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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.

APPELLANT'S RETURN TO PETITION FOR REHEARING

INTRODUCTION

Wanda Whetstone, Appellant, respectfully submits this Return opposing the Petition for Rehearing filed by Respondent Office of the Governor. The Court of Appeals correctly addressed, apprehended, and decided the issues presented by this appeal and thus, rehearing is neither warranted nor necessary. The Court correctly concluded that *Wade v. Berkeley County* controls and that Whetstone may, consistent with the South Carolina Tort Claims Act, settle with an individual employee and then pursue a claim against the government employer. The Petition of Respondent rests on a mischaracterization of the issues decided on appeal and on legal theories the Governor did not preserve.

Furthermore, Respondent's approach of addressing the enforcement procedure as a threshold issue distracts from the true holding of this Court on the substantive question of legislative intent. In addition, if accepted, Respondent's flawed position on that topic would have the effect of undermining Appellant's legal rights to bring suit against a governmental entity after settling with the individually liable party, as in *Wade*. Therefore, the Petition for Rehearing should be denied.

STANDARDS FOR PETITIONS FOR REHEARING

Petitions for Rehearing are authorized by Rule 221(a), SCACR, to address "points supposed to have been overlooked or misapprehended by the court." They are not an opportunity for a disappointed litigant to have a "second bite at the apple" by arguing his case to the Court of Appeals for a second time. *Checker Yellow Cab Co. v. Checker Cab & Parcel Service*, 287 S.C. 608, 612, 340 S.E.2d 549, 552 (Ct. App. 1986), *citing Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933).

ARGUMENT

1. The Court correctly concluded Appellant has the right to settle with a government employee in his or her individual capacity and subsequently bring an action against their government employer

    a. Appellant is legally entitled to bring suit and recover against Governor

Simply put, the primary issue in this case is whether the Legislature intended to allow a private citizen's cause of action to pursue a tort claim against a governmental entity after settling with the entity's individual employee. S.C. Code Ann. §15-78-20(a) states: "It is declared to be the public policy of the State of South Carolina that the state, and its political subdivisions, are only liable for torts within the limitations of this chapter and in accordance with the principles established herein." S.C. Code Ann. §15-78-20(a) (2005). Thus, the "TCA" (the Act) controls

all actions brought pursuant to the Act and all decisions interpreting the act apply including the decision in *Wade.* Furthermore, given Whetstone's analogous facts to *Wade,* this case concerns the meaning of section 15-78-70(d), which states: "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. §15-78-20(d) (2005). "Appellant argues the controlling authority applicable to this case is *Wade v. Berkely County,* 348 S.V. 224, 559 S.E.2d 586 (2002). We agree." *Whetstone v. State of South Carolina, Office of the Governor*, Op. No. 6133 (S.C. Ct. App. dated Jan 21, 2026)(Howard Adv. Sh. No. 3 at 57).

Appellant agrees with this learned Court that the issue at hand in *Whetstone* and *Wade* are analogous. The Court properly understood the issue, acknowledged that the statute does not define the procedures for settlement amongst the tortfeasors, and considered both sides' arguments as to whether the Circuit Court had properly construed the Legislature's intent. The key distinction here is that Whetstone, much like *Wade,* did not enter into a settlement under "The Act" and there was no action pending under "The Act" at the time Whetstone settled with Campbell. "As in this case, Wade's claim was a derivative liability claim in that there were no allegations of tortious conduct by the government entity outside of its employee's actions." *Whetstone* at 60. The Governor's motion for summary judgment and briefing on appeal did not seek relief under S.C. Code § 15-78-70(d) as the sole basis for dismissal and included common law defenses, which do not apply here as the settlement with Campbell was outside of "the Act". The record (motion and memorandum) shows the Governor expressly disclaimed moving under § 15-78-70(d) and instead relied on the common law rule (*Andrade*) concerning the effect of a covenant not to execute of an employee on an employer's derivative liability, which Appellant

argued does not belong here. See R. pp. 22–23, 30–31; Oral Arg. 21:24–21:36. Given the *Andrade* decision did not deal with the UCATA rather the TCA, Respondent's arguments based on the *Andrade* decision are ill-founded and not squarely before this Court.

Regardless of Respondent's chosen framing, the question squarely presented and decided by this Court was statutory: whether the TCA, as construed in *Wade*, bars Whetstone's sequence of actions (settle with employee; sue employer under the TCA). The Court properly addressed that question and applied the correct legal framework of *Wade,* as the Court found *Wade* on all fours with the present case. *Whetstone* at 59-62. Because the Governor's ill-founded argument below was that a covenant not to execute with an employee extinguishes derivative liability of the employer, the Court properly addressed whether *Wade* (and the Tort Claims Act) precludes the employer from being sued after such a settlement.

Rehearing is not a vehicle for presenting new legal theories. Respondent's Petition, which seeks to recast the case as controlled by common law employer-acquittal doctrines (*Andrade*) and to treat *Wade* as non-controlling, advances arguments that were either not preserved or were insufficient to supplant *Wade's* controlling statutory holding. Appellate courts should not grant rehearing to entertain unpreserved or newly minted arguments. See *State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991). The Petition's suggestion the Court decided an argument the Governor "never made" is incorrect: the Court faithfully considered the interplay between *Wade* and the common law rule as applied under the Tort Claims Act and ruled correctly.

b. <u>*Wade* is dispositive on the statutory question and was properly applied</u>

Wade squarely held that §15-78-70(d) does not bar an action against a governmental employee in his individual capacity where no Tort Claims Act action existed against the

employer at the time of the employee settlement. *Wade v. Berkeley Cnty*., 348 S.C. 224, 230, 559 S.E.2d 586, 589 (2002). This Court properly relied on *Wade* in concluding the Tort Claims Act permits the sequence Appellant followed. This Court found persuasive the opinion in *Newkirk v. Enzor* in finding that "Governmental entities *are* vicariously liable for their employee's torts only as provided by the statute; governmental entities are not additionally or alternatively liable under common-law vicarious liability doctrines." *Whetstone* at 61 (emphasis added).

The Governor's efforts to convert the Court's statutory holding into a different, broad stroke common-law rule that would allow the government to enjoy greater protections than private employers (i.e., to be insulated from liability even where a private employer would remain liable) conflicts with the Legislature's intent and the Tort Claims Act's directive that a governmental entity is liable "in the same manner and to the same extent as a private individual under like circumstances." S.C. Code Ann. § 15-78-40. This Court's ruling harmonizes *Wade* with §15-78-40 and the Act's text and purpose. Thus, their interpretations bind lower Courts on the statutory question presented herein.

2. The Governor's reliance on *Andrade* and on a private-employer acquittal rule cannot justify rehearing

Andrade addressed the effect of a covenant not to sue an employee under common law and the Uniform Contribution Among Tortfeasors Act as between private parties. *Andrade* does not displace *Wade's* interpretation of the Tort Claims Act, nor does it establish that government entities receive broader derivative-liability protections than private employers. The Act's text—particularly §15-78-40 and the exclusive-remedy provisions—controls how common-law doctrines operate in TCA cases. This Court correctly observed that the TCA governs liability for employee torts by setting exclusive remedies and statutory limits; the statute's unique statutory scheme means common-law joint-tortfeasor doctrines do not operate in the same way. As the

Court explained (citing *Newkirk*), the TCA replaces the common-law doctrine of respondeat superior for suits against governmental entities—liability exists only "as provided by the statute." *Whetstone* at 61, citing *Newkirk v. Enzor*, 240 F. Supp. 3d 426, 436 (D.S.C. 2017). The Governor's position on Rehearing would produce anomalous and inequitable results: it would permit governmental entities to obtain greater shielding than private actors and would allow plaintiffs to be denied the statutory remedies the Legislature created. This Court properly avoided such an outcome.

Furthermore, "The TCA allows a plaintiff to settle with a government employee in his or her individual capacity and subsequently bring an action against the employer." *Wade* at 230, 559 S.E.2d at 589. "The TCA does not distinguish between joint and vicarious liability, only whether the employee was acting within the scope of her employment." *Whetstone* at 62. Whether or not the employee in the matter was acting within the course and scope of her employment is ultimately a question for the finders of fact, the jury. The Court's decision in this case is not only validated by the legislative intent discussed above, but is further supported by the South Carolina case law cited by the Court differentiating between employer liability under the TCA and private liability under S.C. Code Ann. §15-38-65 (2005)("The [UCATA] shall not apply to governmental entities."). *Whetstone* at 61. "The TCA's language makes no distinction between derivative liability claims and claims against both employer and employee as joint tortfeasors." *Id.* Ultimately, as decided in *Newkirk v. Enzor*, "the doctrine of respondeat superior therefore is inapplicable to claims against South Carolina governmental entities or their employees. Governmental entities are vicariously liable for their employees' torts only as provided by the statute; governmental entities are not additionally or alternatively liable under

common-law vicarious liability doctrines." *Whetstone* at 61 citing *Newkirk v. Enzor*, 240 F. Supp 3d 426, 436 (D.S.C. 2017).

3. Preservation and scope bars rehearing on the new theories advanced

To the extent the Petition now presses a distinct common law defense or reframes the Governor's arguments, these contentions either were not preserved below or were not presented to the Court in the posture necessary to obtain reversal. Appellate courts do not grant rehearing simply to entertain new legal arguments raised for the first time after an adverse ruling. *See State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991).

Respondent's attempts in their Petition for Rehearing to now expand the strike zone, ultimately misses the plate and the crux of the issue in this matter upon appeal: whether or not *Wade* applies to the timeline of settlement of Whetstone with Campbell individually and may a further claim be brought under the TCA. The Court is correct in its ruling that "the common law bar to employer liability discussed in *Andrade* is not applicable in this case." *Whetstone* at 62.

4. No basis for en banc consideration or certification to the Supreme Court

The Petition asks for rehearing principally to re-litigate the correctness of *Wade* or to expand the Court's inquiry beyond the issues presented. Those are merits disagreements, not grounds for rehearing. *Wade* remains binding precedent on the statutory question, and the Governor has not shown intervening controlling authority or manifest error warranting en banc review or Supreme Court review.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Rehearing.

Respectfully submitted,

s/ Mark D. Chappell Jr.
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CERTIFICATE OF SERVICE

I certify that this *Return to Petition for Rehearing* was served on counsel of record on February 13, 2026, via email under Paragraph (d)(1) of Order Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), Appellate Case No. 2020-000447.

s/ Mark D. Chappell Jr.
Mark D. Chappell Jr.
Counsel for Appellant

Friday, February 13, 2026 at 09:45:06 Eastern Standard Time

Subject:	Re: Whetstone - Rehearing Petition
Date:	Friday, February 13, 2026 at 9:41:50 AM Eastern Standard Time
From:	Mark Chappell Jr.
To:	Lambert, Grayson, Will Detwiler, Graham Newman
CC:	Cox, Cameron, David Anderson, Carmen Ganjehsani
Attachments:	image001.png, image001.png, No. 2023-001424 - Return to Petition for Rehearing.pdf

Grayson,

Please find attached the requested Return to Petition for Rehearing that I will be filing with the SC Court of Appeals momentarily.

Hope you and the family have a great long weekend!

Best regards,

Mark D. Chappell Jr.
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(803) 509-5845
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CHAPPELL CHAPPELL & NEWMAN

From: Lambert, Grayson <GLambert@governor.sc.gov>
Date: Monday, February 2, 2026 at 12:51 PM
To: Mark Chappell Jr. <markjr@chappell.law>
Cc: Cox, Cameron <CCox@governor.sc.gov>, David Anderson <danderson@richardsonplowden.com>, Carmen Ganjehsani <cganjehsani@richardsonplowden.com>
Subject: Whetstone - Rehearing Petition

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!

Wm. Grayson Lambert
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