, and attendant services;
- (b) he has been unable to work and has been deprived of his income;
- (c) he has suffered a diminution in his ability to earn an income; and
- (d) he has suffered pain and suffering and lost his enjoyment of life.

14. That the injuries and damages suffered by the Plaintiff were due to and caused by the negligence, carelessness, recklessness, willfulness, wantonness and heedlessness of the Defendants, combining and concurring, in one or more of the following respects:

(a) In failing and neglecting to keep their vehicles under proper control or to so control the same as to have avoided the collision;

(b) In failing and neglecting to keep a proper lookout for other vehicular traffic on the public highway, and the vehicle of the Plaintiff in particular;

W/K
4
(c) In driving and operating their vehicles at a speed greater than was reasonable and prudent under the existing circumstances and without regard to the actual and potential hazards then existing, in violation of the applicable ordinances and statutes in such cases made and provided;

(d) In failing and neglecting to have their vehicles equipped with good and efficient brakes; or if so equipped, in failing and omitting to timely apply the same;

(e) In driving and operating said vehicle upon a public highway without using the degree of care required at the time and place and under the existing circumstances;

(f) In driving and operating said vehicle upon a public highway in such a manner as to indicate either a willful or wanton disregard for the safety of others and of this Plaintiff in particular;

(g) In failing and neglecting to drive said vehicle at an appropriate

reduced speed or at a rate of speed commensurate with safety under the conditions prevailing at the time and place of the collision;

(h) In driving and operating said vehicle upon a public highway without exercising the degree of care that a reasonable and prudent person would have exercised at the time and place and under the existing conditions;

As to the Defendant Berkeley County

(I) In driving its vehicle left of the center line and into the lane of oncoming traffic when it was not safe or prudent to do so;

(j) in attempting to pass a slowed or stopped vehicle when it was not safe or prudent to do so;

As to the Defendant John Doe

(k) in stopping his vehicle suddenly and without warning on the traveled portion of the highway;

(l) in failing to properly signal an intention to stop or turn.

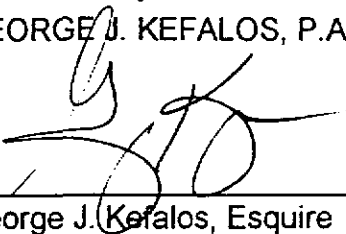
Each of these being contrary to the common and statutory laws of the State of South Carolina.

15. That Plaintiff is informed and believes that he is entitled to a judgment against the Defendants in an amount of, actual and punitive damages, as may be awarded by this Honorable Court.

WHEREFORE, Plaintiff demands judgment against the Defendants in an amount in actual damages, to be determined by this Honorable Court.

GEORGE J. KEFALOS, P.A.

BY:


George J. Kefalos, Esquire
2850 Ashley Phosphate Road
N. Charleston, SC 29418
(803) 572-5000

ATTORNEY FOR THE PLAINTIFF

Charleston, South Carolina

April 15, 1996

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
) CASE NO. 95-CP-08-1281

GERALD D. WADE, JR.,
Plaintiff,
-versus-
BERKELEY COUNTY, SOUTH
CAROLINA, and JOHN DOE,
Defendants.

AMENDED ANSWER
TO AMENDED COMPLAINT
(Jury Trial Demanded)

FILED
97 FEB 27 PM 12:30
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

The Defendant, Berkeley County, South Carolina, amending their Answer and answering the Amended Complaint of the Plaintiff, Gerald D. Wade, Jr., alleges and says as follows:

1. Defendant, Berkeley County, South Carolina, denies each and every allegation of the Amended Complaint not herein specifically admitted, qualified or explained.

2. Defendant, Berkeley County, South Carolina, files its Answer pursuant to all sections of the South Carolina Tort Claims Act under § 15-78-10 and hereby incorporates by reference all defenses set forth in Chapter 78 of the South Carolina Tort Claims Act.

3. Defendant, Berkeley County, South Carolina, admits it is a government entity and political subdivision of the State of South Carolina, but denies that it is among other things engaged in "the business of animal control."

4. Defendant, Berkeley County, South Carolina, admits that it has an animal shelter and does provide some animal control services.

5. Defendant, Berkeley County, South Carolina, admits the allegations contained in Paragraph 3 of the Plaintiff's Amended Complaint.

6. Defendant, Berkeley County, South Carolina, denies any knowledge of Defendant John Doe for want of knowledge but admits Plaintiff has filed this action as an uninsured motorist claim, pursuant to § 38-77-170 of the South Carolina Code of Laws.

7. As to Paragraph 6 of the Plaintiff's Amended Complaint, Defendant, Berkeley County, South Carolina, denies the allegations as stated in Paragraph 6 and requests strict proof thereof.

8. Defendant, Berkeley County, South Carolina, admits upon information and belief the allegations as stated in Paragraph 7 of the Plaintiff's Amended Complaint as to the date, time, and fact that Plaintiff was involved in an auto accident on U. S. Highway 17 near Moncks Corner in Berkeley County, South Carolina, while driving his 1983 Ford pickup.

9. Defendant, Berkeley County, South Carolina, denies the allegations of Paragraph 8 of the Plaintiff's Amended Complaint.

10. Defendant, Berkeley County, South Carolina, denies for want of knowledge, the allegations contained in Paragraph 9 of the Plaintiff's Amended Complaint.

11. Defendant, Berkeley County, South Carolina, denies for want of knowledge, the allegations contained in Paragraph 10 of the Plaintiff's Amended Complaint.

12. Defendant, Berkeley County, South Carolina, denies the allegations contained in Paragraph 11 of the Plaintiff's Amended Complaint and further denies the allegations of Paragraphs 12, for want of knowledge, 13, for want of knowledge, and 14 for want of knowledge of the Plaintiff's Amended Complaint.

13. Further, Defendant, Berkeley County, South Carolina, denies the allegations as stated in Paragraph 15 of the Plaintiff's Complaint and specifically states it denies all allegations as stated in the Amended Complaint which are alleged to have been caused by Defendant, Berkeley County, South Carolina.

**FURTHER ANSWERING SAID AMENDED
COMPLAINT AND AS A FIRST AFFIRMATIVE
DEFENSE THERETO, THIS DEFENDANT
ALLEGES AND SAYS:**

14. That Bobby Joe Pierce was not acting as a agent, servant, or employee of Defendant, Berkeley County, South Carolina, and was not in the course and scope of his employment as an animal control officer with Defendant, Berkeley County, South Carolina, on or about June 1, 1995, when this accident allegedly occurred.

15. As such Bobby Joe Pierce was not in any agency relationship with Defendant, Berkeley County, South Carolina, and,

therefore, Defendant, Berkeley County, South Carolina, could not be vicariously liable for any alleged tort committed by Bobby Joe Pierce as alleged in the Plaintiff's Amended Complaint.

FURTHER ANSWERING SAID AMENDED COMPLAINT AND AS A SECOND AFFIRMATIVE DEFENSE THERETO, THIS DEFENDANT ALLEGES AND SAYS:

16. That even if the Court would determine that Bobby Joe Pierce was an agent or employee of Defendant, Berkeley County, South Carolina, at the time of the alleged occurrence, which Defendant, Berkeley County, South Carolina, denies, § 15-78-70, subsection D, is a complete bar to bringing this action. Upon information and belief, Defendant, Berkeley County, South Carolina, understands a settlement by Plaintiff as against Bobby Joe Pierce took place in this action and said settlement was of a claim which arose out of the same occurrence. As such, said settlement would amount to a complete bar in Plaintiff bringing any action pursuant to § 15-78-70, subsection D, of the South Carolina Tort Claims Act.

FURTHER ANSWERING SAID AMENDED COMPLAINT AND AS A THIRD AFFIRMATIVE DEFENSE THERETO, THIS DEFENDANT ALLEGES AND SAYS:

17. Defendant, Berkeley County, South Carolina, states that any and all damages suffered by the Plaintiff were caused by the sole negligence of Defendant John Doe, his negligence being the sole proximate cause of any injuries alleged.

18. Defendant, Berkeley County, South Carolina, is not liable for that portion of damage caused by Defendant John Doe to Plaintiff, pursuant to § 15-78-60(20).

FURTHER ANSWERING SAID AMENDED
COMPLAINT AND AS A FOURTH
AFFIRMATIVE DEFENSE THERETO, THIS
DEFENDANT ALLEGES AND SAYS:

19. That Defendant Berkeley County, South Carolina, alleges that Bobby Joe Pierce was confronted with a sudden emergency which was not brought about by his negligence or want of care, and Bobby Joe Pierce acted in a reasonable manner as any other person would have done under like or similar circumstances to avoid injury.

FURTHER ANSWERING SAID AMENDED
COMPLAINT AND AS A FIFTH AFFIRMATIVE
DEFENSE THERETO, THIS DEFENDANT
ALLEGES AND SAYS:

20. That Defendant Berkeley County, South Carolina, alleges that Plaintiff Gerald D. Wade, Jr. shall not recover in any action or claim brought hereunder a sum exceeding two hundred fifty thousand dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved, pursuant to § 15-78-120(a)(1). Further Plaintiff is not entitled to an award of punitive damages pursuant to § 15-78-120.

WHEREFORE, having fully answered the allegations of the Plaintiff's Amended Complaint, Defendant, Berkeley County, South Carolina, demands its discharge without further liability and that the cost of this action be cast upon the Plaintiff. Further,

Defendant, Defendant, Berkeley County, South Carolina, demands a jury trial as to all allegations set forth in the Plaintiff's Amended Complaint.

YOUNG, CLEMENT, RIVERS & TISDALE, LLP



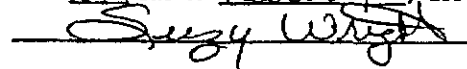
By: _____
Joseph E. DaPore
28 Broad Street, P. O. Box 993
Charleston, SC 29402
(803) 577-4000
Attorneys for the Defendant
Berkeley County, South Carolina

Charleston, South Carolina

Dated: 2.27.97

CERTIFICATE OF MAILING

I HEREBY CERTIFY THAT A TRUE COPY OF THE FOREGOING PLEADING HAS BEEN SERVED UPON OPPOSING COUNSEL BY MAILING A COPY PROPERLY ADDRESSED WITH SUFFICIENT POSTAGE AFFIXED THERETO THIS 24 DAY OF February, 1997.



STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 95-CP-08-1281

GERALD D. WADE, JR.,
Plaintiff,

-versus-

BERKELEY COUNTY, SOUTH
CAROLINA, and JOHN DOE,
Defendants.

THIRD AMENDED ANSWER
TO AMENDED COMPLAINT
(Jury Trial Demanded)

FILED
90 APR 13 PM 3:45
CLERK OF COURT
BERKELEY COUNTY S.C.

The Defendant, Berkeley County, South Carolina, amending their Answer and answering the Amended Complaint of the Plaintiff, Gerald D. Wade, Jr., alleges and says as follows:

1. Defendant, Berkeley County, South Carolina, denies each and every allegation of the Amended Complaint not herein specifically admitted, qualified or explained.

2. Defendant, Berkeley County, South Carolina, files its Answer pursuant to all sections of the South Carolina Tort Claims Act under § 15-78-10 and hereby incorporates by reference all defenses set forth in Chapter 78 of the South Carolina Tort Claims Act.

3. Defendant, Berkeley County, South Carolina, admits it is a government entity and political subdivision of the State of South Carolina, but denies that it is among other things engaged in "the business of animal control."

4. Defendant, Berkeley County, South Carolina, admits that it has an animal shelter and does provide some animal control services.

5. Defendant, Berkeley County, South Carolina, admits the allegations contained in Paragraph 3 of the Plaintiff's Amended Complaint.

6. Defendant, Berkeley County, South Carolina, denies any knowledge of Defendant John Doe for want of knowledge but admits Plaintiff has filed this action as an uninsured motorist claim, pursuant to § 38-77-170 of the South Carolina Code of Laws.

7. As to Paragraph 6 of the Plaintiff's Amended Complaint, Defendant, Berkeley County, South Carolina, denies the allegations as stated in Paragraph 6 and requests strict proof thereof.

8. Defendant, Berkeley County, South Carolina, admits upon information and belief the allegations as stated in Paragraph 7 of the Plaintiff's Amended Complaint as to the date, time, and fact that Plaintiff was involved in an auto accident on U. S. Highway 17 near Moncks Corner in Berkeley County, South Carolina, while driving his 1983 Ford pickup.

9. Defendant, Berkeley County, South Carolina, denies the allegations of Paragraph 8 of the Plaintiff's Amended Complaint.

10. Defendant, Berkeley County, South Carolina, denies for want of knowledge, the allegations contained in Paragraph 9 of the Plaintiff's Amended Complaint.

11. Defendant, Berkeley County, South Carolina, denies for want of knowledge, the allegations contained in Paragraph 10 of the Plaintiff's Amended Complaint.

12. Defendant, Berkeley County, South Carolina, denies the allegations contained in Paragraph 11 of the Plaintiff's Amended Complaint and further denies the allegations of Paragraphs 12, for want of knowledge, 13, for want of knowledge, and 14 for want of knowledge of the Plaintiff's Amended Complaint.

13. Further, Defendant, Berkeley County, South Carolina, denies the allegations as stated in Paragraph 15 of the Plaintiff's Complaint and specifically states it denies all allegations as stated in the Amended Complaint which are alleged to have been caused by Defendant, Berkeley County, South Carolina.

**FURTHER ANSWERING SAID AMENDED
COMPLAINT AND AS A FIRST AFFIRMATIVE
DEFENSE THERETO, THIS DEFENDANT
ALLEGES AND SAYS:**

14. That Bobby Joe Pierce was not acting as a agent, servant, or employee of Defendant, Berkeley County, South Carolina, and was not in the course and scope of his employment as an animal control officer with Defendant, Berkeley County, South Carolina, on or about June 1, 1995, when this accident allegedly occurred.

15. As such Bobby Joe Pierce was not in any agency relationship with Defendant, Berkeley County, South Carolina, and,

therefore, Defendant, Berkeley County, South Carolina, could not be vicariously liable for any alleged tort committed by Bobby Joe Pierce as alleged in the Plaintiff's Amended Complaint.

FURTHER ANSWERING SAID AMENDED COMPLAINT AND AS A SECOND AFFIRMATIVE DEFENSE THERETO, THIS DEFENDANT ALLEGES AND SAYS:

16. That even if the Court would determine that Bobby Joe Pierce was an agent or employee of Defendant, Berkeley County, South Carolina, at the time of the alleged occurrence, which Defendant, Berkeley County, South Carolina, denies, § 15-78-70, subsection D, is a complete bar to bringing this action. Upon information and belief, Defendant, Berkeley County, South Carolina, understands a settlement by Plaintiff as against Bobby Joe Pierce took place in this action and said settlement was of a claim which arose out of the same occurrence. As such, said settlement would amount to a complete bar in Plaintiff bringing any action pursuant to § 15-78-70, subsection D, of the South Carolina Tort Claims Act.

FURTHER ANSWERING SAID AMENDED COMPLAINT AND AS A THIRD AFFIRMATIVE DEFENSE THERETO, THIS DEFENDANT ALLEGES AND SAYS:

17. Defendant, Berkeley County, South Carolina, states that any and all damages suffered by the Plaintiff were caused by the sole negligence of Defendant John Doe, his negligence being the sole proximate cause of any injuries alleged.

18. Defendant, Berkeley County, South Carolina, is not liable for that portion of damage caused by Defendant John Doe to Plaintiff, pursuant to § 15-78-60(20).

FURTHER ANSWERING SAID AMENDED
COMPLAINT AND AS A FOURTH
AFFIRMATIVE DEFENSE THERETO, THIS
DEFENDANT ALLEGES AND SAYS:

19. That Defendant Berkeley County, South Carolina, alleges that Bobby Joe Pierce was confronted with a sudden emergency which was not brought about by his negligence or want of care, and Bobby Joe Pierce acted in a reasonable manner as any other person would have done under like or similar circumstances to avoid injury.

FURTHER ANSWERING SAID AMENDED
COMPLAINT AND AS A FIFTH AFFIRMATIVE
DEFENSE THERETO, THIS DEFENDANT
ALLEGES AND SAYS:

20. That Defendant Berkeley County, South Carolina, alleges that Plaintiff Gerald D. Wade, Jr. shall not recover in any action or claim brought hereunder a sum exceeding two hundred fifty thousand dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved, pursuant to § 15-78-120(a)(1). Further Plaintiff is not entitled to an award of punitive damages pursuant to § 15-78-120.

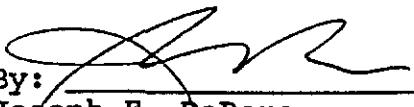
FURTHER ANSWERING SAID AMENDED
COMPLAINT AND AS A SIXTH AFFIRMATIVE
DEFENSE THERETO, THIS DEFENDANT
ALLEGES AND SAYS:

21. Defendant Berkeley County, South Carolina pleads affirmatively §15-78-120 of the S.C. Code of Laws, Ann., entitled Limitation on Liability; Prohibition Against Recovery of Punitive Damages or Exemplary Damages or Prejudgment Interest, et al.

Defendant Berkeley County states that at all times relative to this cause of action Plaintiff's damages are subject to the limitation set forth by statute. Plaintiff's damages are limited by §15-78-120 of the S.C. Code of Laws, Ann., relative to any recovery in any action brought under the South Carolina Tort Claims Act. Plaintiff is not entitled to recovery any sum greater than Two Hundred Fifty Thousand and 00/100 (\$250,000.00) Dollars as set forth in § 15-78-120. Furthermore, Plaintiff is not entitled to any recovery of punitive damages, prejudgment interest, exemplary damages and is further subject to all limitations set forth in §15-78-120 of the S.C. Code of Laws, Ann.

WHEREFORE, having fully answered the allegations of the Plaintiff's Amended Complaint, Defendant, Berkeley County, South Carolina, demands its discharge without further liability and that the cost of this action be cast upon the Plaintiff. Further, Defendant, Defendant, Berkeley County, South Carolina, demands a jury trial as to all allegations set forth in the Plaintiff's Amended Complaint.

YOUNG, CLEMENT, RIVERS & TISDALE, LLP

By: 

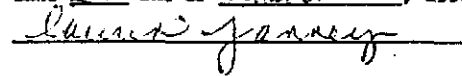
Joseph E. DaPore
28 Broad Street, P. O. Box 993
Charleston, SC 29402
(803) 577-4000
Attorneys for the Defendant
Berkeley County, South Carolina

Charleston, South Carolina

Dated: 3 - 27 - 98

CERTIFICATE OF MAILING

I HEREBY CERTIFY THAT A TRUE COPY OF THE FOREGOING PLEADING
HAS BEEN SERVED UPON OPPOSING COUNSEL BY MAILING A COPY
PROPERLY ADDRESSED WITH SUFFICIENT POSTAGE AFFIXED THERETO
THIS 27 DAY OF March, 1998.



FILED
98 APR 13 PM 3:45
DAVID P. BROWN
CLERK OF COURT
BERKELEY COUNTY S.C.

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
 2) NINTH JUDICIAL CIRCUIT
 2 COUNTY OF BERKELEY)

3 Gerald D. Wade, Jr.,)
 4)
 4 Plaintiff,)
 5)
 5 vs.)
 6)
 6 Bobby Joe Pierce and John)
 7)
 7 Doe,)
 8)
 8 Defendants.)

COPY

Case No. 95-CP-08-1281

9
 10 DEPOSITION OF: BOBBY JOE PIERCE
 11 DATE: Thursday, February 1, 1996
 12 TIME: 2:00 P.M.
 13 PLACE: 2850 Ashley Phosphate Road
 14 North Charleston, South Carolina
 15 REPORTED BY: MARY ANN RIDENOUR
 16 Court Reporter and Notary Public

* * * * *

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POST OFFICE BOX 21784
 CHARLESTON, SOUTH CAROLINA 29413-1784
 803-832-0801

1 Q And I guess you have your arms and your legs?

2 A Got everything.

3 Q Good. Where are you working today? Are you
4 employed?

5 A Today I'm unemployed.

6 Q Where was the last place that you worked?

7 A Animal Control for Berkeley County.

8 Q How long were you there?

9 A I was there from January of '84, no, '92 to
10 '93, '93 until June of '95.

11 Q Right after this wreck?

12 A Yes.

13 Q How long after the wreck did you leave your
14 job with Animal Control at Berkeley County?

15 A Thirty days.

16 Q Why did you leave?

17 A Why did I leave my job?

18 Q Yes, sir.

19 A I was laid off.

20 MR. LING: Let me just say for the record
21 that we strongly contest the legality and validity of
22 the layoff since he was on the job at the time of this
23 accident, and we think he was unfairly terminated.
24 And we are contesting that. And there is a workers'
25 comp claim pending.

1 MR. KEFALOS: Okay.

2 BY MR. KEFALOS:

3 Q What was your position with Animal Control?

4 A I was the Animal Control officer.

5 Q What did you do as an Animal Control officer?

6 A I picked up animals. I checked animals to

7 make sure they were properly fed, properly watered.

8 Injured animals on the road, I checked those. I

9 checked, if there was a dog that was dead on the road,

10 I had to check and make sure he didn't have a collar

11 on. If he had a collar on, I called the owner.

12 Q If he didn't have a collar on, what did you
13 do?

14 A Called the sanitary people and they picked
15 him up. If he was injured, I picked him up and took
16 him to the vet.

17 Q Yourself?

18 A Yes.

19 Q What were your hours?

20 A My hours were 24 hours a day really. I was
21 on-call. I wore a beeper.

22 Q Did you have a radio?

23 A No, I did not have a radio. I was on a
24 beeper 24 hours a day. I was on-call really 24 hours
25 a day.

1 Q Did your boss stay in touch with you 24 hours
2 a day?

3 A If he needed me, yes.

4 Q Were there times that you were called from
5 home?

6 A Surely.

7 Q To respond to certain requests?

8 A Yes, there were. Surely was.

9 Q Did you have standard hours that you were
10 requiried to go to work?

11 A Standard hours to work were from 8:30 until
12 5.

13 Q Five days a week?

14 A Five days a week, uh-huh.

15 Q Did you have a contract with Berkeley County?

16 A Not that I know of. I never did sign a
17 contract, no.

18 Q Was there a handbook or an employee manual
19 for you that you are aware of?

20 A There is one, but I never did see one. I was
21 just told this, that mainly it was just by, you know,
22 by mouth.

23 Q What were you told about -- let me ask it
24 like this. You talked earlier about being on-call 24
25 hours, and basically you saw yourself as being on the

1 job 24 hours?

2 A Surely.

3 Q What was your understanding about your
4 instructions if you would see either a stray or an
5 injured or a dead animal when were you not during your
6 regular office hours?

7 A I was -- it was my job as an Animal Control
8 officer, 24 hours a day -- now I was disciplined for
9 this already, that's the reason I'm telling you this,
10 okay?

11 Q Okay.

12 A I was -- one weekend I went out and see this
13 lady about her horses. She asked me to look at her
14 horses, okay?

15 Q You went out there on the weekend?

16 A I went out on the weekend.

17 Q Do you consider that your time, at the time?

18 A Yes. I thought this was my time, okay? And
19 I was told no, that I was just like a police officer.
20 I was on-call. I was an Animal Control officer 24
21 hours a day, 365 days a year.

22 Q What happened when this woman called you to
23 go out on a weekend?

24 A I went out and looked at her horses. And what
25 happened was that they picked up one of her horses and

1 took it to the pound.

2 Q Who picked it up?

3 A Animal Control.

4 Q Later on?

5 A Not me. It was another lady that worked for
6 Animal Control picked the horse up. And the horse
7 died in the back of the shelter. And they could not
8 charge that lady because I was involved in it. I got
9 two days off suspension because I was involved in this
10 horse.

11 Q Let me understand it. This woman called you
12 to come look at her horses one time?

13 A Yes, ma'am. Yes, sir.

14 Q It was a weekend?

15 A It was on a weekend.

16 Q You went out and looked at the horse for her?

17 A Uh-huh.

18 Q You apparently did something or gave her some
19 opinion about the horse?

20 A Yes. I looked at the horse, and the horse
21 needed worming. The horse was a hard keeper. I don't
22 know whether you know what a hard keeping horse is.

23 Q No.

24 A There is hard keeping horses. There's horses
25 that are hard keepers; there's horses that are not

1 hard keepers. Some of them gain weight; some of them
2 won't never gain weight.

3 Well, we found out that this horse had a worn
4 palate. And generally they get that from eating dirt.

5 Q Anyway, so you go out there, the horse is a
6 hard keeper, she asked you about the horse, you gave
7 her some advice?

8 A Yes. I told her that she needed to worm the
9 horse. And, in actuality, the horse was in fairly
10 good condition. It was a little bit poor, yes.
11 That's what I told her.

12 Q Some time later, somebody from Animal Control
13 in Berkeley County --

14 A Picked up the horse.

15 Q How did they come to pick the horse up?

16 A They picked the horse up because it was in a
17 small shed. This horse was under a vet's care, okay?
18 She was -- it was under a vet's care. It was -- they
19 were keeping it stabled up so they could keep feed and
20 water with it at all times so they could bring the
21 weight up on the horse.

22 Q Okay.

23 A They knew the horse was sick but they went
24 and picked it up anyway.

25 Q Berkeley County Animal Control?

1 A Yes, they did.

2 Q Then the horse died?

3 A Yes, it did.

4 Q How was it that you became disciplined
5 because of that?

6 A Because I was involved in the horse. They
7 felt that they couldn't take her to court because I
8 was involved in it.

9 Q Oh, you --

10 A They couldn't fine her or give her a ticket
11 for this horse because I was involved in it.

12 Q Because you had told her it was all right?

13 A Sure.

14 Q All right. So your boss told you you should
15 have reported that?

16 A To him.

17 Q Even though you saw it off-duty or during the
18 weekend?

19 A Yes. I was told that I worked 24 hours a day
20 as an Animal Control officer, 365 days a year.

21 Q All right. So did you believe after that
22 that your employer there at the Animal Control office
23 had the right to control what you did even when you
24 weren't during those regular business hours?

25 A Well, in actuality, yes, I did because we

1 were on beeper. We were supposed to respond any time
2 we was on-call. And I agreed with them because what
3 they compared that to was like me being in the
4 service. I was in the service 24 hours a day.

5 Q I got you. Had you ever been instructed to
6 do tasks on your way to or from work?

7 A Yes, I have.

8 Q What sort of tasks?

9 A Picking up dogs and cats. I've been asked
10 about picking up dogs on the way from work and
11 bringing them back in the next day.

12 Q You would use your own truck for that?

13 A At the time, I was driving a county truck.

14 Q Okay. How was that? What do you mean you
15 were driving a county truck?

16 A Well, they took the county truck away from me
17 because they said that the truck was using too much
18 gas and they didn't want to ride it so hard.

19 Q So you used to have a county truck?

20 A I used to have a county truck, yes, I did.

21 Q To run back and forth --

22 A Uh-huh.

23 Q -- to work?

24 A Uh-huh.

25 Q So when you first came on board at Animal

1 Control, they issued you a truck?

2 A Sure.

3 Q But they cut that out because of it using too
4 much gas?

5 A Uh-huh.

6 Q That's a "yes"? You need to answer "yes" or
7 "no."

8 A Yes.

9 Q So it was basically a cost-saving measure?

10 A Yes. So they said.

11 Q But for that cost-saving measure, you would
12 have been driving a county truck the morning of this
13 wreck?

14 A Yes.

15 Q All right. Do you know whether they've gone
16 back to issuing trucks to the Animal Control officers
17 to ride back and forth to work?

18 A Yes, they have.

19 Q They have gone back to that?

20 A Yes.

21 Q So it was a short time that they had changed
22 that policy?

23 A Yes.

24 Q Do you know how long that change in the
25 policy lasted?

1 A I think they took my truck in March.

2 Q Okay. Do you know when they -- would you
3 know when they reinstituted the policy of allowing --

4 A I have no idea. But I know all of them drive
5 them now.

6 Q All right. During that time when you were
7 driving your own truck back and forth to work, did you
8 have tools in the truck that you would use sometimes
9 at work?

10 A Yes.

11 Q What sort of tools would you use?

12 A You're talking about my own personal truck?

13 Q Yes, sir.

14 A No. The only thing I had was I had a pair
15 of -- I had rubber gloves. I had, I guess you call
16 that a plastic bag. I generally had a can of ether in
17 the truck.

18 Q Your personal truck?

19 A Yes. And gloves.

20 Q So you had gloves, a plastic bag and a can of
21 ether?

22 A Uh-huh.

23 Q Were these tools that you used in your job as
24 an Animal Control officer?

25 A Yes.

1 Q And you carried these in your truck because
2 you considered yourself on duty all the time?

3 A Yes.

4 Q And you needed to have these pieces of
5 equipment or tools in order to do your job?

6 A Yes.

7 Q Okay. Now, the truck you were driving at the
8 time of the wreck was a '93 Chevy pickup?

9 A Yes, sir.

10 Q That was your personal truck?

11 A Yes.

12 Q How long had you had it?

13 A Let's see. I think it got it in February or
14 March.

15 Q Of '95?

16 A '95, yes.

17 Q All right. Do you know when it had been last
18 inspected?

19 A No, I sure don't. I don't know. It was
20 inspected when I got it. That's all I can tell you.
21 And it hadn't expired.

22 Q Did you buy it from a dealer?

23 A Yes.

24 Q Who was the dealer?

25 A Gene Reed Chevrolet.

1 was fairly heavy.

2 Q You were traveling on 17A?

3 A Yes, I was.

4 Q Coming backs towards Moncks Corner?

5 A Yes, I was.

6 Q It's a two-lane blacktop road?

7 A Yes, it was.

8 Q The hill -- the road is fairly straight and

9 level at the area of the wreck?

10 A Yes, it is.

11 Q There are no hills there and there's no

12 particular sharp curves?

13 A No, sir.

14 Q All right. You were on your way to work?

15 A Yes, I was.

16 Q You were due there, I think you said, at

17 8:30?

18 A 8:30.

19 Q Were you coming from home?

20 A Yes, I was.

21 Q Had you done anything between the time you

22 left home and the time of the wreck?

23 A Yes, I had.

24 Q What had you done?

25 A I had stopped on the side of the road up by

1 the handi-mart and checked on a beagle that was dead
2 on the side of the road to see if he had a collar on.

3 Q Did he have a collar?

4 A No, he did not.

5 Q Why did you stop to check on that beagle by
6 the handi-mart?

7 A Because that's my job. If he had a collar
8 on, I would have had called the people that it
9 belonged to.

10 Q All right. When you stopped to check on that
11 beagle, did you consider yourself on the job?

12 A Yes.

13 Q At that time?

14 A Yes.

15 Q Did you ever report that beagle to
16 sanitation?

17 A No, I never did get a chance to do that.

18 Q All right. Was there anybody else that knows
19 that you checked, you stopped and checked on that
20 beagle by the handi-mart?

21 A The lady that lives there called me the night
22 before and told me that there had been a beagle run
23 over there and he was dead.

24 Q Oh, really? Who's that?

25 A Renthia (ph) Dupree.

1 A After I left there, probably about 25
2 minutes. It wasn't very long at all.

3 Q All right. You have a drawing?

4 A I have a drawing right here.

5 Q Good.

6 A Mr. Don Ackerman -- I don't know whether you
7 got a statement from him, he does. Mr. Don Ackerman
8 was right here. He was behind me. This is me right
9 here.

10 Q Okay.

11 A This car --

12 Q "A" meaning Ackerman?

13 A That's Mr. Ackerman.

14 Q And the "P" for plaintiff?

15 A That's me.

16 MR. LING: Pierce.

17 BY MR. KEFALOS:

18 Q Pierce. Well, it's a not a "P", it's a pi.
19 It's a plaintiff sign.

20 A Anyway, that's me.

21 Q Okay.

22 A Okay. This car right here, somewhere between
23 Harristown Road and Bethea Road, which is not very
24 far, about 500 yards.

25 Q I'm sorry, which road?

1 A Bethea. This is Bethea Road.

2 Q Oh, Bethea Road?

3 A Yeah. And Harristown Road cuts off this way.

4 Q Okay.

5 A There is a fire station right up here. There
6 is a yellow line from there all the way around this
7 curve, no passing zone. This guy --

8 Q So you say -- hold on a second. There is a
9 yellow line from the fire station up to Bethea Road
10 and past?

11 A Past.

12 Q Indicating there's no passing?

13 A That's true.

14 Q Now, you have a fellow who's behind Mr.
15 Ackerman.

16 A And he passed Mr. Ackerman recklessly.

17 Q On the yellow line?

18 A This is the statement Mr. Ackerman made.

19 Q Okay.

20 A Recklessly. This is a black car with dark
21 tinted windows. He passed Mr. Ackerman and he came up
22 here. And somewhere between Harristown Road and
23 Bethea Road he passed me and then cut in and cut me
24 off. And I hit my brakes. He hit his brakes, then I
25 hit mine.

1 Q Why did he hit his brakes, do you know?

2 A I have no idea. The only thing I can tell
3 you is he wanted turn on Bethea Road. That's all I
4 can tell you. I don't know why. He didn't have no
5 signal lights on. He didn't have anything on. All he
6 did was hit his brakes and I hit my brakes.

7 Q All right. Do you know whether he ever
8 turned in to Bethea Road?

9 A I've got another witness. Now, I don't have
10 a statement from him, but I can get one that stated
11 that the black car run him off the road after the
12 wreck because when he got up here the wreck had
13 already happened. Run him off the road going back
14 this way, the same car. He identified the car before
15 I even -- before I even said anything. In fact, he
16 told another woman that he had seen that car, my
17 next-door neighbor. She was the one that told me to
18 get ahold of him because he had seen this car also.

19 Q All right. So does that mean that he didn't
20 turn on Bethea Road?

21 A No, he did not.

22 Q He kept on going?

23 A No. I think he turned around and went back.
24 I think he made a u-turn and went back this way.

25 Q I got you. All right. So he passes you and

1 hits his brakes, you hit your brakes, and what
2 happened?

3 A When I hit my brakes, I skidded out into the
4 road and hit him head-on.

5 Q You hit Gerald Wade head-on?

6 A Uh-huh.

7 Q You crossed the center line when you hit your
8 brakes?

9 A Yes, I did.

10 Q What was it that caused your car to veer, or
11 your truck to veer, to the left like that?

12 A Well, this is just hearsay, too.

13 Q Yeah.

14 A Now, Mr. Patz -- I don't know whether you've
15 got him as a witness.

16 Q I don't know Mr. Patz.

17 A Mr. Patz was behind me and he almost hit me.
18 And he came in on this side. He said that what
19 happened was that the truck, the brakes locked up on
20 the truck. You can tell by the skid marks that the
21 truck left. And the back end of the truck lifted up
22 and skidded over and sat back down. And he said I
23 shot out in the lane.

24 Q Now Mr. Patz was traveling behind you?

25 A He was directly behind me.

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

COVENANT NOT TO EXECUTE JUDGMENT

This covenant is made by and between Gerald D. Wade, Jr., Shirley M. Wade, and Government Employees Insurance Company ("GEICO") for itself and on behalf of Bobby Joe Pierce, for himself, his heirs, personal representatives, legal representatives, successors and assigns.

WHEREAS, Gerald D. Wade, Jr. and Bobby Joe Pierce were involved in an automobile accident on June 1, 1995, on U. S. Highway 17-A near Moncks Corner in Berkeley County, South Carolina; and

WHEREAS, Gerald D. Wade, Jr. subsequently claimed bodily injuries and damages as a direct and proximate result of said accident; and

WHEREAS, the motor vehicle being driven by Bobby Joe Pierce was insured by a policy of automobile liability insurance issued by Government Employees Insurance Company ("GEICO"), Policy Number 223-94-936, having liability limits of \$15,000.00 per person, \$30,000.00 per occurrence; and

WHEREAS, Bobby Joe Pierce and Government Employees Insurance Company acknowledge that Gerald D. Wade, Jr. has a claim for damages arising out of said accident and that Gerald D. Wade, Jr., by and through his attorneys, alleges that his damages will exceed the amount of liability insurance coverage available to Bobby Joe Pierce from Government Employees Insurance Company; and

WHEREAS, Bobby Joe Pierce and Government Employees Insurance Company wish to limit any liability to Gerald D. Wade, Jr. and Shirley M. Wade for damages in excess of \$13,000.00;

NOW, THEREFORE, for and in consideration of the mutual promises and covenants contained herein, and for such other good and valuable consideration, Bobby Joe Pierce, Government Employees Insurance Company, Gerald D. Wade, Jr. and Shirley M. Wade mutually agree, promise and covenant as follows:

1. That Bobby Joe Pierce and Government Employees Insurance Company do hereby agree to pay the total sum of Thirteen

Thousand and No/100ths (\$13,000.00) Dollars to Gerald D. Wade, Jr., Shirley M. Wade and George J. Kefalos, their attorney.

2. That Gerald D. Wade, Jr., Shirley M. Wade and George J. Kefalos, their attorney, acknowledge receipt of such payment.

3. That Gerald D. Wade, Jr. and Shirley M. Wade do hereby promise and covenant for themselves, their heirs, personal representatives, administrators, legal representatives and assigns, not to execute against Bobby Joe Pierce or Government Employees Insurance Company, their heirs, personal representatives, administrators, legal representatives, successors or assigns, on any judgment that may be attained by Gerald D. Wade, Jr. and Shirley M. Wade on account of any and all claims, demands, damages, costs or expenses, including, but not limited to, any medical or hospital expenses, loss of services, actions and causes of action, arising from any act, omission or occurrence or resulting or to result from the automobile accident which occurred on June 1, 1995, in Berkeley County, South Carolina, when Gerald D. Wade, Jr. was involved in a motor vehicle collision with a vehicle driven by Bobby Joe Pierce.

4. That, furthermore, Gerald D. Wade, Jr. and Shirley M. Wade do further covenant and promise that if they should attain a judgment against Bobby Joe Pierce or Government Employees Insurance Company, they will not execute on said judgment against Bobby Joe Pierce or Government Employees Insurance Company and that, upon a final determination of whether any underinsured motorist benefits will be paid, they and their attorney, George J. Kefalos, will cause the judgment to be marked and entered as satisfied.

5. That should Gerald D. Wade, Jr. and Shirley M. Wade or their attorney, George J. Kefalos, refuse to mark and enter any judgment attained against Bobby Joe Pierce or Government Employees Insurance Company as satisfied as provided hereinabove, Gerald D. Wade, Jr., Shirley M. Wade, and their attorney, George D. Kefalos,

do hereby authorize the Clerk of Court for the County of Berkeley, State of South Carolina, to mark and enter the judgment as satisfied upon receiving a copy of this Agreement from counsel for Bobby Joe Pierce or Government Employees Insurance Company.

6. That Gerald D. Wade, Jr. and Shirley M. Wade agree that the payment made by Bobby Joe Pierce and Government Employees Insurance Company is in compromise of a doubtful and disputed claim and that the payment made is not to be construed as an admission of liability on the part of Bobby Joe Pierce or any other person who may be affected by this covenant.

7. That Gerald D. Wade, Jr. and Shirley M. Wade declare and represent that no promise or inducement or agreement not herein expressed has been made to them and that this covenant contains the entire agreement between the parties hereto, and the terms of this covenant are contractual and not merely recital and that Bobby Joe Pierce and Government Employees Insurance Company have made representations as to the possibility of the recovery of any monies by Gerald D. Wade, Jr. and Shirley M. Wade from any underinsured motorist carrier.

8. That Gerald D. Wade, Jr. and Shirley M. Wade and their attorney, George J. Kefalos do further agree that should there be any liens for health care services provided, whether by statute or contract or otherwise, that they will cause the health care provider to be reimbursed from the proceeds of this settlement for the full amounts of said liens and should the health care providers assert a statutory or contractual lien against Bobby Joe Pierce or Government Employees Insurance Company, their heirs, personal representatives, administrators, legal representatives, successors or assigns, that Gerald D. Wade, Jr. and Shirley M. Wade and their attorney, George J. Kefalos, will indemnify and hold harmless Bobby Joe Pierce and Government Employees Insurance Company, their heirs, personal representatives, administrators, legal representatives, successors or assigns from any and all

claims, demands, actions or causes of action of whatsoever kind or nature, including the reimbursement of a reasonable attorney's fee in defending such actions brought by any such purported lienholders.

9. That Gerald D. Wade, Jr. and Shirley M. Wade acknowledge that they rely wholly upon their own judgment, belief and knowledge of the nature, extent and duration of their injuries and damages, and the possibility of recovery for said injuries and damages, and that no representations or statements regarding these injuries or damages or any other matter made by Bobby Joe Pierce or Government Employees Insurance Company, or by their agents or representatives, have been relied on to any extent whatsoever in making this covenant.

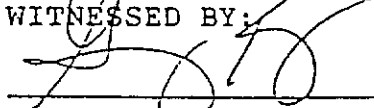
10. That Gerald D. Wade, Jr. and Shirley M. Wade, Bobby Joe Pierce and Government Employees Insurance Company furthermore agree and understand that this instrument is not intended as a release or discharge, nor as an accord and satisfaction with any person whomsoever, but only as a Covenant Not to Execute against Bobby Joe Pierce and Government Employees Insurance Company, their heirs, personal representatives, administrators, legal representatives, successors and assigns, and is executed simply to purchase freedom from the threat of execution upon any judgment that may be attained against Bobby Joe Pierce or Government Employees Insurance Company including any judgment in the lawsuit filed in the Court of Common Pleas for Berkeley County, South Carolina, and assigned Case No. 95-CP-08-1281.

11. That, by entering this Covenant Not to Execute, Gerald D. Wade, Jr., Shirley M. Wade, Bobby Joe Pierce, and Government Employees Insurance Company, their heirs, personal representatives, administrators, legal representatives, successors or assigns expressly agree that none of the terms of this agreement will be referred to, mentioned in any way or otherwise disclosed to the jury in the trial of the lawsuit involving Gerald D. Wade,

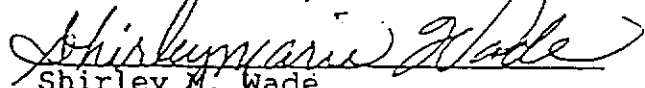
Jr. in the Court of Common Pleas for Berkeley County, South Carolina, and assigned Case No. 95-CP-08-1281.

IN WITNESS WHEREOF, we have hereunto set out hands and seals in the presence of the below-named witnesses on the dates set forth herein below.

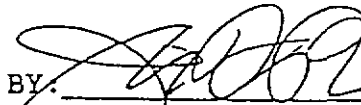
WITNESSED BY:



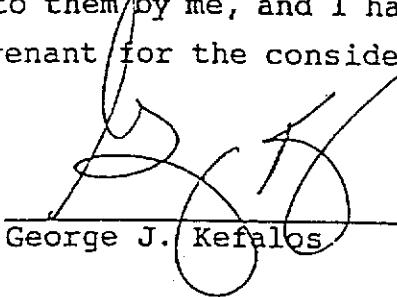

Gerald D. Wade, Jr.


Shirley M. Wade

GOVERNMENT EMPLOYEES INSURANCE
COMPANY

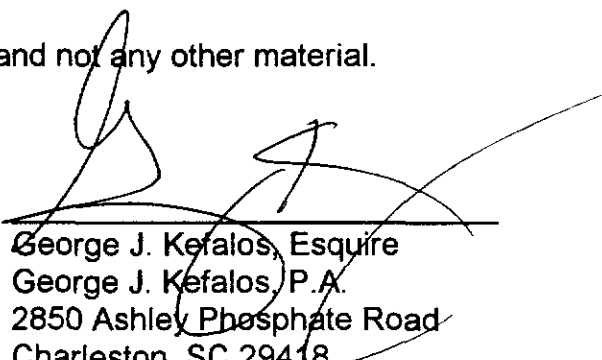
BY: 
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I, the undersigned attorney for Gerald D. Wade, Jr. and Shirley M. Wade, hereby certify that the contents, meanings and effects of the foregoing Covenant Not to Execute have been carefully and fully explained to them by me, and I have recommended that they execute the said Covenant for the consideration therein expressed.


George J. Kefalos

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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11/2, 1998.

THE STATE OF SOUTH CAROLINA
COURT OF APPEALS

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

R. Dennis Markley, Jr., Circuit Court Judge

Case No. 95-CP-08-1281

Gerald D. Wade, Jr.,

Appellant,

v.

Berkeley County, South Carolina
and John Doe,

Respondents.

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

R. Dennis Markley, Jr., Circuit Court Judge

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STATEMENT OF ISSUE ON APPEAL

- I. THE COURT ERRED IN HOLDING THAT THE GIVING OF A COVENANT NOT TO EXECUTE TO THE COUNTY'S DRIVER IN HIS INDIVIDUAL CAPACITY CONSTITUTED A "SETTLEMENT" OF A CLAIM BROUGHT UNDER THE TORT CLAIM STATUTE SO AS TO BAR A SUBSEQUENT TORT CLAIM ACTION AGAINST THE COUNTY.

STATEMENT OF THE CASE

A. Procedural History

This action arises out of an automobile accident on June 1, 1995, between Wade and Bobby Joe Pierce ("Pierce"), an employee, agent, and animal control officer for the County. Initially, Wade brought an action dated August 25, 1995, against Pierce (individually) and against a John Doe (whose actions may have contributed to the accident), for his injuries. At deposition, Pierce asserted that he was acting within the scope and course of his employment with Berkeley County at the time of the wreck. Berkeley County, however, denied that Pierce was on the job at the time of the wreck.

Faced with this factual dispute, Wade joined Berkeley County as a Defendant. At the same time, Wade dismissed Pierce from the suit without prejudice and accepted \$13,000 out of a possible total of \$15,000 from Pierce's insurer in exchange for a covenant not to execute. By doing so, Wade preserved his right to proceed against Pierce (and recover underinsured motorist benefits); it was later determined that Pierce was not on the job at the time of the wreck.

The trial Court initially granted summary judgment to the County on the ground that Wade was collaterally estopped (by reason of the Workers' Compensation claim) from contending that Pierce was in the course of his employment when the accident occurred.

The Court of Appeals reversed that finding in Wade v. Berkeley County, ___ S.C. ___, 498 S.E.2d 684, 689 (Ct. App. 1998), on the ground, *inter alia*, that, "a genuine issue of material fact exists regarding whether Pierce was acting within the scope of his employment when the accident occurred[.]" Notwithstanding the clear factual nature of the dispute, the County moved again for summary judgment and July 13, 1998 the trial Court again granted it, this time because of the covenant previously given. Wade filed his notice of appeal on July 30, 1998.

B. Standard for Summary Judgment.

The Court of Appeals set out the applicable standard for summary judgment in this case, as follows:

"Summary judgment should be granted only when no genuine issue as to any material fact exists, and the moving party is entitled to judgment as a matter of law. Summary judgment is inappropriate when further inquiry into the facts is desirable to clarify proper application of the law. Summary judgment is not appropriate if facts are conflicting, or if the inferences to be drawn from the facts are doubtful. Summary judgment should not be granted even when the evidentiary facts are not in dispute, if there is dispute as to the conclusions to be drawn from those facts. In deciding a motion for summary judgment, the evidence and all of its inferences must be viewed in the light most favorable to the non-moving party."

Wade v. Berkeley County, *supra*, 498 S.E.2d at 687 (citations omitted).

The County's Motion and the trial Court's Order seems premature in that the Court of Appeals held that the question of Pierce's employment status at the time of the accident was a material question of fact. *Id.* at 689.

Presumably, the Court's position is that a resolution of whether or not Pierce was acting in the scope of his employment is irrelevant, that it is entitled to summary judgment

regardless of how the trier of fact disposes of the issue. The difficulty with this position is that the Court of Appeals has already stated that, "a genuine issue of material fact exists regarding whether Pierce was acting within the scope of his employment when the accident occurred[.]" Id. The trial Court now seeks to avoid resolution of that issue, even though it has been pronounced "material," id., by the Court of Appeals. The declaration of materiality by the appellate court is binding in this proceeding because "[t]he doctrine of the law of the case prohibits issues which have been decided in a prior appeal from being relitigated in the trial Court in the same case." Ross v. Medical University of South Carolina, 328 S.C. 51, 492 S.E.2d 62, 68 (1997). The County's attempt to evade the need to litigate "a genuine issue of material fact . . . regarding whether Pierce was acting within the scope of his employment when the accident occurred," Wade v. Berkeley County, supra, 498 S.E.2d at 689, by use of Rule 56, SCRPC, is therefore unavailing; hence, the Motion must fail.

C. Facts:

The County's present Motion was based on a Covenant Not To Execute Judgment ("Covenant"), executed by Wade, his wife, Shirley, Government Employees Insurance Company ("GEICO"), and Pierce. In exchange for a payment of \$13,000.00 from GEICO under Pierce's personal policy of insurance with that company, Mr. and Mrs. Wade agreed not to execute upon any judgment arising out of the incident against Pierce (R. p. 67, Covenant paragraph 4.).

In addition, paragraph 10 of the Covenant (R. p. 69) specifically states, "that this instrument is not intended as a release or discharge, nor as an accord and satisfaction

with any person whomsoever, but only as Covenant Not To Execute against Bobby Joe Pierce and Governmental Employees Insurance Company." Thus, by its specific terms, the Covenant is not a settlement of any claim against anyone, let alone against the County.

Notwithstanding, the County asserts that the very fact of the Covenant entitles it to summary judgment on account of S.C. Code Ann. § 15-78-70(d)(Lawyers' Cooperative 1997 Supp.), which provides as follows:

"A settlement or judgment in an action or a settlement of a claim under this chapter constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence."

(Emphasis supplied).

ARGUMENT

I. THE COVENANT WAS NOT EXECUTED "UNDER THIS CHAPTER."

This statute is inapplicable to the case at hand for several reasons. First, S.C. Code Ann. § 15-78-70(d) is logically restricted to the settlement of actions actually brought under the South Carolina Tort Claims Act ("SCTCA"). The Covenant with Pierce had nothing whatever to do with the SCTCA; it had to do only with a possible claim as to his common law liability as it related to his insurance policy. See Covenant paragraphs 1, 6, 7, 10. R. pp. 67-69.) It follows as a matter of course that the Covenant was not the settlement "of a claim under this chapter," S.C. Code Ann. § 15-78-70(d), and thus cannot bar the present action against the County.

This conclusion is underscored by the terms of § 15-78-70(c), which essentially

provide that an action against an employee "under the provisions of this chapter" is an action against the governmental entity which employs him. As a result, any claim by Wade under the SCTCA "shall name as a party defendant only the . . . political subdivision for which the employee was acting and is not required to name the employee individually[.]" Id. Indeed, if "the employee is individually named, the . . . political subdivision for which the employee was acting must be substituted as the party defendant." Id. The nonparty status of employees in SCTCA actions after the January 1, 1989, amendment of the Act, id., thus underscores the conclusion that the Covenant cannot possibly be a "settlement of a claim under this chapter" within the meaning of § 15-78-70(d).

The trial Court mistakenly reasoned that *any* settlement, judgment or resolution of *any* claim will bar a later claim against the government by reason of the same occurrence. The trial Court should have read the statute to mean that settlement, judgment or resolution of a claim *brought under this chapter* barred any other claim against the government by reason of the same occurrence. In other words, once a claim against the government (a claim under this chapter) has been resolved, no other claim against the government may be brought arising out of the same occurrence.

The words "under this chapter" modify both "a settlement or judgment in an action or a settlement". Logically it can be no other way. A claim under this chapter (a tort claim) can only be resolved in one of the three ways identified by the statute. Before suit, it can be settled. After suit has been filed, it can be resolved by settlement or by judgment.

The trial Court's interpretation of the statute is so broad that it would interfere with a settlement with a co-defendant. In the present case, for example, Berkeley County and

John Doe are co-defendants. Consider what the trial Court's reasoning would require if Wade determined that John Doe had little real involvement in the wreck and saw fit to settle with John Doe. The Court's reasoning would mandate that the action against the County be dismissed. This cannot have been the intention of the legislature.

Moreover, as in the present case, it would interfere with a compromise of part of the claim when there is a dispute about agency. This is not a case where Wade tries to make a dual recovery and avoid the effect of the tort claim statute by first claiming Pierce was acting individually and then suing the County. Here the County has created the problem by its denial of responsibility for Pierce's conduct. It is, in effect, saying, "Sue Pierce in his individual capacity, not us." This being the situation, how can the County be later heard to complain that a resolution of a claim against Pierce (a person it denies was its agent), constitutes a settlement with the County for purposes of the tort claim action? The County created the dilemma by its denial of agency. Under these circumstances, Wade could bring an action against Pierce in his individual capacity, the resolution of which claim would not be under the tort claims chapter. Because of the County's denial of agency, Wade could accept Pierce's liability coverage on a covenant not to execute and proceed against the County. In this way he could preserve his right to recover against Pierce if it is determined that he was not on the job.

II. THE COVENANT IS NOT A "SETTLEMENT" OF THE CLAIM.

A determinatively relevant question in this case is whether the Covenant is a settlement at all, at least for purposes of § 15-78-70(d). There is a large body of South Carolina jurisprudence that distinguishes between releases and covenants not to execute.

The distinction finds support in cases like Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321, 347, 91 S.Ct. 795, 810, 29 L.Ed.2d 77 (1991), where the Court stated that "[t]he straightforward rule is that a party releases only those other parties whom he intends to release."

In South Carolina, "[a] covenant not to execute is treated differently than a settlement agreement which is a release." Cobb v. Benjamin, ____ S.C. ____, 482 S.E.2d 589, 591 (Ct. App. 1997).

Indeed, a covenant not to execute given in favor of a named Defendant, does not act as a bar to a later suit against that same named Defendant, let alone his principal. In Ackerman v. The Travelers, 456 S.E.2d 408 (Ct. App. 1995) Ackerman gave a covenant not to execute to a Defendant and then sought to sue the same Defendant in order to recover underinsured motorist benefits. Travelers, on behalf of the Defendant, sought to dismiss the action by reason of the Covenant. The Court refused to dismiss the action, reasoning:

"The Ackermans are still entitled to recover damages from Scott; they merely agreed not to legally enforce the judgment. In fact, the Covenant expressly reserves Ackerman's right to obtain a judgment against Scott . . ."
Ackerman, p. 147.

**III. A COVENANT GIVEN IN FAVOR OF ONE JOINT TORTFEASOR IS
NOT A RELEASE OF THE OTHER.**

In the tort context, the ineffectiveness of the Covenant as a settlement is a matter of statute law:

"When a release or a covenant not to sue or not to enforce judgment

is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

"(1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the Covenant, or in the amount of the consideration paid for it, whichever is the greater"[]

S.C. Code Ann. § 15-38-50 (Lawyers-Cooperative Cum. Supp. 1997).

What the statute entails is that, "[u]nder South Carolina law, a settlement or a covenant not to sue with one tortfeasor does not discharge any other tortfeasor unless its terms so provide or the plaintiff has received full compensation." Trustees of Grace Reformed Episcopal Church v. Charleston Insurance Co., 868 F.Supp. 128, 130 (D.S.C. 1994). As we have seen, the Covenant by no means was intended to discharge the County; its language stipulates precisely the opposite (Covenant paragraph 10, R. p. 69). Nor did the Covenant provide "full compensation," id., to Wade. Thus, the demonstrated intention of the parties to the Covenant renders the agreement a covenant not to execute, not a release. See Ackerman v. Travelers Indemnity Co., 318 S.C. 137, 456 S.E.2d 408, 413 (Ct. App. 1995).

As a result, the Covenant fits within the rule that, "[t]he release of one tortfeasor does not constitute a release of others who contributed to the plaintiff's injuries unless the parties intended such a release or the plaintiff received full satisfaction." Scott by McClure v. Fruehauf Corp., 302 S.C. 364, 396 S.E.2d 354 (1990). Here, the Covenant demonstrably had the opposite intention; it excluded the County from its sweep. In addition, Wade received far less than "full satisfaction," id., for his injuries from the

agreement with Pierce. Hence, Scott by McClure, supra, along with the other cases cited herein, entails the denial to the County of the summary judgment it seeks in this case. See also Bartholomew v. McCartha, 255 S.C. 489, 179 S.E.2d 912 (1971); Vaughn v. City of Anderson, 300 S.C. 55, 386 S.E.2d 297, 299 (Ct. App. 1989).

Pierce and the County are joint-tortfeasors for purposes of this action. As a leading case announces:

"The decisions of the Supreme Court of South Carolina make it perfectly plain that in South Carolina a plaintiff suing a master and servant for injuries which he has sustained as a result of the negligence of the servant, within the scope of his employment, may bring a suit against master and servant, and join them as joint tortfeasors."

Newton v. Southern Groceries Stores, Inc., 16 F.Supp. 164-65 (E.D.S.C. 1936)(emphasis supplied).

Although, as the Court pointed out in Newton, "[i]t is useless to re-cite and re-discuss the long line of cases, among which we find cases called 'leading cases,'" on the point, id. at 166, later decisions have followed this rule. As the Court stated in Collins v. Johnson, 242 S.C. 112, 130 S.E.2d 185, 190 (1963):

"We have held that the identification of master and servant is so complete that a joint action is maintainable against the two, even though liability of the master rests upon the principle of respondeat superior. Where a servant is guilty of negligence or willfulness while acting for a master within the scope of his employment, the liability is joint and several."

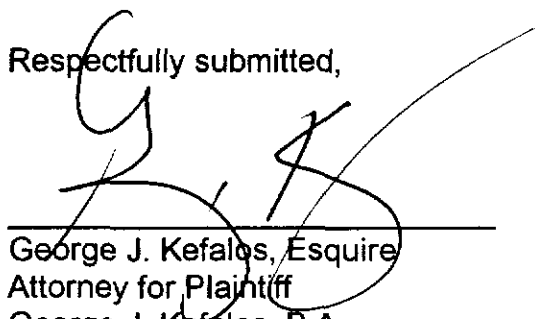
See also, Mackey v. Frazier, 234 S.C. 81, 106 S.E.2d 895, 897 (1959)(same); Parker v. Bissonette, 203 S.C. 155, 26 S.E.2d 497, 500 (1943)(same); Cravens v. Lawrence, 181 S.C. 165, 186 S.E. 269, 271 (1936)(reference to "the settled rule in this jurisdiction" on the issue).

As a result, it is clear that Pierce and the County are joint tortfeasors; hence, S.C. Code Ann. § 15-38-50(1) mandates that the Covenant, even if, for the sake of argument only, it were deemed a release – which it decidedly is not – would not serve to release the County from its liability to Wade. In fact, these very rules are consistent with the Court of Appeals' most recent restatement of the general principles in this area of law in Wade v. Berkeley County, supra, 498 S.E.2d at 687-88.

CONCLUSION

The claim against the County should not have been dismissed, as there was no prior judgment or settlement of a claim under the tort claim statute for the same occurrence.

Respectfully submitted,



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November 16, 1998.

Herald D. Wade, Jr. **BRIEF OF RESPONDENT**
Berkeley County, South Carolina
Berkeley County, S. Carolina **TABLE OF CONTENTS**
& John Doe

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I. STATEMENT OF THE ISSUES ON APPEAL

Whether A Claimant's Grant Of A Covenant Not To Execute To An Employee Of A Governmental Entity Constitutes A "Settlement Of A Claim" Under S.C. Code Ann. § 15-78-70(d) (West Group Supp. 1998) Which Bars The Claimant's Subsequent Civil Action Against The Governmental Entity Which Employed The Employee For The Same Occurrence?

II. STATEMENT OF THE CASE

A. Complaint/Amended Complaint

The Appellant, Gerald D. Wade, Jr., sued the Defendants, Bobby Joe Pierce and John Doe, in August 1995. (R.p.24, paras. 2-3). He asserted a cause of action for automobile negligence (R.pp.24-28, paras. 5-12) and sought actual and punitive damages. (R.p.28, para. 13). Wade later filed an Amended Complaint in April 1996 (R.p.29), dropping Pierce as an individual defendant and naming Berkeley County instead. (R.p.29, paras. 1-4). He asserted the same claim as before and sought similar damages. (R.pp.29-33, paras. 5-15).

B. Berkeley County's Response/Motion for Summary Judgment

Berkeley County timely answered (R.p.35), denying Wade's material allegations (R.pp.35-37, paras. 1, 3, 6-7, 9-13), and asserting the affirmative defenses of lack of agency between Pierce and Berkeley County (R.pp.37-38, paras. 14-15), full and complete settlement under the South Carolina Tort Claims Act¹ (R.p.38, para. 16), Defendant Doe's sole negligence (R.pp.38-39, paras. 17-18),² and sudden emergency. (R.p.39, para. 19).

¹ See The South Carolina Tort Claims Act (the "SCTCA") as codified in S.C. Code Ann. § 15-78-10, et. seq. (West Group Supp. 1997). See especially S.C. Code Ann. § 15-78-10(d) (West Group Supp. 1997).

² See S.C. Code Ann. § 15-78-60(20) (West Group Supp. 1997).

Berkeley County filed its first Motion for Summary Judgment in September 1996 (R.pp.18-19), on the grounds Pierce was not acting as an agent for Berkeley County (R.pp.18-19, paras. 1-2) and that Wade had previously settled his claim. (R.p.19, para. 3). The Honorable A. Victor Rawl, Circuit Judge, heard and granted Berkeley County's motion on December 3, 1996. (R.p.2). Wade appealed and this Court of Appeals reversed Judge Rawl and remanded the case.³

C. Berkeley County's Second Summary Judgment Motion

On remand, Berkeley County filed a second Motion for Summary Judgment based on the previous monetary settlement Wade had reached with Pierce before he filed the Amended Complaint. (R.pp.21-23). Pursuant to a Consent Order (R.pp.9-10), Berkeley County filed a Third Amended Answer denying Wade's material allegations. (R.pp.41-43, paras. 1-13). Berkeley County also asserted the same affirmative defenses as before (R.pp.43-45, paras. 14-20), and added another. (R.p.46, para. 21).

The Honorable R. Markley Dennis, Jr., Circuit Judge, considered Berkeley County's motion on June 29, 1998. (R.p.11). He subsequently granted the motion by written order dated July 13, 1998. (R.pp.11-17). This second appeal followed.

³ See Wade v. Berkeley County, 330 S.C. 311, 498 S.E.2d 684 (Ct.App. 1998) ("Wade I"). In Judge Rawl's order granting summary judgment to Berkeley County in Wade I he noted "[Berkeley County's] alternative ground for summary judgment, that the [SCTCA] bars [Wade's] claim against [Berkeley County] as a matter of law [was] not reached." (R.p.8). It is this ground for summary judgment which gives rise to this appeal.

III. STATEMENT OF THE FACTS

A. Pierce Becomes An Animal Control Officer

Sometime in January 1993, Berkeley County hired Pierce as an animal control officer. (R.p.12).⁴ Among other duties, Pierce was required to travel throughout Berkeley County to pick-up stray domesticated animals, clean the kennels, and, when necessary, euthanize animals. He worked five days per week and his standard working hours were from 8:30 a.m. until 5:00 p.m.

Not long after Pierce was hired, Berkeley County assigned him an Animal Control vehicle to use when picking up animals. While he was permitted to drive the County Truck to and from work, Berkeley County withdrew the County Truck from Pierce in 1994 for cost-savings reasons. Pierce then began to drive his personal vehicle to and from work.⁵ While Pierce was working, he drove an Animal Control department vehicle and left his personal truck parked at the animal shelter.⁶

B. The Accident With Wade

On the evening of May 31, 1995, Pierce received a citizen's telephonic report of a dead dog on U. S. Highway 17-A.⁷ The next morning, on June 1, 1995, Pierce set off for work in his personal

⁴ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

⁵ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

⁶ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

⁷ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

vehicle and stopped by the dog's location.⁸ After checking on the dog, Pierce continued on to work.⁹

At approximately 7:55 a.m., while Pierce was still heading to work, he and Wade were involved in an automobile accident. (R.p.12, para. 1; R.p.30, para. 7; R.p.66, p.1).¹⁰ Defendant Doe, driving a third automobile, reportedly cut Pierce off and caused him to cross the center-line and strike Wade virtually head-on. (R.p.12).¹¹

C. The Pierce Settlement

Prior to when Wade sued Berkeley County for his injuries (R.p.29, paras. 1-4), he sued Pierce and Doe for the same injuries arising from the same accident. (R.p.24, paras. 2-3; R.pp.69-70, paras. 10-11). Wade ultimately dismissed Pierce from this matter after they reached a settlement. (R.pp.69-70, pp.4-5, paras. 10-11). Pierce's private automobile insurance carrier, Government Employees Insurance Company, paid Wade \$13,000.00 to settle his personal injury claims against Pierce. (R.pp.66-67, para. 1). Wade, in turn, granted Pierce and GEICO a *Covenant Not To Execute Judgment* for the \$13,000.00 payment. (R.pp.66-71). At the time GEICO made this payment to Wade on Pierce's behalf, Wade had not yet made any claim against Berkeley County. (R.p.12).

⁸ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

⁹ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

¹⁰ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

¹¹ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686.

D. Second Grant of Summary Judgment

Based on the Wade/Pierce Settlement and GEICO's \$13,000.00 payment, Berkeley County moved for summary judgment under the South Carolina Tort Claims Act.¹² Berkeley County asserted:

. . . if the Court or [the jury] . . . determine[s] . . . Pierce was an employee of . . . Berkeley County . . . at the time of the alleged occurrence . . . [S.C.Code Ann.] § 15-78-70[(d)] (West Group Supp. 1997)] is a complete bar to [Wade's] action.

(R.p.22, para. 1). Berkeley County also asserted:

[it] underst[oo]d[] a settlement by [Wade] as against . . . Pierce [had taken] place in this action [and] said settlement was of a claim which arose out of the same occurrence. [Consequently, such] settlement would amount to a complete bar [to Wade] bringing any action pursuant to [S.C. Code Ann.] § 15-78-70[(d)]

(R.p.22, para. 2). Judge Dennis agreed and granted Berkeley County's motion. (R.pp.11-17). Wade then appealed.

¹² See S.C. Code Ann. §§ 15-78-10, et seq. (West Group Supp. 1997).

IV. ARGUMENT AND CITATION OF AUTHORITY

JUDGE DENNIS PROPERLY GRANTED BERKELEY COUNTY SUMMARY JUDGMENT AS WADE HAD FULLY SETTLED HIS CLAIMS AGAINST PIERCE AND HIS CLAIMS AGAINST BERKELEY COUNTY WERE BARRED BY S.C. CODE ANN. § 15-78-70(d) (WEST GROUP SUPP. 1997)

A. Summary Judgment Standard

Wade has appealed from Judge Dennis' grant of summary judgment to Berkeley County. In deciding a motion for summary judgment, this Court of Appeals must construe the record in favor of Wade and he must receive the benefit of all favorable, albeit reasonable, inferences which might be drawn from the record. Estes v. Roper Temporary Services, 304 S.C. 120, 403 S.E.2d 157 (Ct.App. 1991); Lattie v. SHS Enterprises, Inc., 300 S.C. 417, 389 S.E.2d 300 (Ct.App. 1990); Gilmore v. Ivey, 290 S.C. 53, 348 S.E.2d 180 (Ct.App. 1986). Summary judgment should be granted when further inquiry into the facts is not required to clarify the application of the law. Standard Fire Insurance Co. v. Marine Contracting and Towing Co., 301 S.C. 418, 392 S.E.2d 460 (1990). See also Wade, 330 S.C. 311, 315-361, 498 S.E.2d 684, 687 (citing Middleborough Horizontal Property Regime Council of Co-Owners v. Montedison, 320 S.C. 470, 465 S.E.2d 765 (Ct.App. 1995)). While summary judgement, as a drastic remedy, should be cautiously invoked, Baughman v. American Telephone and Telegraph Co., 306 S.C. 101, 410 S.E.2d 537 (1991); nevertheless

"[a] party opposing a properly supported motion for summary judgment . . . may not rest on the mere allegations or denials of his pleading, but must set forth or point to specific facts showing that there is a genuine

issue of material fact. Thus, the existence of a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment."

Pryor v. Northwest Apartments, Ltd., 321 S.C. 524, 526, 469 S.E.2d 630, 632 (Ct.App. 1996) (quoting Bravis v. Dunbar, 316 S.C. 263, 264, 449 S.E.2d 495, 496 (Ct.App. 1994)) (Citations omitted and alteration in original). Moreover, this Court of Appeals has held

'The rule authorizing summary judgment would serve no useful purpose if frivolous proofs were held to create a triable issue. The question on a motion for summary judgment is whether there is anything of substance to be tried. Therefore, it is incumbent upon the court to search the proof as proffered by affidavits or otherwise, to ascertain whether it discloses a real issue, rather than a formal, perfunctory, or shadowy one. The fact that there is a factual dispute is not enough to preclude a summary judgment. The issue must be one which the defendant is entitled to litigate'

Saluda Motor Lines, Inc. v. Crouch, 300 S.C. 43, 46-47, 386 S.E.2d 290, 291-292 (Ct.App. 1989) (quoting 73 Am.Jur.2d, Summary Judgment, § 27 (Law. Co-op. 1987)) (Emphasis added).

B. Judge Dennis' Grant of Summary Judgment Was Proper

1. Employment "Course and Scope" Immaterial

In Wade I, this Court of Appeals concluded "[t]he facts of this case create a jury question as to whether Pierce was acting within the course and scope of his employment when he collided with Wade." Wade, 330 S.C. 311, 321, 498 S.E.2d 684, 689. Judge Dennis acknowledged this position in his final order. (R.p.14). He stated:

The Court of Appeals has already determined it is a question of fact as to whether Pierce was 'in the course and scope of his employment' with Berkeley County at the time of the accident.

(R.p.14) (citing Wade, 330 S.C. 311, 317-321, 498 S.E.2d 684, 687-689.

Regardless, however, of any final determination of the issue of the "course and scope" of Wade's employment, Judge Dennis recognized:

even if the trier of fact [at the trial of this case concluded] Pierce was acting 'in the course and scope of this employment' with Berkeley County [at the time of his accident with Wade] then this [Trial] Court would still be required to decide whether the SCTCA barred Wade's claim against Berkeley County as a matter of law based on . . . S.C. Code Ann. § 15-78-70(d)

(R.p.14). Wade acknowledged Judge Dennis' position but asserted:

The difficulty with this position is . . . th[is] Court of Appeals has already stated . . . 'a genuine issue of material fact exist[ed] regarding whether Pierce was acting in the course and scope of his employment when the accident occurred[.]

(Appellant's Brief, p.3) (quoting Wade, 330 S.C. 311, 321, 498 S.E.2d 684, 689) (Final alteration in original).¹³

¹³ Wade also argues this Court of Appeals' "declaration of materiality [on the issue of whether Wade was acting in the course and scope of his employment] . . . is binding in this proceeding because '[t]he doctrine of the law of the case prohibits issues which have been decided in a prior appeal from being relegated in the [T]rial Court in the same case.'" (Appellant's Brief, p.3) (quoting Ross v. Medical University of South Carolina, 328 S.C. 51, 63-64, 492 S.E.2d 62, 68 (1997)). Berkeley County does not dispute the existence of the "law of the case" doctrine, but would point out Wade misapplies the doctrine herein since Judge Dennis granted Berkeley County summary judgment on a completely different ground (continued...)

Wade has completely misconstrued this Court of Appeals' decision in Wade I when the decision is viewed in conjunction with Judge Dennis' final order. Both this Court of Appeals' opinion and Judge Dennis' decision are completely consistent and harmonious. The ultimate determination of whether Wade was "acting in the course and scope of his employment" with Berkeley County when the accident took place is immaterial. Even if Wade was in "the course and scope", the SCTCA, under certain circumstances, still afforded Berkeley County protection against Wade's claims.

2. SCTCA Was Wade's Exclusive Remedy

Undisputedly, Wade settled his personal injury claims with Pierce pursuant to GEICO's payment of \$13,000.00. (R.pp.66-71). The Covenant specifically stated:

. . . Gerald D. Wade, Jr. and Shirley M. Wade[, his wife,] do hereby promise and covenant for themselves, their heirs, . . . and assigns, not to execute against . . . [Pierce] or [GEICO] . . . on any judgment [which] may be obtained by [the Wades] on account of any and all claims, demands, damages, costs[, or] expenses, including, but not limited to, any medical or hospital expenses, loss of services, actions[, and] causes of action, arising from any act, omission[, or] occurrence or resulting or to result from the automobile accident which occurred on June 1, 1995, in Berkeley County, South Carolina, when Gerald D. Wade, Jr. was

¹³(...continued)
than the ground discussed in Wade I (i.e.; issue of SCTCA statutory bar due to Wade's monetary settlement with Pierce). (R.pp.11-17). Moreover, as Judge Rawl noted in his order granting summary judgment to Berkeley County in Wade I "[Berkeley County's] alternative ground for summary judgment, that the [SCTCA] bars [Wade's] claim against [Berkeley County] as a matter of law is not reached." (R.p.8).

involved in a motor vehicle collision with a vehicle driven by Bobby Joe Pierce.

(R.p.67, para. 3). In addition, the Covenant also stated:

. . . [the Wades] do further covenant and promise . . . if they should attain a judgement against . . . Pierce or [GEICO], they will not execute on said judgment against . . . Pierce or [GEICO]

(R.p.67, para. 4).

The SCTCA "is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents" S.C. Code Ann. § 15-78-20(b) (West Group Supp. 1997). See Knoke v. South Carolina Department of Parks, Recreation and Tourism, 324 S.C. 136, 144, 478 S.E.2d 256, 260 (1996). Consequently, it is fundamental that the "[p]rovisions [of the SCTCA] relating to limitations and exemptions are to be liberally construed to limit the state's liability." Wade, 330 S.C. 311, 319, 498 S.E.2d 684, 688. See also Summer v. Carpenter, 328 S.C. 36, 44, 492 S.E.2d 55, 59 (1997); Strother v. Lexington County Recreation Commission, 324 S.C. 611, 619, 479 S.E.2d 822, 826 (Ct.App. 1996) (citing Rice v. School District of Fairfield, 317 S.C. 87, 452 S.E.2d 352 (Ct.App. 1994)) (" . . . [t]he 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.").

With regard to government employees, the SCTCA is also "the exclusive civil remedy for any tort committed by an employee of a governmental entity." S.C. Code Ann. § 15-78-70(a) (West Group

Supp. 1997). See Proveaux v. Medical University of South Carolina, 326 S.C. 28, 32, 482 S.E.2d 774, 776 (1997). In fact the SCTCA provides:

On or after January 1, 1989, a person, when bringing an action against a governmental entity under the provisions of [the SCTCA], shall name as a party defendant only the agency or political subdivision for which the employee was acting and is not required to name the employee individually, unless the agency or political subdivision for which the employee was acting cannot be determined at the time the action is instituted. In the event . . . the employee is individually named, the agency or political subdivision for which the employee was acting must be substituted as the party defendant.

S.C. Code Ann. § 15-78-70(c) (West Group Supp. 1997) (Emphasis added). In this vein, the Supreme Court noted:

. . . government agencies generally act through their employees. Thus, when an agency is sued because of the alleged tort of an employee acting within the scope of his or her employment, the [SCTCA] provides . . . only the agency shall be named as a party. S.C.Code Ann. § 15-78-70(c). Governmental employees who commit torts while acting in their official capacity are immune from personal liability unless their conduct constitutes actual fraud, actual malice, intent to harm or a crime of moral turpitude.

Jensen v. Anderson County Department of Social Services, 304 S.C. 195, 205 n.4, 403 S.E.2d 615, 620 n.4 (1991) (citing S.C. Code Ann. §§ 15-78-70(a) and (b) (West Group Supp. 1997)) (Emphasis added).

3. *SCTCA Designed to Eliminate
Employees As Party-Defendants*

The SCTCA is designed to permit claimants to sue governmental entities for the acts of their employees -- not the employee personally -- since "[a]n employee of a governmental entity who commits a tort while acting within the scope of his official duty in not liable therefor except [under certain circumstances]." S.C. Code Ann. § 15-78-70(a). Under the SCTCA an "employee of a governmental entity [does not have] immunity from suit and liability if it is proved . . . the employee's conduct was not within the scope of his official duties or . . . it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-70(b) (West Group Supp. 1997). As noted by the authorities, the SCTCA "confers personal immunity upon any governmental employee 'who commits a tort while acting within the scope of his official duty'" C. Tolbert Goolsby, Jr. and Ginger D. Goforth, The South Carolina Tort Claims Act: A Primer and Then Some, 25 (2d ed. SCBar CLE Div. 1997)

In this case, Wade originally sued Pierce, individually, in August 1995. (R.pp.24-28). He did not assert Pierce committed either fraud, actual malice, or a crime, or intended to hurt Wade. (R.pp.24-28).¹⁴ Moreover, Wade did not add Berkeley County as a

¹⁴ Wade did assert the standard automobile accident allegations made in an "auto negligence" case:

. . . the injuries and damages suffered by
[Wade] were due to and caused by the
negligence, carelessness, recklessness,
wilfulness, wantonness[,] and heedlessness of
(continued...)

party-defendant until April 1996, after he had settled his claims against Pierce's personal automobile insurance company. (R.p.16, para. 6; R.pp.66-71). Assuming Wade, in August 1995, did not know Pierce was an employee of a governmental entity, Wade correctly sued Pierce personally. See S.C. Code Ann. § 15-78-70(c). Nevertheless, once Wade determined Pierce worked for Berkeley County and, in turn, Berkeley County might theoretically be liable, as Pierce's employer, for Wade's injuries, then Wade was required to dismiss Pierce from the case. S.C. Code Ann. § 15-78-70(c) ("In the event the employee is individually named, the agency or political subdivision for which the employee was acting must be substituted as the party[-]defendant.").

Wade discovered Pierce was employed by Berkeley County and, under the facts, Berkeley County theoretically had potential liability when Wade took Pierce's deposition on February 1, 1996. (R.p.48, lines 1-11; R.p.49, line 3 - R.p.59, line 25; R.p.60, line 2 - R.p.65, line 25). Even though Wade was aware Pierce was claiming he was at work at the time of the accident, Wade did not immediately dismiss Pierce as a party-defendant and substitute Berkeley County but, instead, waited until he had settled with GEICO, on Pierce's personal behalf, for \$13,000.00. (R.p.15-16, paras. 5, 7; R.pp.66-71).

¹⁴(...continued)
[the Defendants Pierce and Doe]

(R.pp.26-27, para. 12).

4. The Covenant Constituted "A Settlement of a Claim" Under S.C. Code Ann. § 15-78-70(d)

This Court of Appeals recently held:

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Elmore v. Ramos, 327 S.C. 507, 489 S.E.2d 663 (Ct.App. 1997). In construing a statute, its words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Adkins v. Comcar Industries, Inc., 323 S.C. 409, 475 S.E.2d 762 (1996). If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. City of Camden v. Brassell, 326 S.C. 556, 486 S.E.2d 492 (Ct.App. 1997). Where a statute is complete, plain, and unambiguous, legislative intent must be determined from the language of the statute itself. [City of Camden, 326 S.C. 556, 486 S.E.2d 492].

State v. Smith, 330 S.C. 237, 241, 498 S.E.2d 648, 650 (Ct.App. 1998). See also generally Rowe v. Hyatt, 321 S.C. 366, 468 S.E.2d 649 (1996); Gilstrap v. South Carolina Budget & Control Board, 310 S.C. 210, 423 S.E.2d 101 (1992); Burns v. State Farm Mutual Automobile Insurance Co., 297 S.C. 520, 377 S.E.2d 569 (1989). In addition, "[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the light of the intended purpose of the statute." City of Sumter Police Department v. One 1992 Blue Mazda Truck, 330 S.C. 371, 377, 498 S.E.2d 894, 897 (Ct.App. 1998) (citing Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 440 S.E.2d 364 (1994)). Finally, it is well-settled law a:

statute as a whole must receive a practical, reasonable, and fair interpretation [which] is consonant with the purpose, design, and policy of the legislature. Browning v. Hartvigsen, 307 S.C. 122, 414 S.E.2d 115 (1992). In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Hitachi Data Systems Corp. v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992). The court should review . . . statutory language as a whole in light of its manifest purpose. Simmons v. City of Columbia, 280 S.C. 163, 311 S.E.2d 732 (1984).

City of Sumter Police Department, 330 S.C. 371, 376-377, 498 S.E.2d 894, 897.

It is axiomatic the SCTCA seeks to limit a governmental entity's tort liability as much as possible. (R.p.15, paras. 1-2). Consequently, the SCTCA specifically provides as follows:

A settlement or judgment in an action or a settlement of a claim under this chapter constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence.

S.C. Code Ann. § 15-78-70(d) (Emphasis added). This provision has been viewed as the "kind of limitation [designed to] prevent[] a claimant from recovering twice." Goolsby and Goforth, 23 (citing James Martin, *Common Law Sovereign Immunity and the Maine Tort Claims Act: A Rose by Another Name*, 35 Me.L.Rev. 265, 283 (1983)) (Emphasis added).

While the SCTCA specifically defines several terms, Goolsby and Goforth, 14-15, it did not define the term "settlement". S.C. Code Ann. § 15-78-30 (West Group Supp. 1997). Consequently, the term "must be given [its] plain and ordinary meaning without resort

to subtle or forced construction [which] limit[s] or expand[s] the operation of [S.C. Code Ann. § 15-78-70(d)] and the] language must be read in [harmony] with its subject matter and accords with its general purpose." Greenville Hospital System v. Provident Life and Accident Insurance Co., 330 S.C. 436, 441-442, 499 S.E.2d 232, 235 (Ct.App. 1998) (citing Koenig v. South Carolina Department of Public Safety, 325 S.C. 400, 403-404, 480 S.E.2d 98, 99 (Ct.App. 1996)).

The term "settlement" has been defined as "an agreement to terminate or forestall all or part of a lawsuit." Gorman v. Holte, 164 Cal.App.3d 984, 988, 211 Cal.Rptr. 34, 37 (CA 2d Dist. 1985) (citing 2 *California Civil Procedure Before Trial* 458, § 33.1, Cont.Ed.Bar (1978)). The Supreme Court of Hawai'i defined the term as:

`. . . an agreement to terminate, by means of mutual concessions, a claim [(footnote omitted)] which is disputed in good faith or unliquidated. It is an amicable method of settling or resolving bona fide differences or uncertainties and is designed to prevent or put an end to litigation.'

Sylvester v. Animal Emergency Clinic of Oahu, 72 Hawai'i 560, 565-566, 825 P.2d 1053, 1056 (1992) (citing 15A Am.Jur.2d, Compromise and Settlement, § 1 (Law. Co-op. 1976)). Similarly, the Superior Court of New Jersey, Law Division, determined "[s]ettlement' mean[t] to fix or resolve conclusively; to make or arrange for final disposition." Wager v. Burlington Elevators, Inc., 116 N.J.Super. 390, 397, 282 A.2d 437, 441 (Supr.Ct. 1971) (citing

Webster's Seventh New Collegiate Dictionary; 39 Words and Phrases
65 et seq. (West 1970)).

As far as Pierce's liability to Wade was concerned, the Covenant had the effect of "fix[ing] or resolv[ing] conclusively [and] arrang[ing] [the] final disposition" of Wade's claims vis-a-vis Pierce. Wager, 116 N.J.Super. 390, 397, 282 A.2d 437, 441. Moreover, by its very terms, the Covenant was "an agreement to terminate . . . all . . . of a lawsuit." Gorman, 164 Cal.App.3d 984, 988, 211 Cal.Rptr. 34, 37. Pursuant to the Covenant, Wade and his wife promised:

not to execute against . . . [Pierce] or [GEICO] . . . on any judgment [which] may be obtained by [them] on account of any and all claims, demands, damages, costs[,] or expenses, including, but not limited to, any medical or hospital expenses, loss of services, actions[,] and causes of action, arising from any act, omission[,] or occurrence or resulting or to result from the automobile accident which occurred on June 1, 1995, in Berkeley County, South Carolina, when [Wade] was involved in a motor vehicle collision with a vehicle driven by [Pierce].

(R.p.67, para. 3). In addition, the Wades also promised

". . . if they [obtained] a judgment against [either] Pierce or [GEICO], they w[ould] not execute on said judgment"

(R.p.67, para. 4). Even though Pierce may have been required to testify in this action, he no longer had any personal liability to Wade by virtue of GEICO's \$13,000.00 payment - this would have been true even if there was evidence he had acted in a malicious or intentional manner. Clearly, the settlement agreement between Wade and Pierce\GEICO, as exemplified by the Covenant, must be viewed as

"a settlement of a claim" under the SCTCA. S.C. Code Ann. § 15-78-70(d).

If such was not the case, creative claimants' counsel could easily attempt to circumvent S.C. Code Ann. § 15-78-70(d) by first suing the "unknown" governmental employee in his or her individual capacity, settle with the individual's personal insurance carrier, and then "discover" the individual's "government employee status" and, in turn, sue the governmental entity for the same occurrence. It is clear the Legislature intended to prevent this type of situation when it adopted S.C. Code Ann. § 15-78-70(d).

Should this Court of Appeal's permit Wade's claim, even though he had settled with Pierce individually, would be to completely eviscerate the effect of S.C. Code Ann. § 15-78-70(d). This Court of Appeals should affirm Judge Dennis' order in all respects.

5. *Wade's Settlement With Pierce Barred Wade's Suit Against Berkeley County for the Injuries He Sustained In the June 1, 1995, Accident*

As mentioned previously, the SCTCA specifically provides:

A settlement or judgment in an action or a settlement of a claim under this chapter constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence.

S.C. Code Ann. § 15-78-70(d) (Emphasis added). Since the Covenant between Wade and Pierce\GEICO constitutes a settlement under S.C. Code Ann. § 15-78-70(d), the Covenant acts as "a complete bar to any further action by [Wade] against [Pierce] or [Berkeley County for Wade's personal injuries since the Covenant and this action

against Berkeley County arose from] the same occurrence." S.C. Code Ann. § 15-78-70(d).

As this Court of Appeals has stated when "construing a statute, its words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Smith, 330 S.C. 237, 240-241, 498 S.E.2d 648, 649-650 (citing Adkins, 323 S.C. 409, 475 S.E.2d 762). Moreover, when "a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." Smith, 330 S.C. 237, 241, 498 S.E.2d 648, 650 (citing City of Camden, 326 S.C. 556, 486 S.E.2d 492).

The language in S.C. Code Ann. § 15-78-70(d) is plain and unambiguous. When there has been a settlement of a claim under the SCTCA, then neither the employee or the governmental entity have any further liability to the claimant. Wade chose to sue Pierce first and, in turn, to settle with Pierce and GEICO. He then sued Berkeley County seeking, in essence "a second bite at the apple". The SCTCA, pursuant to S.C. Code Ann. § 15-78-70(d), is clearly designed to prevent such a situation as that "kind of limitation prevents a claimant from recovering twice." Goolsby and Goforth, 23 (citing Martin, 35 Me.L.Rev. 265, 283). Wade could have avoided his present dilemma by initially substituting Berkeley County for Pierce, S.C. Code Ann. § 15-78-70(c); or by suing Berkeley County and Pierce, individually, through asserting the required

allegations against Pierce in his individual capacity. S.C. Code Ann. § 15-70-70(b).

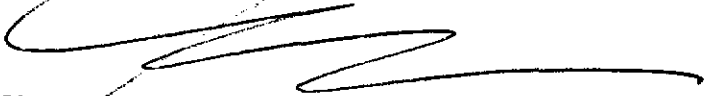
Unfortunately for Wade, he did neither and his attempt to avoid the consequences of his decision is without merit. Judge Dennis properly concluded Berkeley County was entitled to summary judgment as a matter of law since Wade had settled with Pierce and his claims against Berkeley County were therefore barred.

V. CONCLUSION

Based upon the foregoing arguments and citation of authority, the Respondent, Berkeley County, South Carolina, respectfully requests this Court of Appeals to affirm Judge Dennis' decision in all respects.

Respectfully submitted:

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November 6, 1998

THE STATE OF SOUTH CAROLINA
COURT OF APPEALS

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

R. Dennis Markley, Jr., Circuit Court Judge

Case No. 95-CP-08-1281

Gerald D. Wade, Jr.,

Appellant,

v.

Berkeley County, South Carolina
and John Doe,

Respondents.

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

R. Dennis Markley, Jr., Circuit Court Judge

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STATEMENT OF ISSUES

There was no judgment or settlement of a prior claim under the Tort Claim Chapter so as to bar the present action.

STATEMENT OF THE CASE

Wade adopts the statement of the case contained in his appeal brief.

FACTS

Wade adopts the facts contained in his appeal brief.

ARGUMENT

- I. *There was no prior tort claim proceeding.*

Berkeley County fails to address a threshold issue in its brief. Before Berkeley County can insist that South Carolina Tort Claims Act (SCTCA) is Wade's exclusive remedy (Respondent's argument #B2); before Berkeley County can discuss how the SCTCA was designed to eliminate employees as party defendants (Respondent's argument #B3); before Berkeley County can argue a covenant not to execute is a settlement (Respondent's argument #B4), Berkeley County must establish that there was a *prior proceeding* under the SCTCA which resulted in a settlement or judgment in an action, or settlement of a claim.

"A settlement or judgment in an action or a settlement of a claim *under this chapter* constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence."
(Emphasis added)

S.C. Code Ann. § 15-78-70(d)(Lawyers' Cooperative 1997 Supp.)

Berkeley County has completely ignored this fundamental issue in its brief. Berkeley County has failed to address the issue that before the bar in the statute may be

invoked, there must first be a prior claim "under this chapter."

Presumably this is not mere oversight. Berkeley County has not addressed it because it cannot. Indeed, nowhere in its brief does Berkeley County dispute the existence of the pre-condition, or even make an effort to excuse this particular case from the pre-condition. Instead, it has leapfrogged this pre-condition to argue about principles which are axiomatic (i.e., the SCTCA was designed to eliminate employees as party defendants), but legally irrelevant if the predicate has not been met.

All of the arguments marshaled by Berkeley County turn on the assumption that there was a resolution of a prior proceeding brought pursuant to the SCTCA. Without this showing, the bar contained in the statute does not come into play. Berkeley County has never explained how an action against Pierce in his individual capacity is an action under the SCTCA.

Isn't Berkeley County's failure to dispute the requirement of a prior proceeding, its failure to address this issue entirely, an admission that it has not met the requirement?

Simply put, since there was no resolution of a prior proceeding under the SCTCA, there is no bar to the present action.

II. *A covenant not to execute is not a settlement.*

Berkeley County points out that a settlement has been defined as "an agreement to terminate or forestall all or part of a lawsuit" and is "designed to prevent or put an end to litigation". (Berkeley brief @ page 17)

No lawsuit has been ended by a covenant in this case. A Covenant Not to Execute is not a release and does not put an end to litigation. Cobb v. Benjamin, ___ S.C. ___, 482 S.E.2d 589, 591 (Ct. App. 1997). The covenant does not have the effect of "fixing or

resolving conclusively and arranging the final disposition" (Respondent's Brief @ page 18) of Wade's claim against Pierce. Indeed, Pierce remains amenable to suit. Wade retained the ability to join Pierce as a defendant and to obtain a judgment against him. No action against Pierce has been ended. Pierce has not been released.

III. *The conundrum*

The real problem in this case is the use of the covenant appears to be a clever method of circumventing the statutory cap on recoveries in the SCTCA. If permitted, Wade has the opportunity to recover more than the statutory cap. However, this is a reasonable outcome when there is a good faith dispute over agency.

The real question here is what the legislature intended the SCTCA to limit. Was it intended to prevent double recoveries against the government, or, was it intended to interfere with the resolution of disputed claims of agency? The answer should be evident: it was intended to prevent double recoveries against the government. The government's liability is limited to \$250,000. The statute was designed to prevent circumvention of this limit by suing two government agencies for the same occurrence. It was never intended to extend to go beyond that.

The SCTCA is the exclusive remedy only when there is no dispute regarding agency. If there was no question that Pierce was acting in the scope of his employment at the time of the wreck, then Pierce could not be sued individually, and he would have asserted that as a defense. But consider what happens when the government denies Pierce was on the job at the time. The SCTCA is no longer the exclusive remedy. As in any case of disputed agency, Wade would sue both the government and Pierce individually and let the jury determine whether the government has responsibility for

Pierce's action.

Consider what would happen if Wade was required to sue the government first. If he sues the government and loses, does that mean that there was no agency or no liability on the part of Pierce? In that circumstance Wade would have to sue Pierce all over again -- a profound waste of judicial resources.

If Wade sues both the government and Pierce, can Pierce's liability carrier come to Wade and say, "We recognize that Pierce may have personal exposure, he may be found to have been acting outside the scope of his employment. We would like to protect him against personal exposure. We do not ask that you release him or even end the action against him. We will pay you his liability coverage today, if you will agree not to execute on him personally in the event he is found to be personally liable." Isn't this exactly what has happened here? Wade has not released Pierce. Pierce is still amenable to suit (though by now the statute of limitations has lapsed).

Would this be a settlement of a prior proceeding under the SCTCA? Of course not.

Might it mean that Wade could recover more than he would be entitled to recover if he sued just the government? Yes.

Is there anything improper about this? No.

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IN THE
SUPREME COURT*

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S.C. SUPREME COURT

Opinion Nos. 3053, 3145
Filed October 4, 1999 and April 3, 2000

APPEAL FROM THE COURT OF COMMON PLEAS
FOR BERKELEY COUNTY

HONORABLE R. MARKLEY DENNIS, Jr., CIRCUIT COURT JUDGE
Civil Action No. 95-CP-10-1281

Gerald D. Wade, Jr.,

Respondent,

v.

Berkeley County, South Carolina
and John Doe, of whom Berkeley County, South Carolina is,

Petitioner,

And John Doe, is

Respondent.

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I. ISSUES/QUESTIONS PRESENTED

1. DID THE COURT OF APPEALS INCORRECTLY DETERMINE A COVENANT NOT TO EXECUTE IS NOT A SETTLEMENT AS THAT TERM IS USED IN S.C. CODE ANN. §15-78-70(D) (WEST GROUP 1999)?
2. DID THE COURT OF APPEALS INCORRECTLY CONCLUDE THE COVENANT NOT TO EXECUTE GIVEN TO MR. PIERCE DID NOT CONSTITUTE A SETTLEMENT "UNDER THIS CHAPTER" AS SET FORTH IN S.C. CODE ANN. §15-78-70(D) (WEST GROUP 1999)?
3. DID THE COURT OF APPEALS IGNORE THE FACT THAT ITS RULING CONFLICTED WITH THE WELL-SETTLED COMMON LAW OF RESPONDENT SUPERIOR IN THIS STATE?
4. DID THE COURT OF APPEALS FAIL TO APPLY AND INTERPRET THE TERMS OF SOUTH CAROLINA TORT CLAIMS ACT IN FAVOR OF LIMITING THE LIABILITY OF THE STATE AND ITS POLITICAL SUBDIVISIONS?

II. STATEMENT OF THE CASE

The Respondent, Gerald D. Wade, Jr., sued Bobby Joe Pierce and the Defendant, John Doe, in August 1995. (App.p.23, paras. 2-3). Mr. Wade asserted a cause of action for automobile negligence (App.pp.23-27, paras. 5-12) and sought actual and punitive damages. (App.p.27, para. 13). Mr. Wade filed an Amended Complaint in April 1996 after settling with Pierce's insurance company - GEICO. (App.pp.28, 65-69). He dropped Mr. Pierce as an individual defendant and inserted the Petitioner, Berkeley County, South Carolina, as a defendant instead. (App.p.28, paras. 1-4). Mr. Wade asserted the same negligence claim as before and sought similar damages. (App.pp.28-32, paras. 5-15).

Berkeley County timely answered (App.p.34), denying Wade's material allegations (App.pp.34-36, paras. 1, 3, 6-7, 9-13), and asserting affirmative defenses including lack of agency between Mr. Pierce and Berkeley County, and full and complete settlement under the *South Carolina Tort Claims Act*.¹ (App.pp.36-37, paras. 14-15).

Berkeley County moved for summary judgment in September 1996 (App.pp.17-19), on the grounds Pierce was not acting as an agent for Berkeley County (App.pp.17-18, paras. 1-2) and that Wade had previously settled his claim. (App.p.18, para. 3). The Honorable A. Victor Rawl, Circuit Judge, heard and granted Berkeley County's motion on December 3, 1996. (App.p.1). Wade appealed and the Court of Appeals reversed Judge Rawl and remanded the case.²

¹ See *S. C. Code Ann.* §§ 15-78-10, *et. seq.* (West Group Supp. 2000).

² See *Wade v. Berkeley County*, 330 S.C. 311, 498 S.E.2d 684 (Ct.App. 1998) ("Wade I"). In Judge Rawl's order granting summary judgment to Berkeley County he noted "[Berkeley County's] alternative ground for summary judgment, that the [SCTCA] bars [Mr. Wade's] claim against [Berkeley County] as a matter of law [was] not reached." (App.p.7). It is this ground for summary judgment which gives rise to this present appeal.

On remand, Berkeley County again moved for summary judgment based on the previous monetary settlement Mr. Wade had reached with Mr. Pierce, through GEICO, before Mr. Wade filed his Amended Complaint adding Berkeley County as a party-defendant. (App.pp.20-22). The Honorable R. Markley Dennis, Jr., Circuit Judge, heard Berkeley County's motion on June 29, 1998 (App.p.101), and granted it by written order dated July 13, 1998. (App.pp.10-16). This second appeal followed.

A panel of the South Carolina Court of Appeals issued its original opinion on October 4, 1999, reversing Judge Dennis's decision.³ Berkeley County filed a Petition for Rehearing with a Suggestion for Rehearing En Banc. The Court of Appeals granted the petitions and reheard the case, en banc, on January 13, 2000. On April 3, 2000, the Court of Appeals issued its divided opinion again reversing Judge Dennis.⁴

On the *en banc* rehearing, the Court of Appeals was divided by way of a four/three/two vote.⁵ While affirming the panel decision, the plurality felt obliged, apparently for the sake of clarity, to "limit the efficacy of th[e] opinion to the unique facts of this case."⁶ The concurring judges likewise felt obliged to limit the decision to the "unique facts" of the case.⁷

³ See Wade v. Berkeley County, 339 S.C. 495, 529 S.E.2d 734 (Ct.App. 1999) ("Wade II"). (App.pp.122-132).

⁴ See Wade v. Berkeley County, 339 S.C. 513, 529 S.E.2d 743 (Ct.App. 2000) (*en banc*) ("Wade III"). (App.pp.158-173).

⁵ Four of the Court of Appeals' judges voted to affirm the panel decision and the reasoning set forth therein. (App.p.168). Three judges concurred simply in the result reached, while two judges voted to reverse the Court of Appeals' prior opinion and affirm Judge Dennis' grant of summary judgment. (App.p.168). See Wade III, 339 S.C. 513, 514, 529 S.E.2d 743, 744. (App.p.168).

⁶ See Wade III, 339 S.C. 513, 521, 529 S.E.2d 743, 751. (App.p.168).

⁷ Wade III, 339 S.C. 513, 521, 529 S.E.2d 743, 751. (App.p.169). Unfortunately,

Berkeley County subsequently filed a Petition for Rehearing addressed to Wade III (App.pp.174-191) which the Court of Appeals denied. (App.pp.192-193). Berkeley County then filed a Petition for Writ of *Certiorari* with this Supreme Court which was granted on or about December 7, 2000.

III. STATEMENT OF THE FACTS

Sometime in January 1993, Berkeley County hired Mr. Pierce as an animal control officer. (App.p.11).⁸ Among other duties, Mr. Pierce was required to travel throughout Berkeley County to pick-up stray domesticated animals, clean the kennels, and, when necessary, euthanize animals. He worked five days per week and his standard working hours were from 8:30 a.m. until 5:00 p.m.

Not long after Mr. Pierce was hired, Berkeley County assigned him an Animal Control vehicle to use when picking up animals. While he was permitted to drive the County Truck to and from work, Berkeley County withdrew the County Truck from Mr. Pierce in 1994 for cost-savings reasons. Thereafter, Mr. Pierce then began to drive his personal vehicle to and from work. (App.pp.123, 159).⁹ While Mr. Pierce was working, he drove an Animal Control department vehicle and left his personal truck parked at the animal shelter. (App.pp.123, 159).¹⁰

such disclaimers do not negate the Court of Appeals' unprecedented holding which will totally alter the application of the *SCTCA* and common law principles of *respondeat superior*.

⁸ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686. (App.p.123).

⁹ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686; Wade II, 339 S.C. 495, 496, 529 S.E.2d 734, 735; Wade III, 339 S.C. 513, 515, 529 S.E.2d 743, 745. (App.pp.123, 159).

¹⁰ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686; Wade II, 339 S.C. 495, 496, 529 S.E.2d 734, 735; Wade III, 339 S.C. 513, 515, 529 S.E.2d 743, 745. (App.pp.123, 159).

On the evening of May 31, 1995, Mr. Pierce received a telephone call from a citizen reporting a dead dog on U. S. Highway 17-A. (App.pp.123, 159).¹¹ The next morning, on June 1, 1995, Mr. Pierce set off for work in his personal vehicle and stopped by the dog's location. (App.pp.123, 159).¹² After checking on the dog, Mr. Pierce continued on to work. (App.pp.123, 159).¹³

At approximately 7:55 a.m., while Mr. Pierce was undisputedly heading to work, he and Mr. Wade were involved in an automobile accident. (App.p.11, para. 1; App.p.29, para. 7; App.p.65, para. 2; App.pp.123, 159).¹⁴ Defendant John Doe, driving a third automobile, reportedly either broke in front of Mr. Pierce or cut him off and caused Mr. Pierce to cross the center-line and strike Mr. Wade virtually head-on. (App.pp.11; 123, 159).¹⁵

Prior to when Mr. Wade sued Berkeley County for his injuries (App.p.28, paras. 1-4; App.pp.123, 159), he sued Mr. Pierce and John Doe for the same injuries arising from the same accident. (App.p.23, paras. 2-3; App.pp.68-69, paras. 10-11; App.pp.123, 159). Mr. Wade ultimately dismissed Mr. Pierce as a party-defendant from this matter after they reached an insurance settlement. (App.pp.66-69, pp.4-5, paras. 10-11; App.pp.123, 159).¹⁶ Mr.

¹¹ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686; Wade II, 339 S.C. 495, 496, 529 S.E.2d 734, 735; Wade III, 339 S.C. 513, 515, 529 S.E.2d 743, 745. (App.pp.123, 159).

¹² Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686; Wade II, 339 S.C. 495, 496, 529 S.E.2d 734, 735; Wade III, 339 S.C. 513, 515, 529 S.E.2d 743, 745. (App.pp.123, 159).

¹³ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686; Wade II, 339 S.C. 495, 496, 529 S.E.2d 734, 735; Wade III, 339 S.C. 513, 515, 529 S.E.2d 743, 745. (App.pp.123, 159).

¹⁴ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686; Wade II, 339 S.C. 495, 496, 529 S.E.2d 734, 735; Wade III, 339 S.C. 513, 515, 529 S.E.2d 743, 745. (App.pp.123, 159).

¹⁵ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686; Wade II, 339 S.C. 495, 496, 529 S.E.2d 734, 735; Wade III, 339 S.C. 513, 515, 529 S.E.2d 743, 745. (App.pp.123, 159).

¹⁶ Wade II, 339 S.C. 495, 496, 529 S.E.2d 734, 735; Wade III, 339 S.C. 513, 515, 529 S.E.2d 743, 745. (App.pp.123, 159).

Pierce's private automobile insurance carrier, GEICO, paid Mr. Wade \$13,000.00 to settle his personal injury claims against Pierce. (App.pp.65-66, para. 1; App.pp.123, 159). Mr. Wade, in turn, granted Mr. Pierce and GEICO a Covenant Not To Execute Judgment for the \$13,000.00 payment. (App.pp.65-70; App.123, 159). Up until this time, "[Mr.] Wade [had] made no allegation concerning [Mr.] Pierce's employment with [Berkeley] County."¹⁷ After Mr. Wade settled with GEICO, he filed an Amended Complaint alleging Mr. Pierce was acting in the course and scope of his employment with Berkeley County. (App.pp.123, 159).¹⁸

Based on the Mr. Wade/Mr. Pierce Settlement and GEICO's \$13,000.00 payment (App.pp.123, 159), Berkeley County moved for summary judgment under the SCTCA. (App.pp.123, 159).¹⁹ Berkeley County asserted:

. . . if the Court or [the jury] . . . determine[s] . . . [Mr.] Pierce was an employee of . . . Berkeley County . . . at the time of the alleged occurrence . . . [then S.C.Code Ann.] § 15-78-70[(d) (West Group Supp. 1997)] is a complete bar to [Mr. Wade's] action.

(App.p.21, para. 1). Berkeley County also asserted:

[it] underst[oo]d[] a settlement by [Mr. Wade] as against . . . [Mr.] Pierce [had taken] place in this action [and] said settlement was of a claim which arose out of the same occurrence. [Consequently, such] settlement would amount to a complete bar [to Mr. Wade] bringing any action pursuant to [S.C. Code Ann.] § 15-78-70[(d)]

(App.p.21, para. 2). Judge Dennis agreed and granted Berkeley County's motion. (App.pp.10-16; App.pp.123, 159). Mr. Wade then appealed. The Court of Appeals reversed the grant of

¹⁷ Wade II, 339 S.C. 495, 496, 529 S.E.2d 734, 735; Wade III, 339 S.C. 513, 515, 529 S.E.2d 743, 745. (App.pp.123, 159).

¹⁸ Wade, 330 S.C. 311, 315, 498 S.E.2d 684, 686; Wade II, 339 S.C. 495, 496, 529 S.E.2d 734, 735; Wade III, 339 S.C. 513, 515, 529 S.E.2d 743, 745. (App.pp.123, 159).

¹⁹ *See generally S.C. Code Ann.* §§ 15-78-10, *et seq.*

summary judgment and affirmed such ruling when this matter was reheard en banc.²⁰ This Supreme Court now reviews the Court of Appeal's *Wade III* en banc decision.

IV. ARGUMENT AND CITATION OF AUTHORITY

This case revolves around the issue of whether a Covenant Not to Execute given by a claimant/plaintiff to the employee of a governmental entity constitutes a "settlement" under the SCTCA so as to bar further action by the same claimant/plaintiff against the governmental entity for the same claims and/or causes of action. The SCTCA²¹ establishes such a covenant should act as a complete bar to any additional recovery against the governmental entity. Judge Dennis agreed and granted Berkeley County summary judgment on this ground. (App.pp.123, 159). A divided panel of the Court of Appeals reversed, concluding the Covenant Not to Execute against an individual who was, based on Mr. Wade's own complaint, an employee of Berkeley County at all times relevant to the action, did not constitute a "settlement" under the SCTCA. (App.pp.159-173).

1. THE COURT OF APPEALS INCORRECTLY DETERMINED A COVENANT NOT TO EXECUTE FAILED TO CONSTITUTE A "SETTLEMENT" AS THAT TERM IS USED IN THE SOUTH CAROLINA TORT CLAIMS ACT THROUGH S.C. CODE ANN. §15-78-70(d).

Undisputedly, Mr. Wade settled his personal injury claims with Mr. Pierce as a direct result of GEICO's payment of \$13,000.00 on Mr. Pierce's behalf. (App.pp.65-70, App.pp.123, 159).²² Nevertheless, the Court of Appeals' opinion, in *Wade III*, is inconsistent on the issue of

²⁰ See generally *Wade II*, 339 S.C. 495, 496, 529 S.E.2d 734, 735; *Wade III*, 339 S.C. 513, 515, 529 S.E.2d 743, 745. (App.pp.123, 159).

²¹ See *S.C. Code Ann.* §15-78-70(d) (West Group Supp. 2000).

²² *Wade II*, 339 S.C. 495, 496, 529 S.E.2d 734, 735; *Wade III*, 339 S.C. 513, 515, 529

whether the Covenant Not to Execute would, in fact, constitute a "settlement" as that term is used in the SCTCA.²³ The Court of Appeals determined the settlement document (App.pp.65-70) "executed by [Mr.] Wade and [Mr.] Pierce was intended to be a covenant not to execute as opposed to a settlement agreement, release, or covenant not to sue." (App.p.165).²⁴

Nevertheless, the Court of Appeals, also in Wade III, had already stated the following:

Without a jury verdict, order of judgment, or confession of judgment, cases are disposed of by way of amicable disposition under the aegis and ambit of three recognizable legal documents effectuating the settlement: (1) general release; (2) covenant not to sue; and (3) covenant not to execute.²⁵

The Court of Appeals then went to great lengths to "analyze" and "explain" the differences between a General Release, a Covenant Not to Sue, and a Covenant Not to Execute. (App.p..161-163). The Court of Appeals failed, however, to explain or cite any authority in support of the proposition that a Covenant Not to Execute is not a method of reaching a settlement in a given case.

As the dissent properly recognized, this was clearly erroneous, especially in light of the fact this Supreme Court has acknowledged that a Covenant Not to Execute is one method of settling a case.²⁶ In essence, the Court of Appeals created a fourth way to settle a case - (1) a Release, (2) a Covenant Not to Sue, (3) a Covenant Not to Execute, and (4) a "Settlement Document". This holding is incorrect and finds no support in South Carolina law. Moreover,

S.E.2d 743, 745. (App.pp.123, 159).

²³ See S.C. Code Ann. § 15-78-70(d).

²⁴ Wade III, 339 S.C. 513, 518, 529 S.E.2d 743, 748. (App.p.165).

²⁵ Wade III, 339 S.C. 513, 516, 529 S.E.2d 743, 746 (Emphasis in original). (App.p.161).

²⁶ See Poston by Poston v. Barnes, 294 S.C. 261, 264, 363 S.E.2d 888, 889 (1987).

the Court of Appeals fails to explain why a Covenant Not to Execute does not constitute a "settlement" of a claim under the SCTCA. This is especially true in light of the South Carolina Legislature's stated purposes of the SCTCA.

It is axiomatic that the SCTCA "is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents" ²⁷ Consequently, it is fundamental that the "[p]rovisions [of the SCTCA] relating to limitations and exemptions [must] be liberally construed to limit the state's liability." ²⁸

Additionally, as regards government employees, the SCTCA is "the exclusive civil remedy for any tort committed by an employee of a governmental entity." ²⁹ In fact, the SCTCA provides:

. . . a person, when bringing an action against a governmental entity under the provisions of [the SCTCA], shall name as a party defendant only the agency or political subdivision for which the employee was acting and is not required to name the employee individually, unless the agency or political subdivision for which the employee was acting cannot be determined at the time the action is instituted. In the event . . . the employee is individually named, the agency or political subdivision for which the employee was acting must be substituted as the party defendant. ³⁰

²⁷ S.C. Code Ann. § 15-78-20(b) (West Group Supp. 2000). See Knoke v. South Carolina Department of Parks, Recreation and Tourism, 324 S.C. 136, 144, 478 S.E.2d 256, 260 (1996).

²⁸ Wade, 330 S.C. 311, 319, 498 S.E.2d 684, 688. See also Summer v. Carpenter, 328 S.C. 36, 44, 492 S.E.2d 55, 59 (1997); Strother v. Lexington County Recreation Commission, 324 S.C. 611, 619, 479 S.E.2d 822, 826 (Ct.App. 1996) (citing Rice v. School District of Fairfield, 317 S.C. 87, 452 S.E.2d 352 (Ct.App. 1994)) (" . . . [t]he 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.").

²⁹ S.C. Code Ann. § 15-78-70(a) (West Group Supp. 1997). See Proveaux v. Medical University of South Carolina, 326 S.C. 28, 32, 482 S.E.2d 774, 776 (1997).

³⁰ S.C. Code Ann. § 15-78-70(c) (West Group Supp. 2000) (Emphasis added).

In this vein, this Supreme Court noted that

... government agencies generally act through their employees. Thus, when an agency is sued because of the alleged tort of an employee acting within the scope of his or her employment, the [SCTCA] provides . . . only the agency shall be named as a party. S.C.Code Ann. § 15-78-70(c). Governmental employees who commit torts while acting in their official capacity are immune from personal liability unless their conduct constitutes actual fraud, actual malice, intent to harm or a crime of moral turpitude.³¹

The SCTCA is designed to permit claimants to sue governmental entities for the acts of their employees – not the employee personally – since "[a]n employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor except [under certain circumstances]."³² Under the SCTCA an "employee of a governmental entity [does not have] immunity from suit and liability if it is proved . . . the employee's conduct was not within the scope of his official duties or . . . it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude."³³ As noted by the authorities, the SCTCA "confers personal immunity upon any governmental employee who commits a tort while acting within the scope of his official duty"³⁴

With these basic legal principles in mind, it appears evident the majority of the Court of Appeals en banc ignored controlling case law and statutes in an effort to expand Mr. Wade's potential recovery. The evidence showed Mr. Wade originally sued Mr. Pierce, in his individual

³¹ Jensen v. Anderson County Department of Social Services, 304 S.C. 195, 205 n.4, 403 S.E.2d 615, 620 n.4 (1991) (citing S.C. Code Ann. §§ 15-78-70(a), (b) (West Group Supp. 2000)) (Emphasis added).

³² S.C. Code Ann. § 15-78-70(a).

³³ S.C. Code Ann. § 15-78-70(b) (West Group Supp. 2000).

³⁴ C. Tolbert Goolsby, Jr. and Ginger D. Goforth, The South Carolina Tort Claims Act: A Primer and Then Some, 25 (2d ed. SCBar CLE Div. 1997).

capacity, in August 1995. (App.pp.23-27; App.pp.123, 159). Mr. Wade did not initially assert Mr. Pierce that committed either fraud, actual malice, or a crime, or, for that matter, intended in any way to hurt Mr. Wade. (App.pp.24-28; App.pp.123, 159).³⁵ Moreover, Mr. Wade did not add Berkeley County as a party-defendant until April 1996, after he had settled his claims against Mr. Pierce through the \$13,000.00 payment by GEICO. (App.p.15, para. 6; App.pp.65-70; App.pp.123, 159).

Assuming Mr. Wade, in August 1995, did not know that Mr. Pierce was employed by Berkeley County (i.e.; a governmental entity employee), Mr. Wade correctly sued Mr. Pierce personally.³⁶ Nevertheless, once Mr. Wade determined Mr. Pierce actually worked for Berkeley County and, in turn, Berkeley County might "theoretically" be liable as Mr. Pierce's employer for Mr. Wade's injuries, then Mr. Wade was required to immediately dismiss Mr. Pierce from the case.³⁷ The SCTCA did not permit Mr. Wade to sue both Mr. Pierce, individually, and Berkeley County, as his employer. Under the facts herein and the mandate of the SCTCA, Mr. Pierce and Berkeley County are legally not joint tortfeasors. Although the majority of the Court of Appeals acknowledges this fact, it goes on to ignore it in an effort to allow a potential double recovery.

³⁵ Mr. Wade did assert the standard automobile accident allegations made in an "auto negligence" case:

... the injuries and damages suffered by [Wade] were due to and caused by the negligence, carelessness, recklessness, willfulness, wantonness[,] and heedlessness of [the Defendants Pierce and Doe]

(App.pp.25-26, para. 12).

³⁶ See S.C. Code Ann. § 15-78-70(c).

³⁷ S.C. Code Ann. § 15-78-70(c) ("In the event the employee is individually named, the agency or political subdivision for which the employee was acting must be substituted as the party[-]defendant.").

Clearly, Mr. Wade discovered Berkeley County employed Mr. Pierce and, under the facts, Berkeley County theoretically had potential liability when Mr. Wade took Mr. Pierce's deposition on February 1, 1996. (App.p.47, lines 1-11; App.p.48, line 3 – App.p.58, line 25; App.p.59, line 2 – App.p.64, line 25). Even though Mr. Wade was aware Mr. Pierce was claiming he was “at work” at the time of the accident, Mr. Wade did not immediately dismiss Mr. Pierce as a party-defendant and substitute Berkeley County but, instead, waited until he had settled with GEICO, on Mr. Pierce's personal behalf, for \$13,000.00. (App.pp.14-15, paras. 5, 7; App.pp.65-68).

The majority of the Court of Appeals inquired as to “[h]ow can an action against [Mr.] Pierce in his individual capacity constitute an action under the [SCTCA]?”³⁸ The answer is evident and found within the very terms of the SCTCA. As a matter of law, Mr. Pierce cannot be sued in his individual capacity under the facts alleged herein once he testified he believed he was acting in the course and scope of his employment. Again, the majority simply ignored the provisions of the SCTCA which stand in the way of Mr. Wade's potential double recovery.

As the Court of Appeals' dissenters noted, the ruling of the Court of Appeals “opens the door” for every injured party to first sue a governmental employee individually before then proceeding against the governmental entity itself in situations where the employee could be viewed as “acting outside the scope” of his employment.³⁹ This is completely contrary to the SCTCA. Moreover, it permits a claimant/plaintiff to proceed on inconsistent theories and

³⁸ Wade II, 339 S.C. 495, 501, 529 S.E.2d 734, 740; Wade III, 339 S.C. 513, 520, 529 S.E.2d 743, 750. (Emphasis in original). (App.pp.130, 167).

³⁹ See generally Wade II, 339 S.C. 495, 503, 529 S.E.2d 734, 742-743; Wade III, 339 S.C. 513, 523, 529 S.E.2d 743, 753.

allows multiple recoveries for one harm without requiring any election of remedies.⁴⁰ There is no support for such a haphazard and whimsical interpretation of the SCTCA.⁴¹

The inconsistency in the reasoning of the Court of Appeals' majority is evident in its ruling that it need not accept Mr. Wade's own allegations regarding Mr. Pierce's employment status in his Complaint as true in reviewing the grant of summary judgment. (App.pp.130-131; App.p.167).⁴² The majority cites not one shred of authority in support of this position. This simply underscores the inconsistent theories under which the Court of Appeals' majority permits Mr. Wade to proceed. In *Wade I*, Mr. Wade argued vigorously that Mr. Pierce was acting in the course and scope of his employment with Berkeley County. (App.p.123; App.p.156).⁴³ In *Wade II* and *Wade III*, the Court of Appeals has allowed Mr. Wade to, in effect, argue that even though Mr. Wade alleges Mr. Pierce was acting in the course and scope of his employment, those facts need not be the case⁴⁴ if such a position would negatively affect Mr. Wade's ability to recover from Berkeley County.

The Court of Appeals' majority has apparently ignored the facts the SCTCA is plainly designed to permit claimants to sue governmental entities for the acts of their employees – not

⁴⁰ See generally *Wade II*, 339 S.C. 495, 503, 529 S.E.2d 734, 742-743; *Wade III*, 339 S.C. 513, 523, 529 S.E.2d 743, 753. Cf. *Taylor v. Mount Vernon-Woodberry Mills, Inc.*, 211 S.C. 414, 45 S.E.2d 809 (1947).

⁴¹ Rather than “wreak havoc” and “countenance the use of a judicial straightjacket” as the majority predicts, *Wade II*, 339 S.C. 495, 502, 529 S.E.2d 734, 741; *Wade III*, 339 S.C. 513, 520, 529 S.E.2d 743, 750; Mr. Wade could have preserved his right to proceed against Mr. Pierce in the event he was acting outside the scope of his employment by way of a tolling agreement relating to the applicable statute of limitations.

⁴² See generally *Wade II*, 339 S.C. 495, 501, 529 S.E.2d 734, 740; *Wade III*, 339 S.C. 513, 520, 529 S.E.2d 743, 750. (App.pp.130-131; App.p.167).

⁴³ See generally *Wade I*, 330 S.C. 311, 498 S.E.2d 684.

⁴⁴ See generally *Wade II*, 339 S.C. 495, 501, 529 S.E.2d 734, 740; *Wade III*, 339 S.C. 513, 520, 529 S.E.2d 743, 750. (App.130-131; App.p.167).

the employee personally – since "[a]n employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor except [under certain circumstances]."⁴⁵ Under the SCTCA an "employee of a governmental entity [does not have] immunity from suit and liability if it is proved . . . the employee's conduct was not within the scope of his official duties or . . . it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude."⁴⁶ As noted by the authorities, the SCTCA "confers personal immunity upon any governmental employee who commits a tort while acting within the scope of his official duty"⁴⁷

Under the SCTCA Mr. Pierce either is or is not acting within the course and scope of his employment with Berkeley County. The Court of Appeals has permitted Mr. Wade to effectively "have his cake and eat it too." This is reversible error and demonstrates a clear misapplication of the SCTCA.

2. THE COURT OF APPEALS SHOULD HAVE DETERMINED THE COVENANT NOT TO EXECUTE MR. WADE GAVE TO MR. PIERCE CONSTITUTED A SETTLEMENT "UNDER THIS CHAPTER" AS CONTAINED IN S.C. CODE ANN. §15-78-70(d).

To the extent the Court of Appeals reversed Judge Dennis' grant of summary judgment finding the settlement with Mr. Pierce was not a settlement consummated "under this chapter" of the SCTCA; such ruling was clearly erroneous. It ignores the fact that the SCTCA "is the exclusive civil remedy available for any tort committed by a governmental entity, its employees,

⁴⁵ S.C. Code Ann. § 15-78-70(a).

⁴⁶ S.C. Code Ann. § 15-78-70(b).

⁴⁷ Goolsby and Goforth, 25.

or its agents"⁴⁸. Consequently, it is fundamental that the "[p]rovisions [of the SCTCA] relating to limitations and exemptions are to be liberally construed to limit the state's liability."⁴⁹

The majority of the Court of Appeals simply ignored controlling case law and statutes in an effort to expand Mr. Wade's potential recovery. In this case, Mr. Wade originally sued Mr. Pierce, individually, in August 1995. (App.pp.23-27; App.pp.123, 159). Mr. Wade did not assert Mr. Pierce committed either fraud, actual malice, or a crime, or intended to hurt Mr. Wade. (App.pp.23-27; 123, 159). Moreover, Mr. Wade did not add Berkeley County as a party-defendant until April 1996, after he had settled his claims against Pierce's personal automobile insurance company. (App.p.15, para. 6; App.pp.65-70; App.pp.123, 159).

Assuming Mr. Wade, in August 1995, did not know Mr. Pierce was an employee of a governmental entity, Mr. Wade correctly sued Mr. Pierce personally.⁵⁰ Nevertheless, once Mr. Wade determined Mr. Pierce worked for Berkeley County and, in turn, Berkeley County might theoretically be liable, as Pierce's employer, for Wade's injuries, then Mr. Wade was required to dismiss Mr. Pierce from the case.⁵¹ It is axiomatic that Mr. Wade cannot sue Mr. Pierce individually and also sue Berkeley County as Mr. Pierce's his employer. Under the facts of this case and the mandate of the SCTCA, they are not and cannot be joint tortfeasors. Although the majority acknowledges this fact, it ignores it in an effort to allow a potential double recovery.

⁴⁸ S.C. Code Ann. § 15-78-20(b) (West Group Supp. 2000). See Knoke, 324 S.C. 136, 144, 478 S.E.2d 256, 260.

⁴⁹ Wade, 330 S.C. 311, 319, 498 S.E.2d 684, 688. See also Summer v. Carpenter, 328 S.C. 36, 44, 492 S.E.2d 55, 59 (1997).

⁵⁰ See S.C. Code Ann. § 15-78-70(c).

⁵¹ S.C. Code Ann. § 15-78-70(c) ("In the event the employee is individually named, the agency or political subdivision for which the employee was acting must be substituted as the party[-]defendant.").

Mr. Wade discovered Berkeley County employed Mr. Pierce and, under the facts, Berkeley County theoretically had potential liability when Mr. Wade took Mr. Pierce's deposition on February 1, 1996. (App.p.47, lines 1-11; App.p.48, line 3 - App.p.58, line 25; App.p.59, line 2 - App.p.64, line 25). Even though Mr. Wade was aware Mr. Pierce was claiming he was "at work" at the time of the accident, Mr. Wade did not immediately dismiss Mr. Pierce as a party-defendant and substitute Berkeley County but, instead, waited until he had settled with GEICO, on Mr. Pierce's personal behalf, for \$13,000.00. (App.p.14-15, paras. 5, 7; App.pp.65-70; App.pp.123, 159). The plurality opinion majority inquired how can an action against Mr. Pierce in his individual capacity constitute an action under the SCTCA? (App.p.130; App.p.167).⁵²

The answer is evident and found in the terms of the SCTCA. Lawsuits brought under the SCTCA are not the same as these generally brought by litigants. Such claims proceed under their own set of rules. As a matter of law, recovery cannot be allowed, by settlement or otherwise, against Mr. Pierce in his individual capacity under the facts alleged in this case and against Berkeley County based on the allegation he was acting in his official capacity. Plaintiffs, such as Mr. Wade, cannot have it both ways under the clear terms and conditions of the SCTCA. Again, the majority of the Court of Appeals simply ignored the provisions of the SCTCA which stand in the way of Mr. Wade's potential double recovery.

As Judge Goolsby aptly noted in his dissent, the ruling of the Court of Appeals opens the door for every injured party to sue a governmental employee individually before proceeding against the governmental entity just in case the employee was acting outside the scope of his employment. This is completely contrary to the SCTCA. It further allows a plaintiff to proceed

⁵² Wade III, 339 S.C. 513, 520, 529 S.E.2d 743, 750. (App.130-131; App.p.167).

on inconsistent theories and allows multiple recoveries for one harm without requiring any election of remedies.⁵³ There is no support for such a haphazard and whimsical interpretation of the SCTCA.⁵⁴

South Carolina law provides that the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.⁵⁵ Consequently, when "construing a statute, its words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation."⁵⁶ Under our law when "a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning."⁵⁷ In addition, "[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the light of the intended purpose of the statute."⁵⁸ Finally, it is well-settled law a:

⁵³ Cf. Taylor v. Mount Vernon-Woodberry Mills, Inc., 211 S.C. 414, 45 S.E.2d 809 (1947).

⁵⁴ Rather than "wreak havoc" and "countenance the use of a judicial straightjacket" as the majority of the Court of Appeals predicts, Wade could have preserved his right to proceed against Pierce in the event he was acting outside the scope of his employment by way of a tolling agreement relating to the applicable statute of limitations.

⁵⁵ Elmore v. Ramos, 327 S.C. 507, 489 S.E.2d 663 (Ct.App. 1997).

⁵⁶ State v. Smith, 330 S.C. 237, 498 S.E.2d 648, 650 (Ct.App. 1998) (citing Adkins v. Comcar Industries, Inc., 323 S.C. 409, 475 S.E.2d 762 (1996)).

⁵⁷ Smith, 330 S.C. 237, 498 S.E.2d 648, 650 (citing City of Camden v. Brassell, 326 S.C. 556, 486 S.E.2d 492 (Ct.App. 1997)).

⁵⁸ City of Sumter Police Department v. One 1992 Blue Mazda Truck, 330 S.C. 371, 498 S.E.2d 894, 897 (Ct.App. 1998) (citing Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 440 S.E.2d 364 (1994)).

statute as a whole must receive a practical, reasonable, and fair interpretation [which] is consonant with the purpose, design, and policy of the legislature. . . . In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. . . . The court should review . . . statutory language as a whole in light of its manifest purpose.⁵⁹

It is axiomatic the SCTCA seeks to limit a governmental entity's tort liability as much as possible. (App.p14, paras. 1-2). Consequently, the SCTCA specifically provides as follows:

A settlement or judgment in an action or a settlement of a claim under this chapter constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence.⁶⁰

This provision has been viewed as the "kind of limitation [designed to] prevent[] a claimant from recovering twice."⁶¹

While the SCTCA specifically defines several terms,⁶² , it did not define the term "settlement".⁶³ Consequently, the term "must be given [its] plain and ordinary meaning without resort to subtle or forced construction [which] limit[s] or expand[s] the operation of [S.C. Code Ann. § 15-78-70(d) and the] language must be read in [harmony] with its subject matter and accords with its general purpose."⁶⁴ The term "settlement" has been defined as "an agreement

⁵⁹ City of Sumter Police Department, 330 S.C. 371, 376-377, 498 S.E.2d 894, 897 (citing Browning v. Hartvigsen, 307 S.C. 122, 414 S.E.2d 115 (1992); Hitachi Data Systems Corp. v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992); Simmons v. City of Columbia, 280 S.C. 163, 311 S.E.2d 732 (1984)).

⁶⁰ S.C. Code Ann. § 15-78-70(d) (West Group Supp. 2000) (Emphasis added).

⁶¹ Goolsby and Goforth, 23 (citing James Martin, *Common Law Sovereign Immunity and the Maine Tort Claims Act: A Rose by Another Name*, 35 Me.L.Rev. 265, 283 (1983)) (Emphasis added).

⁶² Goolsby and Goforth, pp.14-15.

⁶³ See generally S.C. Code Ann. § 15-78-30 (West Group Supp. 2000).

⁶⁴ Greenville Hospital System v. Provident Life and Accident Insurance Co., 330 S.C. 436, 441-442, 499 S.E.2d 232, 235 (Ct.App. 1998) (citing Koenig v. South Carolina

to terminate or forestall all or part of a lawsuit."⁶⁵ The Supreme Court of Hawai'i defined the term as:

... an agreement to terminate, by means of mutual concessions, a claim [(footnote omitted)] which is disputed in good faith or unliquidated. It is an amicable method of settling or resolving bona fide differences or uncertainties and is designed to prevent or put an end to litigation.⁶⁶

Similarly, the Superior Court of New Jersey, Law Division, determined "[s]ettlement' mean[t] to fix or resolve conclusively; to make or arrange for final disposition."⁶⁷

As far as Mr. Pierce's liability to Mr. Wade was concerned, the Covenant Not to Execute had the precise effect of "fix[ing] or resolv[ing] conclusively [and] arrang[ing] [the] final disposition" of Mr. Wade's claims vis-a-vis Mr. Pierce.⁶⁸ Moreover, by its very terms, the

Department of Public Safety, 325 S.C. 400, 403-404, 480 S.E.2d 98, 99 (Ct.App. 1996)).

⁶⁵ Gorman v. Holte, 164 Cal.App.3d 984, 988, 211 Cal.Rptr. 34, 37 (CA 2d Dist. 1985) (citing 2 California Civil Procedure Before Trial 458, § 33.1, Continuing Education of The Bar 1978).

⁶⁶ Sylvester v. Animal Emergency Clinic of Oahu, 72 Hawai'i 560, 565-566, 825 P.2d 1053, 1056 (1992) (citing 15A Am.Jur.2d, Compromise and Settlement, § 1 (Law. Co-op. 1976)).

⁶⁷ Wager v. Burlington Elevators, Inc., 116 N.J.Super. 390, 397, 282 A.2d 437, 441 (Super. Ct. 1971) (citing Webster's Seventh New Collegiate Dictionary; 39 Words and Phrases 65 et seq. (West 1970)). See also generally Reynosa v. Christofferson, ___ S.W.2d ___ (Tex.Civ.App. San Antonio 1997) (1997 W.L. 367244) (citing Tex. Civ. Prac. and Rem. Code Ann. § 101.106 (West Group 2000) ("A judgment in an action or a settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim."). In a somewhat reversed situation as that in this case, the Texas Civil Court of Appeals, San Antonio, in Urban v. Canada, 963 S.W.2d 805 (Tex.Civ.App. 1998), concluded that Tex. Civ. Prac. and Rem. Code Ann. § 101.106 precluded a plaintiff from pursuing her libel claim against a governmental employee after she dismissed her identical claim against the governmental unit with prejudice. Urban, 963 S.W.2d 805, 807-808.

⁶⁸ Wager, 116 N.J.Super. 390, 397, 282 A.2d 437, 441.

Covenant Not to Execute was "an agreement to terminate . . . all . . . of a lawsuit."⁶⁹ Pursuant to the Covenant, Wade and his wife promised:

not to execute against . . . [Mr. Pierce] or [GEICO] . . . on any judgment [which] may be obtained by [them] on account of any and all claims, demands, damages, costs[,] or expenses, including, but not limited to, any medical or hospital expenses, loss of services, actions[,] and causes of action, arising from any act, omission[,] or occurrence or resulting or to result from the automobile accident which occurred on June 1, 1995, in Berkeley County, South Carolina, when [Wade] was involved in a motor vehicle collision with a vehicle driven by [Pierce].

(App.p.66, para. 3). In addition, the Wades also promised ". . . if they [obtained] a judgment against [either Mr.] Pierce or [GEICO], they w[ould] not execute on said judgment"

(App.p.66, para. 4). Even though Mr. Pierce may have been required to testify in this action, he no longer had any personal liability to Mr. Wade by virtue of GEICO's \$13,000.00 payment - this would have been true even if there was subsequent evidence that Mr. Pierce had acted in a malicious or intentional manner. Clearly, the settlement agreement between Mr. Wade and Mr. Pierce, via GEICO, as exemplified by the Covenant Not to Execute, must be viewed as "a settlement of a claim" under the SCTCA.⁷⁰

If such was not the case, the creative claimants' counsel, such as has been sanctioned herein by the Court of Appeals, could easily circumvent S.C. Code Ann. § 15-78-70(d) by first suing the "unknown" governmental employee in his or her individual capacity, settle with the individual's personal insurance carrier, and then "discover" the individual's "government employee status" and, in turn, sue the governmental entity for the same occurrence. It is clear

⁶⁹ Gorman, 164 Cal.App.3d 984, 988, 211 Cal.Rptr. 34, 37.

⁷⁰ S.C. Code Ann. § 15-78-70(d).

the South Carolina Legislature intended to prevent this type of situation when it adopted S.C. Code Ann. § 15-78-70(d).

The Court of Appeals' decision to permit Mr. Wade's claim, even though he clearly had settled with Mr. Pierce individually, has completely eviscerated the effect of S.C. Code Ann. § 15-78-70(d). Under the SCTCA, Mr. Pierce either is or is not acting in the course and scope of his employment. The Court of Appeals allowed Mr. Wade to have it both ways. This constitutes reversible error and demonstrates a clear misapplication of the SCTCA to the facts of this case.

3. THE COURT OF APPEALS FAILED TO CONSIDER THAT ITS RULING
CONFLICTS WITH SOUTH CAROLINA'S WELL-SETTLED COMMON LAW OF
RESPONDENT SUPERIOR

Interestingly, at the *en banc* oral argument, a judge of the Court of Appeals stated several members of the Court of Appeals were "profoundly concerned" with the impact the original panel's ruling, in *Wade II*, would have on common law *respondeat superior* liability. Although the dissent addresses this issue (App.p.173),⁷¹ both the plurality opinion and the concurrence completely ignore the issue. (App.pp.158-170).⁷² Applying the rationale of the Court of Appeals' majority, a litigant can pursue a claim against the master after settling with the servant, even when the complaint alleges the servant was acting on behalf of the master.⁷³ There is no support for such a proposition in the law of this state.

⁷¹ Wade III, 339 S.C. 513, 523, 529 S.E.2d 743, 753-754. (App.p.173).

⁷² Wade III, 339 S.C. 513, 515-522, 529 S.E.2d 743, 745-752. (App.pp.158-170).

⁷³ Cf. Collins v. Johnson, 245 S.C. 215, 139 S.E.2d 915 (1965).

The dissenters note the following:

... notwithstanding the majority's disclaimer toward the end of its opinion, and considering its discussion concerning joint tortfeasors and the result it reaches (allowing a claim against the master after the servant has settled a claim based on the same occurrence), the majority still treats [Mr.] Pierce and Berkeley County as joint tortfeasors. Clearly, at least at common law, they are not so.⁷⁴

The dissent further noted that "[a] principal whose liability rests solely upon the doctrine of respondeat superior and not upon any independent act of the principal is not a joint tortfeasor with the agent from whose conduct the principal's liability is derived."⁷⁵ Moreover, the dissent noted that the authorities had concluded "[a] covenant not to sue [an] employee would also release the employer who was liable solely because of the doctrine of respondeat superior."⁷⁶

In this case, Mr. Wade clearly entered into a Covenant Not To Execute with Mr. Pierce (App.pp.65-70) which purportedly eliminated any liability to Mr. Pierce and GEICO over and above GEICO's \$13,000.00 payment to Mr. Wade. (App.pp.65-70).⁷⁷ As analogously noted by

⁷⁴ Wade III, 339 S.C. 513, 523, 529 S.E.2d 743, 753-754 (citing Seaboard Air Line Railway Co. v. Coastal Distributing Co., 273 F.Supp. 340, 342 (D.S.C. 1967) ("Contrary to the argument of the railroad, [the master and servant], though suable jointly (Cravens v. Lawrence, 181 S.C. 165, 169, 186 S.E. 269 (1936); Parker v. Bissonette, 203 S.C. 155, 163, 26 S.E.2d 497 (1943); Davenport v. Southern Railway Co., 135 F. 960, 962-963 (4th Cir. 1905) are not strictly joint-tortfeasors.") (Emphasis in original).

⁷⁵ Wade III, 339 S.C. 513, 523, 529 S.E.2d 743, 753-754 (quoting Alvarez v. New Haven Register, Inc., 249 Conn. 709, 720, 735 A.2d 306 (1999)).

⁷⁶ Wade III, 339 S.C. 513, 523, 529 S.E.2d 743, 753-754 (quoting William Hubbard and Robert Felix, The South Carolina Law Of Torts, p.630 (2d Ed. S.C. Bar CLE Division 1997)).

⁷⁷ The Court of Appeals, on the one hand, stated that the \$13,000.00 "payment to [Mr.] Wade by [Mr.] Pierce and GEICO was effectuated so as to eliminate personal liability of [Mr.] Pierce in his status as an individual." Wade II, 339 S.C. 495, 501, 529 S.E.2d 734, 740; Wade III, 339 S.C. 513, 520, 529 S.E.2d 743, 750. (Emphasis added). (App.pp.130, 167). Nevertheless, on the other hand, the Court of Appeals stated that Mr. Wade, by giving a Covenant Not To Execute to Mr. Pierce, was "still entitled to seek a judgment against [Mr.] Pierce and [GEICO and Mr. Wade] merely agreed not to legally enforce the judgment. In fact, the covenant not to execute expressly reserve[d] [Mr.] Wade's right to obtain a judgment

Professors Hubbard and Felix, since the employee (i.e.; Mr. Pierce) was given a covenant not to execute, that settlement also releases the employer (i.e.; Berkeley County) through *respondeat superior*.⁷⁸

In *Wade I*, the Court of Appeals recognized that "[u]nder the doctrine of *respondeat superior* in tort law . . . the master is responsible for the acts of his servant even when the servant acts against the express instructions of the master, provided he is acting within the scope of his employment."⁷⁹ Moreover, the Court of Appeals stated "[t]he 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."⁸⁰ Under well-settled South Carolina law, "[w]hen a master-servant relationship exists, the tort of the servant is imputed to the master by law, without any requirement of fault on the part of the master [and] the master

against [Mr.] Pierce." *Wade II*, 339 S.C. 495, 500, 529 S.E.2d 734, 739; *Wade III*, 339 S.C. 513, 519, 529 S.E.2d 743, 749. (Emphasis added). (App.pp.128, 165). Mr. Pierce's "personal liability" is not eliminated if a judgment may be obtained against him and recorded on the judgment rolls. Certainly a recorded judgment would damage Mr. Pierce in that it would effectively limit his ability to sell real or certain personal property or to obtain credit. In that sense, Mr. Pierce still has some "personal liability" and exposure.

⁷⁸ *South Carolina Law Of Torts*, p.630. It would not matter whether the covenant was a "covenant not to sue" or a "covenant not to execute" since the effect of either document is the same to the tortfeasor. As noted in *Wade III*, "[a] Covenant Not to Sue and a Covenant Not to Execute are so closely akin that a major distinguishing factor is that the latter is normally executed when a settlement occurs after the filing of a lawsuit, while the former is entered into before a lawsuit is filed." *Wade III*, 339 S.C. 513, 523, 529 S.E.2d 743, 753-754 (quoting *Poston by Poston v. Barnes*, 294 S.C. 261, 263-264, 363 S.E.2d 888, 889-890 (1987)).

⁷⁹ *Wade I*, 330 S.C. 311, 318, 498 S.E.2d 684, 688 (citing *South Carolina Insurance Co. v. James C. Greene & Co.*, 290 S.C. 171, 183, 348 S.E.2d 617, 624 (Ct.App. 1986)).

⁸⁰ *Wade I*, 330 S.C. 311, 318, 498 S.E.2d 684, 688 (citing *South Carolina Insurance Co.*, 290 S.C. 171, 179, 348 S.E.2d 617, 621).

is liable for the torts of his servant even when the servant acts against the express instructions of his master, so long as the servant acts to further the master's business."⁸¹

The Court of Appeals already determined, in *Wade I*, that "a genuine issue of material fact exist[ed] regarding whether [Mr.] Pierce was acting within the scope of his employment [with Berkeley County] when the accident occurred [with Mr. Wade]."⁸² Moreover, Mr. Wade alleged herein that Mr. Pierce was within the course and scope of his employment with Berkeley County at the time of the accident. (App.p.3; App.p.11, para. 2; App.pp.28-33; App.pp.123, 159).⁸³ In fact, the only way Mr. Wade gets to recover from Berkeley County is if Mr. Pierce was "acting within the course and scope" of his employment with Berkeley County at the time of the accident.⁸⁴

Consequently, contrary to the denials (App.p.168)⁸⁵ the decision of the Court of Appeals effectively treats Mr. Pierce and Berkeley County as joint tortfeasors – something they cannot be under South Carolina law. Under the SCTCA, the respective liabilities of Mr. Pierce and Berkeley County to Mr. Wade are mutually exclusive. Moreover, the Court of Appeals' decision permits one to sue and settle with the servant (i.e.; the employee) and, thereafter, maintain suit against the master (i.e.; the employer) for the same claims and causes of action all arising from

⁸¹ *Wade I*, 330 S.C. 311, 318, 498 S.E.2d 684, 688 (citing *South Carolina Insurance Co.*, 290 S.C. 171, 180, 183, 348 S.E.2d 617, 624).

⁸² *Wade I*, 330 S.C. 311, 320-321, 498 S.E.2d 684, 689. See also *Wade II*, 339 S.C. 495, 496 n.2, 529 S.E.2d 734, 735 n.2; *Wade III*, 339 S.C. 513, 515 n.2, 529 S.E.2d 743, 745 n.2. (App.pp.123, 159).

⁸³ When considering summary judgment all of Mr. Wade's allegations must be considered to be true. *Wade I*, 330 S.C. 311, 316-317, 498 S.E.2d 684, 687 (citing *Pryor v. Northwest Apartments, Limited*, 321 S.C. 524, 469 S.E.2d 630 (Ct.App. 1996)).

⁸⁴ See *S.C. Code Ann.* § 15-78-70.

⁸⁵ *Wade III*, 339 S.C. 513, 520, 529 S.E.2d 743, 750. (App.p.168).

the same circumstances. As the dissent properly notes, there is no such authority for such a novel theory under South Carolina law.

4. THE COURT OF APPEALS FAILED TO APPLY AND/OR INTERPRET THE TERMS OF THE SOUTH CAROLINA TORT CLAIMS ACT IN FAVOR OF LIMITING THE LIABILITY OF THE STATE AND ITS POLITICAL SUBDIVISIONS WHEN IT CONSIDERED MR. WADE'S CLAIMS AGAINST BERKELEY COUNTY.

It cannot be reasonably argued that one of the principal purposes, if not the principle purpose, of the SCTCA is to limit a governmental entity's tort liability as much as possible.

(App.p.15, paras. 1-2). Consequently, the SCTCA specifically provides:

A settlement or judgment in an action or a settlement of a claim under this chapter constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence.⁸⁶

This provision has been viewed as the "kind of limitation [designed to] prevent[] a claimant from recovering twice."⁸⁷

The Court of Appeals ignored the controlling law which mandates that the SCTCA must be liberally construed in favor of limiting the state's potential liability. Rather, the Court of Appeals relied on a forced interpretation of the SCTCA which it in turn construed liberally in favor of expanding the state's potential liability. This forced interpretation is further evidenced by the plurality and concurring opinions repeated attempts to limit their ruling to the unique facts of this case. This is contrary to the very terms of the SCTCA which the Court of Appeals was mandated to apply.⁸⁸ The interpretation offered by the dissent is the correct one in that it

⁸⁶ S.C. Code Ann. § 15-78-70(d) (Emphasis added).

⁸⁷ Goolsby and Goforth, 23 (citing Martin, 35 Maine Law Review. 265, 283) (Emphasis added).

⁸⁸ Greenville Hospital System v. Provident Life and Accident Insurance Co., 330

is based on the language of the statute and the mandate that the SCTCA be interpreted to the benefit of the state. The majority's interpretation does neither.

The language in S.C. Code Ann. § 15-78-70(d) is plain and unambiguous. When there has been a settlement of a claim under the SCTCA, then neither the employee nor the governmental entity has any further liability to the claimant. Mr. Wade chose to sue Mr. Pierce individually first and, in turn, to settle with Mr. Pierce and GEICO. He then sued Berkeley County seeking, in essence, "a second bite at the apple". The SCTCA, pursuant to S.C. Code Ann. § 15-78-70(d), is clearly designed to prevent such a situation.⁸⁹ Mr. Wade could have avoided his present dilemma by initially substituting Berkeley County for Mr. Pierce,⁹⁰ or by suing Berkeley County and Mr. Pierce, individually, through asserting the required allegations against Mr. Pierce in his individual capacity.⁹¹

Unfortunately for Mr. Wade, he did neither and his attempt to avoid the consequences of his decision is without merit. Judge Dennis properly concluded Berkeley County was entitled to summary judgment as a matter of law since Mr. Wade had settled with Mr. Pierce and his claims against Berkeley County were therefore barred. The Court of Appeals's decision to the contrary should and must be reversed in all respects.

S.C. 436, 441-442, 499 S.E.2d 232, 235 (Ct.App. 1998) (citing Koenig v. South Carolina Department of Public Safety, 325 S.C. 400, 403-404, 480 S.E.2d 98, 99 (Ct.App. 1996)).

⁸⁹ Goolsby and Goforth, 23 (citing Martin, 35 Maine Law Review. 265, 283).

⁹⁰ S.C. Code Ann. § 15-78-70(c).

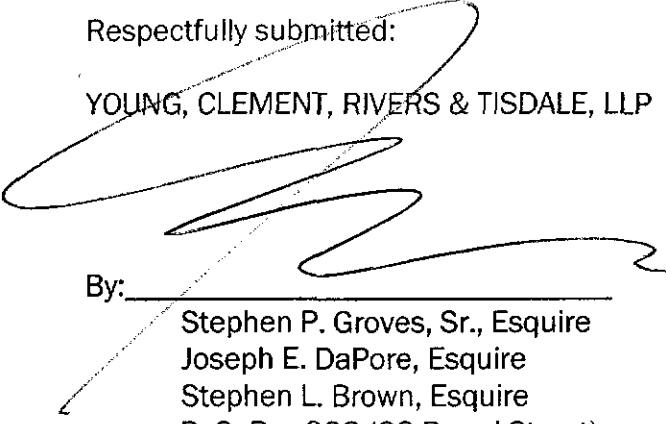
⁹¹ S.C. Code Ann. § 15-70-70(b).

V. CONCLUSION

Based upon the foregoing arguments and citation of authority, the Petitioner, Berkeley County, South Carolina, respectfully requests this Supreme Court to reverse the en banc majority decision of the Court of Appeals and enter judgment for Berkeley County.

Respectfully submitted:

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January 8, 2001

*THE STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT*

RECEIVED

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S.C. SUPREME COURT

Opinion Nos. 3053, 3145
Filed October 4, 1999 and April 3, 2000

APPEAL FROM THE COURT OF COMMON PLEAS
FOR BERKELEY COUNTY

HONORABLE R. MARKLEY DENNIS, Jr., CIRCUIT COURT JUDGE
Civil Action No. 95-CP-10-1281

Gerald D. Wade, Jr.,

Respondent,

v.

Berkeley County, South Carolina
and John Doe, of whom Berkeley County, South Carolina is,

Petitioner,

And John Doe, is

Respondent.

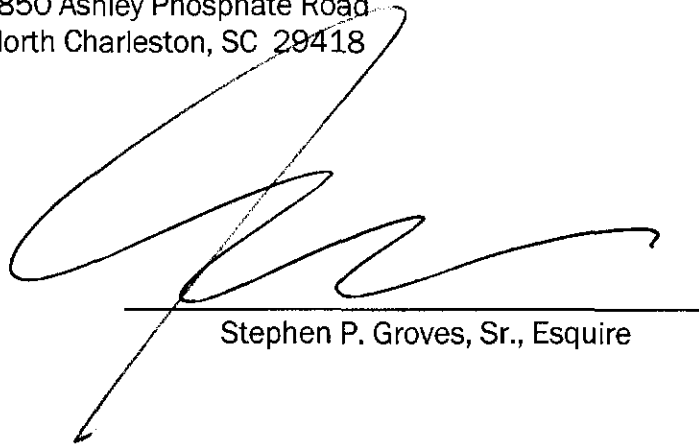
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A handwritten signature in black ink, appearing to read 'Stephen P. Groves, Sr.', is written over a horizontal line. A long, thin diagonal line extends from the bottom of the signature towards the bottom left of the page.

Charleston, South Carolina

January 8, 2001

Original

2/6/2001

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Opinion No. 3053
Filed October 4, 1999, and April 3, 2000

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Honorable R. Markley Dennis, Jr., Circuit Court Judge
Case No. 95-CP-08-1281

Gerald D. Wade, Jr.,

Respondent,

v.

Berkeley County, South Carolina and
John Doe, of whom Berkeley County,
South Carolina, is

Petitioner,

And John Doe is

Respondent.

RESPONDENT WADE'S RETURN TO
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I. COUNTER STATEMENT OF ISSUES PRESENTED

- A. Does a Covenant Not to Execute given to a person in his individual capacity constitute a settlement of a prior claim "Under This Chapter" as contemplated by the Tort Claims Act? (Issues/Questions Presented 1&2)
- B. Did the Court of Appeals properly apply and interpret the law of *Respondent Superior* and the terms of S.C. Tort Claims Act in favor of limiting the liability of the state? (Issues/Questions Presented 3&4)

II. STATEMENT OF THE CASE

Respondent Wade adopts Petitioner's statement of the case.

III. STATEMENT OF THE FACTS

This action arises out of an automobile accident of June 1, 1995, between Gerald Wade ("Wade") and Bobby Joe Pierce ("Pierce"). Initially, Wade brought an action dated August 25, 1995, against Pierce (individually) and against a John Doe (whose actions may have contributed to the accident), for his injuries. At deposition, Pierce asserted that he was acting within the scope and course of his employment as an employee, agent, and animal control officer for Berkeley County ("County") with the County at the time of the wreck. The County denied that Pierce was on the job at the time of the wreck.

Faced with this factual dispute, Wade joined the County as a Defendant. At the same time, and in exchange for the payment of \$13,000.00 from GEICO under Pierce's personal policy of insurance with that company, Mr. and Mrs. Wade agreed not to execute upon any judgment arising out of the incident against Pierce (R. p. 66, Covenant paragraph 4). Wade dismissed Pierce from the suit without prejudice.

The covenant was never intended to be a final settlement with Pierce. Indeed, paragraph 10 of the Covenant (R. p. 68) specifically states, "that this instrument is not

intended as a release or discharge, nor as an accord and satisfaction with any person whomsoever, but only as a Covenant Not To Execute against Bobby Joe Pierce and Governmental Employees Insurance Company." By proceeding in this way, Wade preserved his right to proceed against Pierce to recover underinsured motorist benefits while at the same time providing Pierce with a modicum of protection personally if it were later determined that Pierce was not on the job at the time of the wreck (in which case Pierce would otherwise have personal exposure for an excess judgment).

The trial Court initially granted summary judgment to the County on the ground that Wade was collaterally estopped (by reason of the Workers' Compensation claim) from contending that Pierce was in the course of his employment when the accident occurred.

The Court of Appeals reversed that finding in Wade v. Berkeley County, ___ S.C. ___, 498 S.E.2d 684, 689 (Ct. App. 1998), (Wade I) on the ground, *inter alia*, that, "a genuine issue of material fact exists regarding whether Pierce was acting within the scope of his employment when the accident occurred[.]"

After remand, the County moved again for summary judgment on July 13, 1998, this time arguing that the covenant given to Pierce should bar any subsequent action against the County. The trial Court again granted the County's motion. Wade appealed that Order on July 30, 1998.

A three-judge panel of the Court of Appeals reversed on October 4, 1999 (R. p. 122), pointing out that the Covenant Not to Execute against Pierce did not constitute a "settlement of a claim under this [S.C. Tort Claims Act] chapter." This ruling was later affirmed by the full Court sitting en banc on April 03, 2000 (R. p. 158).

IV. ARGUMENT

A. THE COVENANT NOT TO EXECUTE GIVEN TO PIERCE IN HIS INDIVIDUAL CAPACITY WAS NOT A SETTLEMENT OF A PRIOR CLAIM "UNDER THIS CHAPTER" AS CONTEMPLATED BY THE TORT CLAIMS ACT. (Questions Presented Nos. 1 & 2)

1. *The limitation contained in S.C.C.A. §15-78-70(d) applies only in the event of prior tort claim proceedings. Since there was no prior tort claim proceeding, there could be no prior settlement "under this chapter" so as to bar a tort claim action.*

The County has consistently failed to address a threshold issue in its brief. Before the County can insist that the South Carolina Tort Claims Act ("SCTCA") is Wade's exclusive remedy, before the County can discuss how the SCTCA was designed to eliminate employees as party defendants, before the County can argue a Covenant Not to Execute is a settlement, the County must establish that there was a *prior proceeding* under the SCTCA which resulted in a settlement or judgment in an action, or a settlement, of a claim. S.C. Code Ann. § 15-78-70(d) applies only when there has been a prior tort claim proceeding:

"A settlement or judgment in an action or a settlement of a claim *under this chapter* constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence." (Emphasis added) S.C. Code Ann. § 15-78-70(d)(Lawyers' Cooperative 1997 Supp.)

The County has completely ignored this most fundamental of issues. The County has failed to address the fact that before the bar in the statute may be invoked, there must

be a prior claim "under this chapter." The County either fails to recognize or intentionally ignores the fact that since there was no prior tort claim proceeding, there can be no prior settlement of a claim "under this chapter."

S.C. Code Ann. § 15-78-70(d) was not designed to accomplish what the County would like. The effect of S.C. Code Ann. § 15-78-70(d) is limited to cases where there had been the settlement of prior actions actually brought under the SCTCA, and, of course, this makes sense. The Legislature sought to limit the government's liability from multiple suits against different government agencies arising out of the same occurrence.¹

The County is trying to stretch the statute beyond what it was reasonably designed to do. By doing so, it is arguing that the settlement, judgment or resolution of *any* claim will bar a later claim against the government arising out of the same occurrence. The statute was not intended to do that. The statute was only intended to mean that a settlement, judgment or resolution of a claim *brought under this chapter* will bar any other claim against the government by reason of the same occurrence. In other words, once a claim against the government (a claim under this chapter) has been resolved, no other claim against the government may be brought arising out of the same occurrence.

The action against Pierce as an individual had nothing whatever to do with the SCTCA; the government was not sued, the Attorney General was not served and none of the predicate allegations required of a tort claim action was asserted.

¹ e.g. Plaintiff is injured in a wreck with a police car on a defective highway. S.C. Code Ann. § 15-78-70(d) would prevent Plaintiff from settling with the police and then suing the Highway Department for the same occurrence.

The Covenant with Pierce, likewise, had nothing whatever to do with the SCTCA; it had to do only with a possible claim as to Pierce's common law personal liability as it related to his liability insurance policy. (See Covenant paragraphs 1, 6, 7, 10. R. pp. 65-68.) It follows as a matter of course that the Covenant was not the settlement "of a claim under this chapter," S.C. Code Ann. § 15-78-70(d), and, thus, cannot bar the present action against the County.

2. *The Covenant Not to Execute does not constitute a "settlement" between Wade and Pierce.*

The County's assertion in the opening sentence of its Argument (pg 7 of the County's brief) that, "Undisputedly, Mr. Wade *settled* his personal injury claims with Mr. Pierce. . ." (emphasis added) demonstrates its misapprehension of the facts of this case, as well as the law governing the facts. The Covenant Not to Execute is not a settlement of Wade's personal injury claims against Pierce because the case against Pierce has not been released and the claim against him remains viable. Indeed (but for the statute of limitations), Wade could name Pierce as a Defendant today.

In South Carolina, a Covenant Not to Execute does not act as a release; it is treated differently than a settlement agreement, which is a release:

"...a Covenant Not To Execute is not a satisfaction or a release and that its legal effect is similar to that of a Covenant Not To Sue because it does not operate to release other joint tortfeasors. [citation omitted] A Covenant Not To Execute is a promise not to enforce a right of action or execute a judgment when one had such a right at the time of entering into the agreement." Poston by Poston v. Barnes, 363 S.E.2d 888, 294 S.C. 261, 44 Ed. Law Rep. 796 (S.C. 1987) see also Cobb v. Benjamin, ____ S.C. ____, 482 S.E.2d 589, 591 (Ct. App. 1997).

Indeed, a Covenant Not to Execute given in favor of a named Defendant does not act as a bar to a later suit against that same named Defendant, let alone, his principal. In Ackerman v. The Travelers, 456 S.E.2d 408 (Ct. App. 1995), Ackerman gave a Covenant Not to Execute to a Defendant and then sought to sue the same Defendant in order to recover underinsured motorist benefits. Travelers, on behalf of the Defendant, sought to dismiss the action by reason of the Covenant. The Court refused to dismiss the action, reasoning:

"The Ackermans are still entitled to recover damages from Scott; they merely agreed not to legally enforce the judgment. In fact, the Covenant expressly reserves Ackerman's right to obtain a judgment against Scott . . ."
Ackerman, p. 147.

The covenant given in this case contains the very same language as *Ackerman*, reserving to Wade the right to obtain a judgment against Pierce. This being the case, there cannot possibly be a settlement of Wade's personal injury claim against Pierce as the County claims.

Finally, in this regard, although certainly inadvertent, the County's reference to the South Carolina Law of Torts Hubbard and Felix, (2nd Ed. S.C. Bar CLE Division 1997)² is misleading. Professors Hubbard and Felix **never** wrote that a Covenant Not to Execute given in favor of an employee would act as a release of the employer. They only wrote that a Covenant Not to Sue given in favor of an employee would act as a release of the employer.

² "As analogously noted by Professors Hubbard and Felix, since the employee (i.e.; Mr. Pierce) was given a covenant not to execute, that settlement also released the employer (i.e.; Berkeley County) through *respondeat superior*." Brief @ pg 22-23.

B. SINCE THE SOUTH CAROLINA TORT CLAIMS ACT PROVIDES FOR SUIT AGAINST THE INDIVIDUAL AND THE GOVERNMENT IN CASES WHERE AGENCY HAS NOT BEEN DETERMINED, IT NECESSARILY CONTEMPLATES SETTLEMENT OR DISMISSAL OF ONE WITHOUT PREJUDICE TO PROCEEDING AGAINST THE OTHER.

1. *Wade may sue both Pierce (in his individual capacity) and the County under the SCTCA when agency has not been determined.*

It is clear that the action against Pierce was not a prior claim "under this chapter." The County was not sued, the Attorney General was not served and none of the tort claim action predicates was met. How, then, does the County invoke the protection of this statute when the action against Pierce was so obviously not a prior claim "under this chapter"? The County begins by baldly (and incorrectly) asserting that "Appellant cannot sue Pierce individually and Berkeley County as his employer" (County's Brief Pg 15). The County then goes on to mistakenly reason that since Pierce could not be sued individually, any prior suit must be deemed to be a tort claim action.

The assertion and reasoning are both incorrect because, in certain limited cases such as the present one, viz. where agency is denied or otherwise not determined, the individual may be named as a defendant. § 15-78-70 (c) **specifically** allows an individual to be named where the political subdivision for which he may have been acting cannot be determined.

"... a person when bringing an action against a governmental entity under the provisions of this chapter, shall name as a party defendant only the agency or political subdivision for

which the employee was acting and is not required to name the employee individually, *unless the agency or political subdivision for which the employee was acting cannot be determined* at the time the action is instituted." § 15-78-70 (c) (Emphasis added)

In the present case, the County has denied allegations of agency. This is a situation where the political subdivision for which the employee was alleged to have been working "cannot be determined," as contemplated by § 15-78-70. This being the case, contrary to what the County asserts, Pierce can be sued individually, as least until the issue of agency can be determined.

This is, of course, consistent with a complete reading of the Act. Throughout its text, the Act makes a distinction between liability in one's individual capacity and liability in one's representative capacity. The exclusive remedy limitations contained in § 15-78-20(b)³ and the requirement to substitute the government as a party defendant contained in § 15-78-70(c)⁴ apply only to those circumstances where the act of the agent is acknowledged to be within the scope and course of his employment.

In fact, all of the statutes quoted by the County apply only to the acts of employees. The definition of an employee is limited to persons acting within the scope and course of the government business by 15-78-30 as follows:

"On or after January 1, 1989, 'employee' means any officer, employee, or agent of the State or its political subdivisions, including elected or appointed officials, law enforcement

³ SCTCA "is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents...";

⁴ "[I]n the event the employee is individually named, the agency or political subdivision for which the employee was acting must be substituted as the party-defendant."

officers, and *persons acting on behalf or in service of a governmental entity in the scope of official duty including*, but not limited to, technical experts whether with or without compensation..." (emphasis added)

Because their effect is limited by their express language to act in the "scope of official duty," these statutes do not extend to actions against a person in his or her individual capacity. The government must be substituted for the individual only when there is no dispute that the individual was acting in his representative capacity.⁵ The County concedes as much in its Brief at page 10: "Under the SCTCA an 'employee of a governmental entity [does not have immunity] from suit and liability if it is proved . . . the employee's conduct was not within the scope of his official duties. . . .'"

An analysis based on *respondeat superior* is misplaced and has no application to the present case: first (as was explained above), because there has been no settlement with the servant which would inure to the benefit of the master; and second, because the very facts which would establish liability on the part of Pierce individually would exculpate the County (and vice versa).

The law of *Respondeat Superior* is based on vicarious liability. A master will be held responsible for the acts of his servant performed in the servant's representative capacity. If Pierce has personal liability, it is only in his individual capacity, in which case the County would have no liability. Consequently, a covenant (even a settlement or release) would have no impact on the County. The County admits as much when it

⁵ "In the event that the employee is individually named, the agency or political subdivision for which the employee was acting must be substituted as the party defendant." § 15-78-70 (c) (emphasis added).

concedes at page 24 of its brief, "Under the SCTCA, the respective liabilities of Mr. Pierce and Berkeley County to Mr. Wade are mutually exclusive."

Since recovery against one would preclude recovery against the other, how can a Covenant Not to Execute given to one inure to the benefit of the other?

2. *The Real Issue: How to Sue and Dismiss an Individual Defendant When Agency Is in Dispute.*

Under these circumstances, i.e., Wade's right to sue Pierce personally, how should the issue of agency be determined? This is the real issue before the Court today.

The County proposes that Pierce be granted immunity from suit the moment Pierce claims he was on the job.

"Nevertheless, once Wade determined Pierce worked for Berkeley County and, in turn, Berkeley County might theoretically be liable as Pierce's employer for Wade's injuries, then Wade was required to dismiss Pierce from the case."
(County's Brief pp. 14-15.)

This proposal, together with the County's assertion that "[a]s a matter of law, Pierce cannot be sued in his individual capacity under the facts alleged in this case once he testified he was acting in the course and scope of his employment" (County's Brief p. 16) is at the same time amusing and disingenuous. A matter of whose law, what law? Where is the authority for this piece of reasoning?

Does this mean that Pierce's claim that he was on the job resolves the issue of agency? Does Pierce's claim that he was on the job constitute a determination of agency? Does this mean that Wade can accept Pierce's claim as the law of the case? Does this mean that the County is bound to accept agency as a "matter of law" once Pierce claims

it? Obviously not. Not only is this inconsistent with established law, but it flies in the face of the SCTCA which provides that issues of immunity turn on "**proof**" of agency,⁶ not allegations or claims of agency. The use of the word "proof" in the statute contemplates the resolution by litigation of a disputed fact, not by the unilateral assertion or claim by one party.

The absurdity of these assertions is evident. Pierce's claim that he was on the job is not a "determination" of agency, binding either Wade or the County. The County concedes as much because, after proposing to dismiss Pierce, it recognizes that Pierce could later be found to be off the job, creating problems with the statute of limitations. To this the County breezily proposes another solution: "Appellant could have preserved his right to proceed against Pierce in the event he was acting outside the scope of his employment by way of a tolling agreement relating to the applicable statute of limitations." (County's Brief n. 41 p. 13.)

And just how does the County propose to compel Pierce to agree to a tolling agreement? If, as the County proposes, Pierce has the right to be dismissed from the suit, why would Pierce want to waive his defense to the statute of limitations if it turns out later that he has personal liability? Why would he want to do such a thing when it only causes him harm? He has everything to lose and nothing to gain by such an agreement. Maybe the County has another novel interpretation of the statute which would require Pierce to agree to waive his defenses once he is dismissed?

⁶ "... if it is proved . . . the employee's conduct was not within the scope of his official duties. . . ." § 15-78-20 (b).

Would not the reasonable, indeed, appropriate, course of action be to sue the individual as well as the County until the political subdivision for which the employee was acting can be "determined" by the Court? Of course it is. There is nothing "haphazard and whimsical" (County's Brief p. 13) in such an application of the statute. It is simply an efficient use of judicial resources to allow the issues of agency and tort liability to be resolved in the same suit.

Ironically, this procedure is precisely what the County itself suggests at page 14 of its Brief where it writes, "Under the SCTCA an 'employee of a governmental entity [does not have immunity] from suit and liability if it is proved . . . the employee's conduct was not within the scope of his official duties. . . ' " How could it efficiently be "proved. . . the employee's conduct was not within the scope of his official duties. . ." without joining him as a defendant in the same suit with the government?

If this is the reasonable thing to do, then consider what should happen if the parties conclude (before the end of trial) that pursuit of the employee as an individual is no longer justified. Is there anything in the law which would prevent the dismissal of the individual defendant? No, of course not.

As the County itself admits in its Brief @ p. 24, "Under the SCTCA, the respective liabilities of Mr. Pierce and Berkeley County to Mr. Wade are mutually exclusive." Their liabilities are based on different facts, different findings and different laws. Since agency is not determined, Wade has the right of action against Pierce as an individual, as well as the County. If it is later determined that Pierce was not on the job at the time of the wreck, the recovery will be limited to Pierce. On the other hand, if it is later determined that

Pierce was on the job at the time of the wreck, then Pierce will be dismissed and the recovery limited to the County.

Each of these claims has its own calculation of the likelihood of success and its own peculiar value. Wade can agree not to pursue his right of action against Pierce as an individual. That does not mean he has agreed to release his right of action against the County for its liability if it is determined that Pierce was in the course and scope of his employment at the time of the wreck.

Does the County contend that once joined, the individual defendant could not be dismissed without a judicial determination? Is there anything in the law which provides that under those limited circumstances, the claim against the individual defendant cannot be compromised? No, of course not. In fact, this is consistent with the Court's ruling in *Poston supra*.

Does this, as the County protests, "allow a potential double recovery" (County's Brief p. 15) or a "second bite at the apple" (County's Brief p. 26)? Or, worse yet, does this allow "a plaintiff to proceed on inconsistent theories and allowed multiple recoveries for one harm without requiring any election of remedies." (County's Brief pp. 15-16)? Of course not; this sort of compromise of disputed claims happens all the time. The trial Court always has the right to reform the jury verdict to assure that there is no double recovery.

V. CONCLUSION

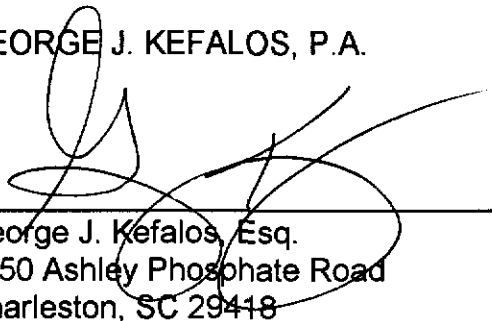
The SCTCA regulates actions against government employees only for conduct in their **representative** capacity. The SCTCA specifically authorizes suit against an individual when, for some reason, the agency for which he or she was employed cannot

be determined. A dismissal or resolution of that individual claim does not prevent further action against the government.

The action against Pierce individually was not brought as a tort claim action. The **covenant** given to Pierce for any acts taken in his **individual capacity** is not a **release** of the County for any acts taken in his **representative capacity**.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Opinion No. 3053
Filed October 4, 1999, and April 3, 2000

S.C. SUPREME COURT

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Honorable R. Markley Dennis, Jr., Circuit Court Judge
Case No. 95-CP-08-1281

Gerald D. Wade, Jr.,

Respondent,

v.

Berkeley County, South Carolina and
John Doe, of whom Berkeley County,
South Carolina, is

Petitioner,

And John Doe is

Respondent.

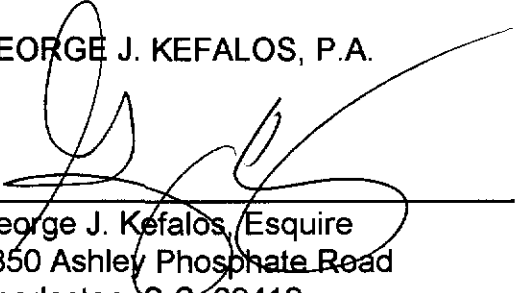
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*THE STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT*

Opinion Nos. 3053, 3145
Filed October 4, 1999 and April 3, 2000

APPEAL FROM THE COURT OF COMMON PLEAS
FOR BERKELEY COUNTY

HONORABLE R. MARKLEY DENNIS, Jr., CIRCUIT COURT JUDGE
Civil Action No. 95-CP-10-1281

Gerald D. Wade, Jr.,

Respondent,

v.

Berkeley County, South Carolina
and John Doe, of whom Berkeley County, South Carolina is,

Petitioner,

And John Doe, is

Respondent.

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S.C. SUPREME COURT

Pet.App.254

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ARGUMENT AND CITATION OF AUTHORITY

- A. **EVEN THOUGH S.C. CODE ANN. §15-78-70(D) (WEST GROUP SUPP. 2000), DOES NOT REQUIRE A "PRIOR TORT CLAIM PROCEEDING" TO EXIST IN ORDER TO INVOKE THE "SETTLEMENT" BAR THE COVENANT NOT TO EXECUTE AT ISSUE INVOLVED A PRIOR TORT PROCEEDING UNDER THE SCTCA**

Mr. Wade claims that there must be a prior tort proceeding under the SCTCA before the bar contained in the "settlement" provision cant take effect. (Respondent's Brief, p.3). Mr. Wade, as did the Court of Appeals, misinterprets both the letter and the spirit of SCTCA.

The SCTCA "is the [unquestionably] exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents" ¹ Consequently, it is fundamental that the "[p]rovisions [of the SCTCA] relating to limitations and exemptions [must] be liberally construed to limit the state's liability." ² In fact, the SCTCA specifically provides:

. . . a person, when bringing an action against a governmental entity under the provisions of [the SCTCA], shall name as a party defendant only the agency or political subdivision for which the employee was acting and is not required to name the employee individually, unless the agency or political subdivision for which the employee was acting cannot be determined at the time the action is instituted. In the event . . . the employee is individually named, the agency or political subdivision for which the employee was acting must be substituted as the party defendant. ³

¹ S.C. Code Ann. § 15-78-20(b) (West Group Supp. 2000). See Knoke v. South Carolina Department of Parks, Recreation and Tourism, 324 S.C. 136, 144, 478 S.E.2d 256, 260 (1996).

² Wade, 330 S.C. 311, 319, 498 S.E.2d 684, 688. See also Summer v. Carpenter, 328 S.C. 36, 44, 492 S.E.2d 55, 59 (1997); Strother v. Lexington County Recreation Commission, 324 S.C. 611, 619, 479 S.E.2d 822, 826 (Ct.App. 1996) (citing Rice v. School District of Fairfield, 317 S.C. 87, 452 S.E.2d 352 (Ct.App. 1994)) (" . . . [t]he 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. ").

³ S.C. Code Ann. § 15-78-70(c) (West Group Supp. 2000) (Emphasis added).

In this vein, this Supreme Court noted that "[g]overnmental employees who commit torts while acting in their official capacity are immune from personal liability unless their conduct constitutes actual fraud, actual malice, intent to harm or a crime of moral turpitude."⁴

The SCTCA is designed to permit claimants to sue governmental entities for the acts of their employees – not the employee personally – since "[a]n employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor except [under certain circumstances]."⁵ Under the SCTCA an "employee of a governmental entity [does not have] immunity from suit and liability if it is proved . . . the employee's conduct was not within the scope of his official duties or . . . it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude."⁶

The evidence demonstrated Mr. Wade originally sued Mr. Pierce, in his individual capacity, in August 1995. (App.pp.23-27; App.pp.123, 159). Mr. Wade did not initially assert Mr. Pierce had committed either fraud, actual malice, or a crime or even intended in any way to hurt Mr. Wade. (App.pp.24-28; App.pp.123, 159). Mr. Wade only added Berkeley County in April 1996, as a party-defendant after he had settled his claims against Mr. Pierce by way of GEICO's \$13,000.00 payment. (App.p.15, para. 6; App.pp.65-70; App.pp.123, 159).

⁴ Jensen v. Anderson County Department of Social Services, 304 S.C. 195, 205 n.4, 403 S.E.2d 615, 620 n.4 (1991) (citing S.C. Code Ann. §§ 15-78-70(a), (b) (West Group Supp. 2000)) (Emphasis added).

⁵ S.C. Code Ann. § 15-78-70(a) (West Group Supp. 2000).

⁶ S.C. Code Ann. § 15-78-70(b). See also C. Tolbert Goolsby, Jr. and Ginger D. Goforth, The South Carolina Tort Claims Act: A Primer and Then Some, 25 (2d ed. SCBar CLE Div. 1997).

On the assumption Mr. Wade did not know Mr. Pierce was potentially a "governmental entity employee, Mr. Wade correctly sued Mr. Pierce in his personal capacity.⁷ On the other hand, on February 1, 1997, once Mr. Wade determined Mr. Pierce worked for Berkeley County (or asserted he worked for Berkeley County) and, in turn, Berkeley County could have *respondeat superior* liability for Mr. Wade's injuries, then Mr. Wade had to immediately dismiss Mr. Pierce from the case.⁸ Once Mr. Wade knew Mr. Pierce was a "governmental employee" and Berkeley County was potentially liable, the SCTCA automatically, by operation of law, controlled the case since the only way a claimant can proceed against a governmental entity is through the SCTCA. Once Mr. Pierce is "viewed" as a governmental employee (whether or not that issue is contested) the governmental entity must be substituted and the employee dropped.⁹ Any personal settlement with the employee once he or she is a "known" governmental employee can only constitute a settlement under the SCTCA.

On February 1, 1996, while pursuing his claim against Mr. Pierce, Mr. Wade discovered Mr. Pierce worked for Berkeley County and, in turn, Berkeley County might be liable. (App.p.47, lines 1-11; App.p.48, line 3 - App.p.58, line 25; App.p.59, line 2 - App.p.64, line 25). Even though Mr. Wade knew Mr. Pierce claimed he was "at work" at the time of the accident, Mr.

⁷ See S.C. Code Ann. § 15-78-70(c).

⁸ S.C. Code Ann. § 15-78-70(c) ("In the event the employee is individually named, the agency or political subdivision for which the employee was acting must be substituted as the party[-]defendant.").

⁹ S.C. Code Ann. § 15-78-70(c). Theoretically, where the agency issue is contested the claimant could possibly sue both the individual and the entity, pursuant to S.C. Code Ann. § 15-78-70(b) (West Group Supp. 2000), until the agency issue was resolved. The claimant could not, however, settle with the individual as such a settlement, as in this case, would eliminate the entity's potential liability.

Wade waited the dismiss Mr. Pierce until after he had settled GEICO, on Mr. Pierce's personal behalf. (App.pp.14-15, paras. 5, 7; App.pp.65-68).

The SCTCA is clearly intended to shield a governmental employee from liability for actions done while he or she is operating in the course and scope of their official duties.¹⁰ The SCTCA makes the governmental agency liable¹¹ and, moreover, affords a monetary recovery cap for such liability.¹² The Court of Appeals has interpreted the SCTCA in such a fashion as to eliminate the governmental employee's liability cap, at least, as to the liability limits of the employee's personal insurance coverage.

As a matter of law, Mr. Pierce cannot be sued in his individual capacity under the facts alleged herein once he testified he believed he was acting in the course and scope of his employment. At that point he was a "governmental employee" entitled to the full protections of the SCTCA. The Court of Appeals has "open[ed] the door" for every injured party to first sue a governmental employee individually before then proceeding against the governmental entity itself in situations where the employee could be viewed as "acting outside the scope" of his employment.¹³ This is completely contrary to the SCTCA. Moreover, it permits a claimant/plaintiff to proceed on inconsistent theories and allows multiple recoveries for one harm without requiring any election of remedies.¹⁴ This was clearly not the Legislature's intent when enacting the SCTCA.¹⁵

¹⁰ S.C. Code Ann. § 15-78-70(a) (West Group Supp. 2000).

¹¹ S.C. Code Ann. § 15-78-70(a).

¹² S.C. Code Ann. § 15-78-120(a) (West Group Supp. 2000).

¹³ See generally Wade II, 339 S.C. 495, 503, 529 S.E.2d 734, 742-743; Wade III, 339 S.C. 513, 523, 529 S.E.2d 743, 753.

¹⁴ See generally Wade II, 339 S.C. 495, 503, 529 S.E.2d 734, 742-743; Wade III, 339 S.C. 513, 523, 529 S.E.2d 743, 753. Cf. Taylor v. Mount Vernon-Woodberry Mills, Inc., 211 S.C.

The Court of Appeals ignores the proposition that the SCTCA is specifically designed to permit claimants to sue governmental entities for the acts of their employees – not governmental employee personally – since “[a]n employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor except [under certain circumstances not present in this case].”¹⁶

Under the SCTCA and the facts of this case, Mr. Pierce cannot be both acting within and acting outside the course and scope of his employment with Berkeley County. He can only be doing one or the other. The Court of Appeals, in *Wade I*, concluded there was a question regarding whether Mr. Pierce was a governmental employee at the time of the accident.¹⁷ Consequently, until such time as a finder-of-fact conclusively determines Mr. Pierce was not acting as a Berkeley County employee at the time of the accident, then both Berkeley County and Mr. Wade are entitled to the full protections offered by the SCTCA. The Court of Appeals has herein permitted Mr. Wade to effectively “have his cake and eat it too.” This is an incorrect application of the SCTCA and must be reversed.

414, 45 S.E.2d 809 (1947).

¹⁵ Rather than “wreak havoc” and “countenance the use of a judicial straightjacket” as the majority predicts, *Wade II*, 339 S.C. 495, 502, 529 S.E.2d 734, 741; *Wade III*, 339 S.C. 513, 520, 529 S.E.2d 743, 750; Mr. Wade could have preserved his right to proceed against Mr. Pierce in the event he was acting outside the scope of his employment by way of a tolling agreement relating to the applicable statute of limitations.

¹⁶ S.C. Code Ann. § 15-78-70(a). Under the SCTCA an “employee of a governmental entity [does not have] immunity from suit and liability if it is proved . . . the employee’s conduct was not within the scope of his official duties or . . . it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.” S.C. Code Ann. § 15-78-70(b). See also *Goolsby and Goforth*, 25.

¹⁷ *Wade III*, 339 S.C. 513, 515 n.2, 529 S.E.2d 743, 745 n.2.

**B. THE COVENANT NOT TO EXECUTE GIVEN BY MR. PIERCE TO MR. WADE
CONSTITUTES A SETTLEMENT UNDER S.C. CODE ANN. §15-78-70(D)**

Contrary to Mr. Wade's assertions (Respondent's Brief, pp.5-6)) a Covenant Not To Execute given by a claimant to an at-fault party is a settlement both under the SCTCA and under the general law. The Court of Appeals ignored basic law and its decision should be reversed.

Even though the Court of Appeals indicated Mr. Wade's Covenant Not To Execute given to Mr. Pierce was not a "settlement",¹⁸ the Court of Appeals specifically stated that "[w]ithout a jury verdict, order of judgment, or confession of judgment, cases are disposed of by way of amicable disposition under the aegis and ambit of three recognizable legal documents effectuating the settlement: (1) general release; (2) covenant not to sue; and (3) covenant not to execute."¹⁹ The Court of Appeals then "analyzed" and "explained" the differences between a General Release, a Covenant Not to Sue, and a Covenant Not to Execute. (App.p..161-163). The Court of Appeals failed, however, to explain or cite any authority in support of the proposition that a Covenant Not to Execute was not a method of reaching a settlement in a given case.

In fact, this Supreme Court has acknowledged a Covenant Not to Execute is one method of settling a case.²⁰ In essence, the Court of Appeals has created a fourth way to settle a case - (1) a Release, (2) a Covenant Not to Sue, (3) a Covenant Not to Execute, and (4) a "Settlement Document". This holding is unsupported by South Carolina law. Moreover, the

¹⁸ Wade III, 339 S.C. 513, 518, 529 S.E.2d 743, 748. (App.p.165).

¹⁹ Wade III, 339 S.C. 513, 516, 529 S.E.2d 743, 746 (Emphasis added). (App.p.161).

²⁰ See Poston by Poston v. Barnes, 294 S.C. 261, 264, 363 S.E.2d 888, 889 (1987).

Court of Appeals failed to explain why a Covenant Not to Execute does not constitute a "settlement" of a claim under the SCTCA. This is especially true in light of the South Carolina Legislature's stated purposes of the SCTCA to limit a governmental entity's liability.

Since the SCTCA does not define the term "settlement"²¹ the term "must be given [its] plain and ordinary meaning without resort to subtle or forced construction [which] limit[s] or expand[s] the operation of [S.C. Code Ann. § 15-78-70(d) and the] language must be read in [harmony] with its subject matter and accords with its general purpose."²²

For example, "settlement" has been defined as "an agreement to terminate or forestall all or part of a lawsuit."²³ The Supreme Court of Hawai'i defined the term as "an agreement to terminate, by means of mutual concessions, a claim . . . which is disputed in good faith or unliquidated. It is an amicable method of settling or resolving bona fide differences or uncertainties and is designed to prevent or put an end to litigation."²⁴ Similarly, the Superior Court of New Jersey, Law Division, interpreted "[s]ettlement' [to] mean to fix or resolve conclusively; to make or arrange for final disposition."²⁵

²¹ See generally S.C. Code Ann. § 15-78-30 (West Group Supp. 2000).

²² Greenville Hospital System v. Provident Life and Accident Insurance Co., 330 S.C. 436, 441-442, 499 S.E.2d 232, 235 (Ct.App. 1998) (citing Koenig v. South Carolina Department of Public Safety, 325 S.C. 400, 403-404, 480 S.E.2d 98, 99 (Ct.App. 1996)).

²³ Gorman v. Holte, 164 Cal.App.3d 984, 988, 211 Cal.Rptr. 34, 37 (CA 2d Dist. 1985) (citing 2 California Civil Procedure Before Trial 458, § 33.1, Continuing Education of The Bar 1978).

²⁴ Sylvester v. Animal Emergency Clinic of Oahu, 72 Hawai'i 560, 565-566, 825 P.2d 1053, 1056 (1992) (citing 15A Am.Jur.2d, Compromise and Settlement, § 1 (Law. Co-op. 1976) (Footnote omitted)).

²⁵ Wager v. Burlington Elevators, Inc., 116 N.J.Super. 390, 397, 282 A.2d 437, 441 (Super. Ct. 1971) (citing Webster's Seventh New Collegiate Dictionary; 39 Words and Phrases 65 et seq. (West 1970)). See also generally Reynosa v. Christofferson, ____ S.W.2d ____ (Tex.Civ.App. San Antonio 1997) (1997 W.L. 367244) (citing Tex. Civ. Prac. and Rem. Code Ann. § 101.106 (West Group 2000) ("A judgment in an action or a settlement of a claim under this

As far as Mr. Pierce's liability to Mr. Wade was concerned, the Covenant Not to Execute had the precise effect of "fix[ing] or resolv[ing] conclusively [and] arrang[ing] [the] final disposition" of Mr. Wade's claims vis-a-vis Mr. Pierce.²⁶ Moreover, by its very terms, the Covenant Not to Execute was "an agreement to terminate . . . all . . . of a lawsuit."²⁷ Pursuant to the Covenant, Wade and his wife promised:

not to execute against . . . [Mr. Pierce] or [GEICO] . . . on any judgment [which] may be obtained by [them] on account of any and all claims, demands, damages, costs[,] or expenses, . . . arising from any act, omission[,] or occurrence or resulting or to result from the automobile accident which occurred on June 1, 1995, in Berkeley County, South Carolina, when [Mr. Wade] was involved in a motor vehicle collision with a vehicle driven by [Mr. Pierce].

(App.p.66, para. 3). In addition, the Wades also promised ". . . if they [obtained] a judgment against [either Mr.] Pierce or [GEICO], they w[ould] not execute on said judgment"

(App.p.66, para. 4). Even though Mr. Pierce may have been required to testify in this action, he no longer had any personal liability to Mr. Wade by virtue of GEICO's \$13,000.00 payment - this would have been true even if there was subsequent evidence that Mr. Pierce had acted in a malicious or intentional manner. Clearly, the settlement agreement between Mr. Wade and

chapter bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim."'). In a somewhat reversed situation as that in this case, the Texas Civil Court of Appeals, San Antonio, in Urban v. Canada, 963 S.W.2d 805 (Tex.Civ.App. 1998), concluded that Tex. Civ. Prac. and Rem. Code Ann. § 101.106 precluded a plaintiff from pursuing her libel claim against a governmental employee after she dismissed her identical claim against the governmental unit with prejudice. Urban, 963 S.W.2d 805, 807-808.

²⁶ Wager, 116 N.J.Super. 390, 397, 282 A.2d 437, 441.

²⁷ Gorman, 164 Cal.App.3d 984, 988, 211 Cal.Rptr. 34, 37.

Mr. Pierce, via GEICO, as exemplified by the Covenant Not to Execute, must be viewed as "a settlement of a claim" under the SCTCA.²⁸

If such was not the case, the creative claimants' counsel, such as has been sanctioned herein by the Court of Appeals, could easily circumvent S.C. Code Ann. § 15-78-70(d) by first suing the "unknown" governmental employee in his or her individual capacity, settle with the individual's personal insurance carrier, and then "discover" the individual's "government employee status" and, in turn, sue the governmental entity for the same occurrence. The Legislature certainly intended to prevent this type of situation when it enacted S.C. Code Ann. § 15-78-70(d).

Moreover, once Mr. Pierce knew Mr. Wade as a "governmental employee" and Berkeley County might be liable under *respondeat superior* then the SCTCA controlled the case from that point on as a matter of law. Clearly Mr. Pierce and Berkeley County were both entitled to the protections of the SCTCA under those facts. Mr. Wade's decision to obtain a settlement from GEICO on Mr. Pierce's behalf, even though he knew Mr. Pierce was likely a "governmental employee" was done at Mr. Wade's own risk since such a settlement was controlled by the SCTCA. In fact, Mr. Wade could have dismissed Mr. Pierce without a settlement and proceeded against Berkeley County unhindered since Berkeley County has significantly higher liability limits than the GEICO policy.

The Court of Appeals' decision to permit Mr. Wade's claim, even though he clearly had settled with Mr. Pierce individually, has completely eviscerated the effect of S.C. Code Ann. § 15-78-70(d). The Court of Appeals stated that a Covenant Not To Execute was one of the

²⁸ S.C. Code Ann. § 15-78-70(d).

recognized methods to settle a case, but ignored that proposition when applying the SCTCA to Mr. Pierce. The Court of Appeals incorrectly interpreted the SCTCA and its decision must be reversed.

C. THE SCTCA PERMITS BOTH A GOVERNMENTAL ENTITY AND A GOVERNMENTAL EMPLOYEE TO BE SUED IN THE SAME ACTION ONLY UNDER CERTAIN CIRCUMSTANCES WHICH ARE NOT PRESENT HEREIN

The SCTCA permits a claimant to bring an action against a governmental entity in the same fashion as the claimant would bring such an action against a private individual/entity.²⁹ Nevertheless, the primary goal of the SCTCA is to limit the governmental entity's liability to the extent permitted by law.³⁰

Mr. Wade asserts that he is entitled to sue both Mr. Pierce and Berkeley County since Berkeley County has contested Mr. Pierce's agency with Berkeley County at the time of the accident. (Respondent's Brief, p.7.) Mr. Wade, thereafter, presents, at best, a strained interpretation of the SCTCA seeking to justify his actions in this case. (Respondent's Brief, pp.7-9). Mr. Wade is, however, simply incorrect and the SCTCA does not provide him the relief sought.

As regards a governmental employee, such as Mr. Pierce, the SCTCA is "the exclusive civil remedy for any tort committed by an employee of a governmental entity."³¹ The SCTCA provides:

²⁹ S.C. Code Ann. §§ 15-70-20(a), 15-78-40 (West Group Supp. 2000).

³⁰ S.C. Code Ann. § 15-70-20(f) (West Group Supp. 2000).

³¹ S.C. Code Ann. § 15-78-70(a) (West Group Supp. 200). See Proveaux v. Medical University of South Carolina, 326 S.C. 28, 32, 482 S.E.2d 774, 776 (1997).

. . . a person, when bringing an action against a governmental entity under the provisions of [the SCTCA], shall name as a party defendant only the agency or political subdivision for which the employee was acting and is not required to name the employee individually, unless the agency or political subdivision for which the employee was acting cannot be determined at the time the action is instituted.³²

The SCTCA further provides that “[i]n the event that the employee is individually named, the agency or political subdivision for which the employee was acting *must be* substituted as the party defendant.”³³ Contrary to Mr. Wade’s assertions, there is nothing in the language of the SCTCA which permits him to sue both Berkeley County and Mr. Pierce when, admittedly, the agency relationship between the governmental employee (Mr. Pierce) and the governmental entity (Berkeley County) is questioned. (App.pp.28-29, paras. 6; 8, 11; App.pp.41-43, paras. 7, 9, 11, 14-15).

Even though the SCTCA provides that “[n]othing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee’s conduct was not within the scope of his official duties”,³⁴ that language does not protect Mr. Wade since he has already settled with the party whose agency status is at issue.. Mr. Wade possibly could have sued both Berkeley County and Mr. Pierce, as alternative theories of recovery, asserting Mr. Pierce’s agency was disputed, but such a suit could only have been maintained if both Berkeley County and Mr. Pierce were still in this action. Mr. Wade, however, decided to settle with Mr. Pierce and that settlement eliminated and joint suit possibilities.

³² S.C. Code Ann. § 15-78-70(c) (West Group Supp. 2000) (Emphasis added).

³³ S.C. Code Ann. § 15-78-70(c).

³⁴ S.C. Code Ann. § 15-78-70(b) (West Group Supp. 2000).

Contrary to Mr. Wade's assertions that the SCTCA "do not extend to actions against a person in his or her individual capacity" (Respondent's Brief, p.9), the SCTCA directly addresses that situation by providing for individual liability under specified circumstances.³⁵ In all other circumstances the governmental entity becomes the liable party.

In this case, Mr. Wade, in August 1995 (App.p.23, paras. 2-3), correctly sued Mr. Pierce individually under S.C. Code Ann. § 15-78-70(c) since Mr. Wade assumably did not know Mr. Pierce would claim to be in the "course and scope of his employment" with Berkeley County. On February 1, 1996, Mr. Wade took Mr. Pierce's deposition and learned that Mr. Pierce "was working" at the time of the accident." (App.pp.47-64). Mr. Wade then settled with GEICO, on Mr. Pierce's behalf, shortly thereafter. (App.pp.65-69). In April 1996, Mr. Wade amended his Complaint substituting Berkeley County as the defendant for Mr. Pierce. (App.p.28, paras. 1-4). Mr. Wade asserted the same negligence claims against Berkeley County as made against Mr. Pierce and sought similar damages. (App.pp.28-32, paras. 5-15).

Mr. Wade entered into a Covenant Not To Execute with Mr. Pierce (App.pp.65-70) which purportedly eliminated any liability to Mr. Pierce and GEICO over and above GEICO's \$13,000.00 payment to Mr. Wade. (App.pp.65-70).³⁶ As analogously noted by Professors

³⁵ S.C. Code Ann. § 15-78-70(b) (liability attaches where "employee's conduct was not within the scope of his official duties or . . . constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.").

³⁶ The Court of Appeals, on the one hand, stated that the \$13,000.00 "payment to [Mr.] Wade by [Mr.] Pierce and GEICO was effectuated so as to *eliminate personal liability of [Mr.] Pierce* in his status as an individual." Wade II, 339 S.C. 495, 501, 529 S.E.2d 734, 740; Wade III, 339 S.C. 513, 520, 529 S.E.2d 743, 750. (Emphasis added). (App.pp.130, 167). Nevertheless, on the other hand, the Court of Appeals stated that Mr. Wade, by giving a Covenant Not To Execute to Mr. Pierce, was "still entitled to seek a judgment against [Mr.] Pierce and [GEICO and Mr. Wade] merely agreed not to legally enforce the judgment. In fact, the covenant not to execute expressly reserve[d] [Mr.] Wade's *right to obtain a judgment* against [Mr.] Pierce." Wade II, 339 S.C. 495, 500, 529 S.E.2d 734, 739; Wade III, 339 S.C. 513,

Hubbard and Felix, since the employee (i.e.; Mr. Pierce) was given a covenant not to execute, that settlement also releases the employer (i.e.; Berkeley County) through *respondeat superior*.³⁷

In *Wade I*, the Court of Appeals recognized that “[u]nder the doctrine of *respondeat superior* in tort law . . . the master is responsible for the acts of his servant even when the servant acts against the express instructions of the master, provided he is acting within the scope of his employment.”³⁸ Moreover, the Court of Appeals stated “[t]he 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.”³⁹

The Court of Appeals already determined, in *Wade I*, that there was a “genuine issue of material fact . . . regarding whether [Mr.] Pierce was acting within the scope of his employment [with Berkeley County] when the accident occurred [with Mr. Wade].”⁴⁰ Moreover, Mr. Wade

519, 529 S.E.2d 743, 749. (Emphasis added). (App.pp.128, 165). Mr. Pierce’s “personal liability” is not eliminated if a judgment may be obtained against him and recorded on the judgment rolls. Certainly a recorded judgment would damage Mr. Pierce in that it would effectively limit his ability to sell real or certain personal property or to obtain credit. In that sense, Mr. Pierce still has some “personal liability” and exposure.

³⁷ South Carolina Law Of Torts, p.630. It would not matter whether the covenant was a “covenant not to sue” or a “covenant not to execute” since the effect of either document is the same to the tortfeasor. As noted in *Wade III*, “[a] Covenant Not to Sue and a Covenant Not to Execute are so closely akin that a major distinguishing factor is that the latter is normally executed when a settlement occurs after the filing of a lawsuit, while the former is entered into before a lawsuit is filed.” *Wade III*, 339 S.C. 513, 523, 529 S.E.2d 743, 753-754 (quoting *Poston v. Barnes*, 294 S.C. 261, 263-264, 363 S.E.2d 888, 889-890 (1987)).

³⁸ *Wade I*, 330 S.C. 311, 318, 498 S.E.2d 684, 688 (citing *South Carolina Insurance Co. v. James C. Greene & Co.*, 290 S.C. 171, 183, 348 S.E.2d 617, 624 (Ct.App. 1986)).

³⁹ *Wade I*, 330 S.C. 311, 318, 498 S.E.2d 684, 688 (citing *South Carolina Insurance Co.*, 290 S.C. 171, 179, 348 S.E.2d 617, 621).

⁴⁰ *Wade I*, 330 S.C. 311, 320-321, 498 S.E.2d 684, 689. See also *Wade II*, 339 S.C. 495, 496 n.2, 529 S.E.2d 734, 735 n.2; *Wade III*, 339 S.C. 513, 515 n.2, 529 S.E.2d 743, 745 n.2. (App.pp.123, 159).

has asserted Mr. Pierce was within the course and scope of his employment with Berkeley County at the time of the accident. (App.p.3; App.p.11, para. 2; App.pp.28-33; App.pp.123, 159).⁴¹ In fact, the only way Berkeley County is liable to Mr. Wade is if Mr. Pierce was "acting within the course and scope" of his employment with Berkeley County at the time of the accident.⁴²

Consequently, contrary to the denials (App.p.168)⁴³ the decision of the Court of Appeals effectively treats Mr. Pierce and Berkeley County as joint tortfeasors – something they cannot be under South Carolina law. Under the SCTCA, the respective liabilities of Mr. Pierce and Berkeley County to Mr. Wade are mutually exclusive. Moreover, the Court of Appeals' decision permits one to sue and settle with the servant (i.e.; the employee) and, thereafter, maintain suit against the master (i.e.; the employer) for the same claims and causes of action all arising from the same circumstances. Such a novel theory is not supported by South Carolina law.

The Court of Appeals should have dismissed Mr. Wade's claim as he had already settled with Mr. Pierce. The SCTCA, except in circumstances not present herein, does not permit Mr. Wade to sue both Mr. Pierce and Berkeley County in the same action for the same claim. Mr. Wade cannot have it both ways. When he settled with Mr. Pierce his claim against Berkeley County was eliminated. The decision of the Court of Appeals must be reversed.

⁴¹ When considering summary judgment all of Mr. Wade's allegations must be considered to be true. Wade I, 330 S.C. 311, 316-317, 498 S.E.2d 684, 687 (citing Pryor v. Northwest Apartments, Limited, 321 S.C. 524, 469 S.E.2d 630 (Ct.App. 1996)).

⁴² See S.C. Code Ann. § 15-78-70.

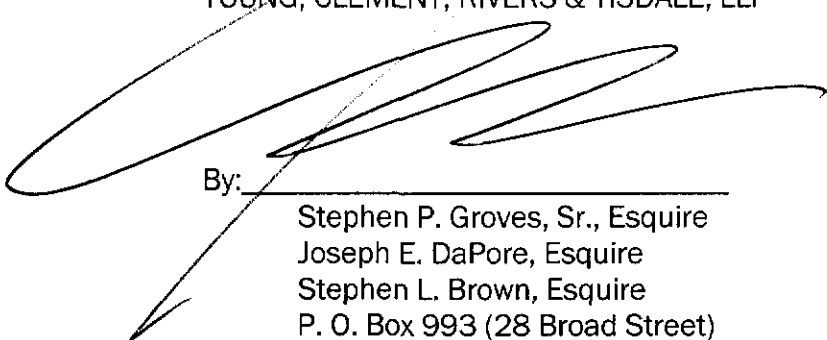
⁴³ Wade III, 339 S.C. 513, 520, 529 S.E.2d 743, 750. (App.p.168).

CONCLUSION

Based upon the foregoing arguments and citation of authority, the Petitioner, Berkeley County, South Carolina, respectfully requests this Supreme Court to reverse the *en banc* majority decision of the Court of Appeals and enter judgment for Berkeley County.

Respectfully submitted:

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February 12, 2001

*THE STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT*

Opinion Nos. 3053, 3145
Filed October 4, 1999 and April 3, 2000

APPEAL FROM THE COURT OF COMMON PLEAS
FOR BERKELEY COUNTY

HONORABLE R. MARKLEY DENNIS, Jr., CIRCUIT COURT JUDGE
Civil Action No. 95-CP-10-1281

Gerald D. Wade, Jr.,

Respondent,

v.

Berkeley County, South Carolina
and John Doe, of whom Berkeley County, South Carolina is,

Petitioner,

And John Doe, is

Respondent.

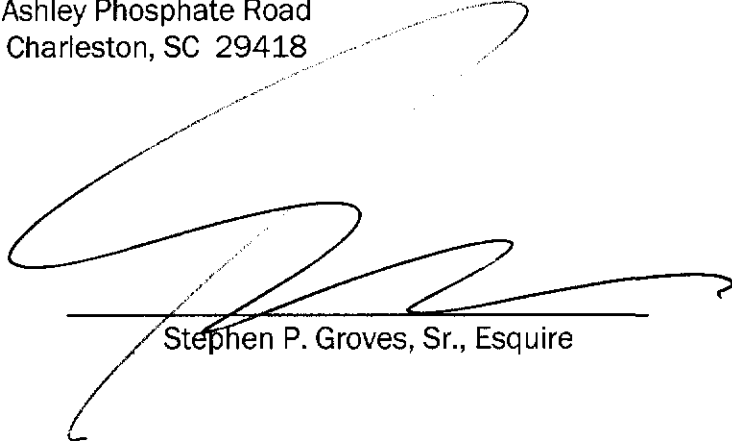
PROOF OF SERVICE FOR
PETITIONER'S REPLY BRIEF ON CERTIORARI

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*Attorneys for Respondents/Petitioners
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I hereby certify on February 12, 2001, I served three copies of the *Petitioner's Reply Brief on Certiorari* on all counsel involved in this appeal in this matter by United States Mail, postage prepaid, addressed as follows:

George J. Kefalos, Esquire
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Stephen P. Groves, Sr., Esquire

Charleston, South Carolina

February 12, 2001

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SC Court of Appeals

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To: ["markjr@chappell.law"](mailto:markjr@chappell.law)
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Subject: Whetstone - Rehearing Petition
Date: Monday, February 2, 2026 12:50:00 PM
Attachments: [No. 2023-001424 - Petition for Rehearing.pdf](#)
[No. 2023-001424 - Petition Appendix.pdf](#)
[image001.png](#)

Mark,

Please find attached the petition for rehearing and accompanying petition appendix, which I'll be filing with the Court of Appeals momentarily.

Hope y'all enjoyed the snow!



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