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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable William A. McKinnon, Circuit Court Judge

Appellate Case No. 2026-_____

Case No. 2021-CP-40-01276

WANDA WHETSTONE,.....Respondent,

v.

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

PETITION APPENDIX

Wm. Grayson Lambert
Chief Legal Counsel
Erica W. Shedd
Deputy Legal Counsel
Tyra S. McBride
Deputy Legal Counsel
Cameron R. Cox
Deputy Legal Counsel
OFFICE OF THE GOVERNOR
South Carolina State House
1100 Gervais Street
Columbia, South Carolina 29201
(803) 734-2100
glambert@governor.sc.gov
eshedd@governor.sc.gov
tmcbride@governor.sc.gov
ccox@governor.sc.gov

Counsel for Petitioner

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

William A. McKinnon, Circuit Court Judge

Case No. 2023-001424

Wanda Whetstone, ...Appellant,

v.

State of South Carolina, Office of the Governor, ...Respondent.

RECORD ON APPEAL

Mitchell J. Williams, Esquire
Harris, Graves & Williams, LLC
PO Box 11566
Columbia, SC 29211
(803) 799-2911
Attorney for Appellant

David A. Anderson
Carmen V. Ganjehsani
Hunter W. Adams
RICHARDSON, PLOWDEN & ROBINSON, P.A.
1900 Barnwell Street
Columbia, South Carolina 29201
(803) 771-4400

Thomas A. Limehouse, Jr.
Chief Legal Counsel
Wm. Grayson Lambert
Senior Litigation Counsel
Erica Wells Shedd
Deputy Legal Counsel
OFFICE OF THE GOVERNOR
South Carolina State House
1100 Gervais Street
Columbia, South Carolina 29201
(803) 734-2100

Counsel for Respondent

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF RICHLAND	)	**FOR THE FIFTH JUDICIAL CIRCUIT**
Wanda Whetstone, Plaintiff, v. State of South Carolina, Office of the Governor, Defendants.	)	Civil Action No. 2021-CP-40-1276 **ORDER GRANTING SUMMARY JUDGMENT**

This matter came before me on the Defendant's Office of the Governor ("Defendant") motion for summary judgment. Oral argument was heard on July 25th 2023 and supporting case law and memorandums considered by both parties. For the following reasons, the Defendant's motion is hereby GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises out of a motor vehicle accident which took place on or about April 23, 2019 at the 5000 block of Trenholm Road in Richland County, South Carolina. Compl. ¶ 3. Plaintiff alleges that as she was traveling southbound on Trenholm Road, Karen Campbell ("Campbell") pulled out in front of Plaintiff while attempting to make a left turn onto Trenholm Road. *Id.* At the time of the accident, Campbell was on her lunch break and was making a personal stop at Bank of America for a personal errand. The accident occurred as Campbell was leaving the bank. Plaintiff claims Campbell's negligence caused the accident and that she suffered injuries and damages as a result. *Id.* at ¶ 6.

Plaintiff alleges that Campbell was an agent and servant of Defendant and was in the course and scope of her employment at the time the accident occurred. *Id.* at ¶ 7. Plaintiff therefore asserts Defendant is vicariously liable under the doctrine of *respondeat superior* and the South Carolina Tort Claims Act (S.C. CODE ANN. § 15-78-10 *et. seq.*) for the alleged tortious conduct of Campbell. *Id.* Plaintiff makes no allegation that Defendant was independently negligent outside of its vicarious liability for the alleged tortious acts of Campbell.

Prior to initiating this suit, Plaintiff asserted claims under Campbell's liability insurance coverage and two separate underinsured motorist policies. USAA, Campbell's liability carrier, paid Plaintiff its policy limits of $100,000, and, pursuant to the payment, Plaintiff executed a document entitled "State of South Carolina Covenant Not to Execute, Policy Release, and Settlement Agreement" on July 2, 2020. Plaintiff likewise received two separate payments of $25,000 of the respective policy limits of the two UIM carriers: Progressive Insurance Company and Root Insurance Company. Each of the three payments were tendered prior to Plaintiff initiating the instant action.

Despite having settled her claim arising out of the motor vehicular accident with Campbell, Plaintiff filed her Complaint against Defendants State of South Carolina and Office of the Governor on March 18, 2021 asserting the theory of vicarious liability. Defendants filed a motion to dismiss the complaint on April 16, 2021, arguing the State of South Carolina was an improperly named entity under the Tort Claims Act and further that Campbell was not acting within the course and scope of employment at the time of the incident. Plaintiff agreed to dismiss the State of South Carolina as a defendant and proceed solely against the Office of the Governor where Campbell serves as Special Assistant to the First Lady and Governor's Mansion Director. Opposing affidavits were submitted regarding whether Campbell was acting within the course and scope of

her employment during the accident, and this Court ruled that the resulting factual dispute precluded dismissal of the Complaint. Of particular note, the affidavit submitted by Plaintiff to this Court on September 22, 2021 specifically averred that, at the scene of the accident, Campbell allegedly informed Plaintiff that Campbell was employed by Defendant and was out purchasing decorations for an upcoming event at Defendant's office when the accident occurred. Therefore, at the time Plaintiff settled her claim arising out of the motor vehicular accident with Campbell, Plaintiff was aware of her potential vicarious liability claim against Defendant.

Defendant now moves for summary judgment on the grounds that Plaintiff's settlement and release of her claim against alleged tortfeasor Campbell extinguished Defendant's derivative liability based upon Campbell's allegedly tortious conduct.

STANDARD OF REVIEW

Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 42, 747 S.E.2d 178, 181 (2013). "In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment." *Id.*; *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 425, 746 S.E.2d 35, 38 (2013).

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (citations omitted). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply

rest on mere allegations or denials contained in the pleadings. . . . Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Ellis v. Davidson*, 358 S.C. 509, 518-19, 595 S.E.2d 817, 822 (Ct. App. 2004). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Id.* at 518, 595 S.E.2d at 822.

ORDER

Prior to initiating the present suit, Plaintiff made a claim arising out of the motor vehicular accident directly against Campbell under her automobile liability policy and settled the claim with Campbell under a covenant not to execute. As a result of Plaintiff's settlement with Campbell, Defendant's potential vicarious liability for Campbell's alleged tortious conduct was extinguished as a matter of law.

Under South Carolina law, settlement of a claim against an employee "operates as an acquittal of the employer who is only derivatively liable." *Andrade v. Johnson*, 345 S.C. 216, 226, 546 S.E.2d 665, 670 (Ct. App. 2001), *reversed on other grounds* 356 S.C. 238, 588 S.E.2d 588 (2003). The question of the effect of a settlement with an employee/agent on an employer/principal's derivative liability was squarely before the court in *Andrade*.

In *Andrade*, the plaintiff consumer sued a heating contractor and SCE&G, alleging (amongst other claims) the contractor negligently installed HVAC systems in the plaintiff's home while working as an agent of SCE&G. The plaintiff executed a covenant not to sue with the agent contractor whereby she agreed not to bring suit against the contractor, but specifically reserved the right to pursue a suit against SCE&G as the contractor's principal. *Id.* at 221-22, 546 S.E.2d at 667-68. SCE&G as the principal moved for summary judgment on the plaintiff's vicarious liability claims asserted against it arguing, as Defendant does here, its vicarious liability was extinguished

upon the plaintiff's executed settlement with the agent contractor. *Id.* The trial court granted the motion, and the plaintiff appealed the decision to the Court of Appeals which held the trial court properly granted SCE&G's motion for summary judgment. *Id.* at 221, 546 S.E.2d at 668.

At the outset, the Court of Appeals noted the question had not been answered in South Carolina. *Id.* at 223, 546 S.E.2d at 668-69. Critically, the court first held that form of the settlement i.e. a full release, covenant not to sue, or covenant not to execute, is not dispositive of the issue. *Id.* at 224, 546 S.E.2d at 669. Rather, the court observed "[t]he most important factor is the type of liability and the relationship *inter se* of the various allegedly liable parties rather than the type of document used to discharge liability." *Id.* Thus, Plaintiff cannot distinguish *Andrade* from the present case by arguing the covenant not to execute here somehow alters the analysis. Instead, as emphasized by the Court of Appeals, the key question is "whether the liability arises *only* vicariously because of the negligence of another party or whether the parties are true joint tortfeasors, both being independently negligent toward the third party." *Id.* (emphasis in original).

The Court of Appeals concluded that, when the plaintiff executed the covenant not to sue with the agent, her claims against the agent were terminated, and, therefore, the derivative liability of the principal was extinguished. *Id.* at 226-27, 546. S.E.2d at 670. The court noted that this conclusion is bolstered by the fact vicariously liable employers/principals have full rights of indemnity against a tortfeasor employee/agent. *Id.* at 226, 546 S.E.2d at 670 (internal citations omitted). The court reasoned that if the employer/principal's vicarious liability was not terminated, then the employer/principal could seek full compensation from the employee/agent who had settled, which would strip the covenant not to sue of any real meaning. *Id.* Stated another way, extinguishing the employer/principal's derivative liability protects the settling employee/agent from an indemnity claim.

The Court of Appeals therefore held that South Carolina common law was clear that a covenant in favor of an agent released a principal: "[A] covenant not to sue, which ordinarily does not release another joint-tortfeasor from liability, does operate as a release of the master, liable only under *respondeat superior*, if given to the servant responsible." *Id. (quoting Seaboard Air Line R.R. v. Coastal Distrib.*, 273 F. Supp. 340, 343 (D.S.C.1967)).

Here, the holding in *Andrade* mandates that Defendant's derivative liability was extinguished as a matter of law when Plaintiff settled her claim with Campbell. As noted in *Andrade*, the fact a covenant not to execute was utilized is of no moment – even when the covenant specifically provides that claims against Defendant were preserved. Again, as the Court of Appeals noted, the type of document used to effectuate the settlement is not dispositive, but rather the relationship of the parties and whether the employer's liability is solely vicarious. Thus, regardless of the fact that Plaintiff's settlement with Campbell was under a covenant not to execute, summary judgment on Plaintiff's vicarious liability claim against Defendant is proper because Plaintiff has alleged that Defendant's liability arises only vicariously because of the purported negligence of Campbell. *See also Oyuela-martinez v. Kuhn & Kuhn, LLC,* No. 2019-CP-10-00341, 2020 WL 12932358, at *2 (S.C.Com.Pl. May 28, 2020) (Judge Bentley Price holding that an employer's derivative liability was extinguished when the alleged tortfeasor employee executed a covenant not to execute with the employee) *aff'd Oyuela-Martinez v. Kuhn & Kuhn, LLC*, No. 2020-000932, 2022 WL 2826358 (S.C. Ct. App. July 20, 2022).

Counsel for the Plaintiff argued that the case of *Wade v. Berkeley Cty.*, 348 S.C. 224, 559 S.E.2d 586 (2002) should be controlling however that case is distinguishable. There, the Supreme Court held that the plaintiff's execution of a covenant not to execute with a tortfeasor employee was not a "settlement" within the meaning of S.C. CODE ANN. § 15-78-70(d) of the Tort Claims

Act such that a later claim against the employer Berkeley County was not statutorily barred. *Id.* In *Wade*, the plaintiff settled with a tortfeasor employee under a covenant not to execute and later sued the employer, Berkeley County, under a vicarious liability theory. *Id.* Berkeley County moved for summary judgment under § 15-78-70(d) of the Tort Claims Act which 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.

Id.

In applying the statute, the Supreme Court held that the settlement between the plaintiff and the tortfeasor employee was not made "under the act" within the meaning of the statute since no claim had been made against the County at the time of the settlement. *Id.* at 230, 559 S.E.2d at 588-89.

The *Wade* decision only considered the effect of S.C. CODE ANN. § 15-78-70(d) and did not address the separate common law principle that a settlement of a claim against an employee operates to extinguish the liability of the employer who is only derivatively liable. Defendant is not moving for summary judgment here pursuant to the provisions of § 15-78-70(d), but is instead moving for summary judgment based upon the common law principles applicable to employers and employees. The statutory provisions of the Tort Claims Act are threshold requirements which a plaintiff must satisfy in order for sovereign immunity to be waived and liability asserted against a State entity. *See* S.C. CODE ANN. § 15-78-20(a) (" [I]t 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.") Defendant did not argue it is entitled to sovereign immunity as a state entity under the terms of the Tort Claims Act. Rather, Defendant argued that, as an employer, its vicarious liability was extinguished upon

the settlement between Plaintiff and Campbell based on common law principles. Defendant's argument is not rooted in the provisions of the Tort Claims Act, but rather under principles of common law governing derivative liability recognized in *Andrade*. Defendant's status as an arm of the State is immaterial to its argument that its derivative liability as an *employer* was extinguished by the covenant not to execute signed by its employee.

Again, notwithstanding any public policy argument, it is the common law principles recognized in *Andrade* and not the statutory requirements of the Tort Claims Act that Defendant relies upon in its Motion. Thus, *Wade* is distinguishable from the present suit, and any potential argument by Plaintiff which relies upon *Wade* is without merit. As such, summary judgment is appropriate as explained above.

CONCLUSION

As such, according to longstanding South Carolina common law and the principles adhered to in *Andrade*, the executed Covenant Not To Execute, Policy Release, and Settlement Agreement Plaintiff entered into with the employee Ms. Campbell, operates as a release of the employer, the Office of the Governor's Office who is only derivatively liable. The Office of the Governor's Office motion for summary judgment is hereby **GRANTED.**

IT IS SO ORDERED.

July ____, 2023

William A. McKinnon
Circuit Court Judge

Richland Common Pleas

Case Caption: Wanda Whetstone vs State Of South Carolina Office Of The Governor

Case Number: 2021CP4001276

Type: Order/Summary Judgment

So Ordered

/s William A. McKinnon, #2761, Resident Circuit Judge and Chief Admin. Judge for CP, 16th Cir.

Electronically signed on 2023-07-26 10:32:11 page 9 of 9

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2021CP4001276

Official File Stamp:	08-08-2023 04:14:27 PM
Court:	CIRCUIT COURT
	Common Pleas
	Richland
Case Caption:	Wanda Whetstone vs State Of South Carolina Office Of The Governor
Document(s) Submitted:	Form 4 Plaintiff's Motion to Reconsider is DENIED for the re Form 4 Plaintiff's Motion to Reconsider is DENIED for the reasons set forth in the hearing.
Filed by or on behalf of:	William A. Mckinnon

This notice was automatically generated by the Court's auto-notification system.

-

The following people were served electronically:

David Allen Anderson for State Of South Carolina Office Of The Governor

Mitchell Jerry Williams for Wanda Whetstone

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Richland
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP4001276

Wanda Whetstone
PLAINTIFF(S)

State Of South Carolina Office Of The Governor
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

Plaintiff's Motion to Reconsider is DENIED for the reasons set forth in the hearing.

ORDER INFORMATION

This order ☑ ends ☐ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 08/08/2023 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

Richland Common Pleas

Case Caption: Wanda Whetstone vs State Of South Carolina Office Of The Governor

Case Number: 2021CP4001276

Type: Order/Electronic Form 4

So Ordered

/s William A. McKinnon, #2761, Resident Circuit Judge and Chief Admin. Judge for CP, 16th Cir.

Electronically signed on 2023-08-08 15:17:23 page 3 of 3

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS
Wanda Whetstone, Plaintiff(s), vs. State of South Carolina, Office of the Governor, Defendant(s).	Civil Action No. _____ **COMPLAINT** **Jury Trial Requested**

The Plaintiff would respectfully show unto the Court that:

1. The Plaintiff is a citizen and resident of Richland County, South Carolina.

2. The Plaintiff is informed and believes that the "State of South Carolina, Office of the Governor" (hereinafter "Governor") is an agency, political subdivision or governmental entity as defined by S.C. Code of Laws §15-78-10 et. seq.

3. On or about April 23, 2021, Plaintiff was traveling southbound in the 5000 Block of Trenholm Road in Richland County, SC when Karen Campbell, an employee of the "Governor", failed to yield the right of way when turning left into traffic out of a private drive and collided with plaintiff. This collision caused injuries and damages to Plaintiff.

4. Karen Campbell was under a duty to operate her vehicle on the streets and highways of Richland County in a safe and careful manner, keeping a proper lookout for all other vehicles and persons lawfully traveling the roadway.

5. The Plaintiff believes that at the time and place in question Karen Campbell was within the scope of her employment with the Office of the Governor whereby Defendant "Governor" is called to answer for its agent and servant's actions under the doctrine of respondeat superior and pursuant to S.C. Tort Claims Act, S.C. Code of Laws §15-78-10 et. seq.

6. As a result of the collision, the Plaintiff sustained the following injuries and damages:

   a. extensive pain, anguish, soreness, immobility and discomfort;

b. disability for a period of time;

c. money spent for medical care and treatment;

d. inability to carry on normal activities;

e. loss of enjoyment of life;

f. time and wages from Plaintiff's job;

g. permanent scarring;

h. permanent disability/impairment; and

i. future pain, anguish, soreness, immobility and discomfort;

7. The Plaintiff believes that at the time and place in question, Karen Campbell, was operating her vehicle while in the scope of her employment, as an agent and servant of Defendant "Governor", whereby Defendant, "Governor", should be called to answer for its agent and servant's actions under the doctrine of respondeat superior and pursuant to the S.C. Tort Claims Act, S.C. Code of Laws §15-78-10 et. seq.

8. The injuries and damages incurred by the Plaintiff were directly and proximately caused by the careless, negligent, grossly negligent, willful, wanton, reckless and unlawful acts of Defendant's agent and servant, Karen Campbell, in one or more of the following particulars:

a. In failing to yield the right of way;

b. In failing to apply the brakes of the vehicle and/or maintain them in proper working condition;

c. In making an improper and unlawful turning movement;

d. In failing to keep a proper lookout;

e. In entering the roadway laned for traffic improperly;

f. In failing to steer the vehicle or take other evasive action so as to avoid the collision;

g. In failing to use the degree of due care that a reasonable and prudent person should have exercised under the existing conditions; and

h. In operating the vehicle in such a manner as to indicate unlawful or wanton disregard for the safety of other persons or property.

9. The careless, negligent, grossly negligent, willful, wanton, reckless and unlawful acts of Defendant's employee, Karen Campbell, were the direct and proximate cause of the accident and resulting injuries and damage.

10. The Plaintiff is informed and believes that she is entitled to judgment against the Defendant, jointly and severally, for actual damages in an appropriate amount.

WHEREFORE, the Plaintiff prays judgment against the Defendant, jointly and severally, for actual damages in an appropriate amount, the costs of this action, and for such other and further relief as the Court may deem just and proper.

HARRIS AND GRAVES, P.A.

s/ Mitchell J. Williams
MITCHELL J. WILLIAMS
Attorney for Plaintiff
SC Bar No. 8002
Harris and Graves, P.A.
P.O. Box 11566
Columbia, SC 29211
(803) 799-2911
mjw@harrisgraves.com

Columbia, South Carolina

Dated: March 18, 2021

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF RICHLAND	)	
Wanda Whetstone,	)	
	)	
Plaintiff,	)	Civil Action No. 2021-CP-40-1276
	)	
v.	)	
	)	**ANSWER**
State of South Carolina, Office of the Governor,	)	**(Jury Trial Demanded)**
	)	
	)	
Defendants.	)	
	)	

The Defendants, not waiving but expressly reserving all rights in their notice of motion and motion to dismiss filed contemporaneously herewith, answer the Complaint of the Plaintiff as follows:

FOR A FIRST DEFENSE

1. The Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action against the Defendants, and therefore, the Defendants must be dismissed pursuant to Rule 12(b)(6), SCRCP.

FOR A SECOND DEFENSE

2. Karen Campbell was not acting in the scope of her official duty with the Office of the Governor at the time of this incident, and therefore, the Office of the Governor is not a proper Defendant pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-70. As a result, this action must be dismissed.

FOR A THIRD DEFENSE

3. The Defendant State of South Carolina is not a proper party, pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-70, and therefore, must be dismissed.

FOR A FOURTH DEFENSE

4. The Defendants deny each and every allegation of the Plaintiff's Complaint not hereinafter specifically admitted, qualified, or explained.

5. As to paragraph 1 of the Plaintiff's Complaint, the Defendants lack information upon which to form a belief as to the truth of these allegations, and therefore, deny these allegations.

6. The Defendants deny paragraphs 2 and 3 of the Plaintiff's Complaint.

7. As to paragraph 4 of the Plaintiff's Complaint, this paragraph sets forth legal conclusions which can neither be admitted or denied. However, to the extent this paragraph asserts any actions, inactions, wrongdoing or liability on the part of the Defendants, those allegations are specifically denied.

8. The Defendants deny paragraphs 5, 6, 7, 8, 9, and 10 of the Plaintiff's Complaint.

9. The Defendants deny the Plaintiff is entitled to the relief requested in the Complaint, or any other relief against the Defendants.

FOR A FIFTH DEFENSE

10. The Defendants assert any recovery by the Plaintiff must be reduced or offset by amounts Plaintiff has received or will recover from others for the same injuries and/or damages claimed in this suit.

FOR A SIXTH DEFENSE

11. The Defendants allege, upon information and belief, that any injuries or damages allegedly suffered by the Plaintiff, without admitting that to be true, were due to and caused by the sole negligence, recklessness, willfulness, wantonness, carelessness, and gross negligence of

the Plaintiff and were not caused by the Defendants, which sole negligence of the Plaintiff is a complete bar to the Plaintiff's attempt to recover from the Defendants.

FOR A SEVENTH DEFENSE

12. The Defendants allege, upon information and belief, that any injuries or damages allegedly suffered by the Plaintiff, without admitting that to be true, were due to and caused entirely by the negligence of the Plaintiff or his negligence which is more than the Defendants' negligence, and that such is a complete bar to the Plaintiff's recovery herein. Further, the Defendants allege that if the Plaintiff's negligence was less than the Defendants' negligence, that such negligence should be compared to that negligence of the Defendants, so as to apportion the relative fault as to each party.

FOR AN EIGHTH DEFENSE

13. The Defendants are the alter ego of the State of South Carolina, and therefore, are entitled to sovereign immunity from suit, including but not limited to the statutory caps on damages pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-120(a).

FOR A NINTH DEFENSE

14. The Defendants allege, upon information and belief, that any injury or damages alleged in the Plaintiff's Complaint were due to, occasioned by, or caused by intervening acts of omission or commission on the part of someone other than these Defendants, without which acts and/or omissions the Plaintiff would not have sustained any injuries or damages as are set forth in the Plaintiff's Complaint, all of which these Defendants plead as a bar to this action.

FOR A TENTH DEFENSE

15. The Defendants allege, upon information and belief, that any injuries or damages alleged suffered by the Plaintiff, without admitting them to be true, were due to and caused by

the Plaintiff's knowing and voluntary assumption of the risk, and the Defendants therefore plead Plaintiff's assumption of the risk as a complete bar to this action.

FOR AN ELEVENTH DEFENSE

16. The Defendants deny there is joint and several liability under the South Carolina Tort Claims Act and therefore move to strike all claims for joint and several liability.

FOR A TWELFTH DEFENSE

17. The Defendants allege that the Plaintiff has failed to join an indispensable party to this action, pursuant to Rule 19, SCRCP, and therefore, this action must be dismissed against these Defendants.

FOR A THIRTEENTH DEFENSE

18. The Plaintiff has failed to state a claim against the Defendants pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-30, and therefore, this action must be dismissed.

WHEREFORE, having fully answered the Complaint of the Plaintiff, the Defendants pray that the Complaint be dismissed with prejudice, for the costs of this action, and for such other and further relief as the Court deems just and proper.

LINDEMANN & DAVIS, P.A.

BY: *s/ James M. Davis, Jr.*

JAMES M. DAVIS, JR. #6519
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
T: 803-881-8920
Email: jim@ldlawsc.com

Counsel for Defendants

April 16, 2021

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No. 2021-CP-40-1276
Wanda Whetstone, Plaintiff, v. State of South Carolina, Office of the Governor, Defendants.	)	**DEFENDANT OFFICE OF THE GOVERNOR'S MOTION FOR SUMMARY JUDGMENT**

YOU WILL PLEASE TAKE NOTICE that Defendant Office of the Governor ("Defendant") will move for an Order pursuant to South Carolina Rule of Civil Procedure 56 granting summary judgment as a matter of law as to the claims asserted by Plaintiff Wanda Whetstone ("Plaintiff") against Defendant. In support of that Motion, Defendant states as follows:

- Plaintiff alleges she was involved in an automobile accident with Karen Campbell on or about April 23, 2019, which resulted in Plaintiff allegedly suffering injuries and damages. Compl. ¶ 3.
- Prior to filing this suit, Plaintiff settled her claims against alleged tortfeasor Campbell. *Id.* ¶ 7. On July 2, 2020, Plaintiff resolved her claims against Campbell for $100,000 and in consideration for a release and covenant not to execute. (Exhibit A).
- Despite her previous settlement with Campbell's personal insurance company, Plaintiff now alleges Campbell, while driving her personal vehicle, was acting in the course and scope of her employment with Defendant at the time of the accident. *Id.* ¶ 7.
- Plaintiff's Complaint does not assert a specific cause of action against Defendant but simply contends Defendant "should be called to answer for its agent and servant's actions

under the doctrine of respondeat superior and pursuant to the South Carolina Tort Claims Act," *id.*, and should be liable "jointly and severally" for actual damages, *id.* ¶ 6.

- By settling her claim with Campbell, Defendant's potential vicarious liability for Campbell's alleged tortious conduct was released and extinguished as a matter of law. *Andrade v. Johnson*, 345 S.C. 216, 226–27, 546 S.E.2d 665, 670 (Ct. App. 2001) ("When [plaintiff] issued a covenant not to sue in [agent's] favor, any claims she had against [agent] were terminated. Thus, [principal's] derivative liability based upon [agent's] conduct was extinguished. . . . We hold the covenant not to sue issued in favor of . . . the agent, released . . . the vicariously liable principal."), *rev'd on other grounds by* 356 S.C. 238, 588 S.E.2d 588 (2003); *see also Seaboard Air Line R.R. v. Coastal Distrib.*, 273 F. Supp. 340, 343 (D.S.C. 1967) ("[A] covenant not to sue, which ordinarily does not release another joint-tortfeasor from liability, does operate as a release of the master, liable only under respondeat superior, if given to the servant responsible."); S.C. 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.").

This Motion is based upon the pleadings, any discovery that has been conducted in this case, the applicable statutory and case law, and the South Carolina Rules of Civil Procedure. A Memorandum of Law, affidavits, and exhibits may be submitted in support of the Motion.

s/David A. Anderson
David A. Anderson, SC Bar No. 11550
Hunter Adams, S.C. Bar No. 103526
RICHARDSON, PLOWDEN & ROBINSON, P.A.
P. O. Drawer 7788
Columbia, SC 29202
(803) 771-4400
danderson@richardsonplowden.com
hadams@richardsonplowden.com
ATTORNEYS FOR DEFENDANT OFFICE OF THE GOVERNOR

January 18, 2023

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No. 2021-CP-40-1276
Wanda Whetstone, Plaintiff, v. State of South Carolina, Office of the Governor, Defendants.	)	**DEFENDANT OFFICE OF THE GOVERNOR'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Defendant Office of the Governor ("Defendant"), by and through undersigned counsel, hereby submits this Memorandum of Law in Support of its Motion for Summary Judgment. For the reasons detailed further below, Defendant is entitled to judgment as a matter of law because Plaintiff's sole claim that Defendant, as a principal, is vicariously liable for the acts of its agent is legally foreclosed by Plaintiff's prior release of, settlement with, and covenant not to execute against Defendant's agent.

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual background

This case arises out of a motor vehicle accident which took place on or about April 23, 2019, in or near the 5000 block of Trenholm Road in Richland County, South Carolina. Compl. ¶ 3. Plaintiff alleges that as she was traveling southbound on Trenholm Road, Karen Campbell pulled out in front of Plaintiff while attempting to make a left turn onto Trenholm Road. *Id.* Plaintiff claims Campbell's negligence caused the accident and that she suffered injuries and damages as a result. *Id.* ¶ 6.

Prior to filing this suit, Plaintiff asserted claims under Campbell's liability insurance coverage and two separate underinsured motorist policies. USAA, Campbell's liability carrier, paid Plaintiff its policy limits of $100,000, and, in exchange for the payment, Plaintiff executed a release, settlement agreement, covenant not to execute on July 2, 2020. (**Exhibit A**). The release and covenant provides that Plaintiff agreed, in pertinent part, to:

> forever discharge Karen P. Campbell . . . from any and all claims, demands, damages, actions, and causes of action, or suits of any kind or nature whatsoever, and more particularly on account of all injuries and damages, known or unknown, both to person and property of the undersigned which have resulted or may in the future develop from an automobile accident on April 23, 2019 in Columbia South Carolina.

Id. (emphasis in original). Plaintiff likewise received two separate payments of $25,000 of the respective policy limits of the two UIM carriers: Progressive Insurance Company and Root Insurance Company. Each of the three payments were tendered prior to Plaintiff filing this lawsuit.

Despite settling her claim arising out of the motor vehicle accident with Campbell and signing a release and covenant not to execute, Plaintiff now alleges that Campbell was an agent and servant of Defendant and was acting in the course and scope of her employment at the time the accident occurred. *Id.* ¶ 7. Plaintiff curiously asserts Defendant is vicariously liable under the doctrine of *respondeat superior* and the South Carolina Tort Claims Act (S.C. CODE ANN. §§ 15-78-10 *et. seq.*) for the alleged tortious conduct of Campbell. *Id.* Plaintiff does not contend that Defendant was independently negligent or owed any duty to Plaintiff outside of asserting that Defendant is vicariously liable for the alleged tortious acts of Campbell.

B. Procedural history

Nearly two years after the motor vehicle accident with Campbell and over eight months after signing the release and covenant not to execute, Plaintiff filed a Complaint against Defendants State of South Carolina and Office of the Governor on March 18, 2021, asserting a single claim

premised on a theory of vicarious liability. Defendants moved to dismiss the Complaint on April 16, 2021, arguing the State of South Carolina was an improperly named entity under the Tort Claims Act and that Campbell was not acting within the course and scope of employment at the time of the accident. Plaintiff agreed to dismiss the State of South Carolina as a defendant and to proceed solely against the Office of the Governor, where Campbell serves as Special Assistant to the First Lady and Governor's Mansion Director. Opposing affidavits were submitted regarding whether Campbell was acting within the course and scope of her employment during the accident, and this Court ruled that the resulting factual dispute precluded dismissal of the Complaint at that preliminary stage.

Of particular note, the affidavit submitted by Plaintiff to this Court on September 22, 2021, specifically averred that, at the scene of the accident, Campbell allegedly informed Plaintiff that Campbell was employed by Defendant and was out purchasing decorations for an upcoming event when the accident occurred. Although Defendant disputes this characterization and relies on Campbell's earlier April 7, 2021 affidavit, which notes that she was "running a personal errand to [her] personal bank" "during [her] lunch break," Campbell Aff. ¶ 4, the Court need not reach or resolve any factual dispute over whether Campbell was acting in the course and scope of her employment at the time of the accident. Even assuming, *arguendo*, Campbell was acting in the scope of her employment, Defendant is entitled to judgment as a matter of law based on the release and covenant executed by Plaintiff. Thus, any such factual disputes are immaterial and irrelevant. Nevertheless, Plaintiff's affidavit indicates that when she settled her claim arising out of the motor vehicle accident with Campbell, Plaintiff was aware of a potential vicarious liability claim against Defendant.

Defendant now moves for summary judgment on the grounds that Plaintiff's settlement and release of her claim against alleged tortfeasor Campbell extinguished any derivative liability based upon Campbell's allegedly tortious conduct and thus forecloses Plaintiff's sole claim against Defendant.

LEGAL STANDARD

A motion for summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP; *see also Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 42, 747 S.E.2d 178, 181 (2013). "In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment." *Progressive Max Ins. Co.*, 405 S.C. at 42, 747 S.E.2d at 181 ; *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 425, 746 S.E.2d 35, 38 (2013).

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (citations omitted). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. . . . Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Ellis v. Davidson*, 358 S.C. 509, 518–19, 595 S.E.2d 817, 822 (Ct. App. 2004). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Id.* at 518, 595 S.E.2d at 822. When the "success of the proposed actions is a question of

law," deciding that question on summary judgment "is appropriate." *Manning v. Quinn*, 294 S.C. 383, 386, 365 S.E.2d 24, 25 (1988).

ARGUMENT

Prior to filing this suit, Plaintiff made a claim arising out of the motor vehicle accident directly against Campbell under her automobile liability policy and settled the claim with Campbell, with Plaintiff providing a release and covenant not to execute. As a result of Plaintiff's settlement with Campbell, Defendant's potential vicarious liability for Campbell's alleged tortious conduct was extinguished as a matter of law because settlement of a claim against an employee "operates as an acquittal of the employer who is only derivatively liable." *Andrade v. Johnson*, 345 S.C. 216, 226, 546 S.E.2d 665, 670 (Ct. App. 2001), *rev'd on other grounds* 356 S.C. 238, 588 S.E.2d 588 (2003).

In *Andrade*, the plaintiff sued a heating contractor and SCE&G, alleging (among other claims) the contractor negligently installed HVAC systems in the plaintiff's home while working as an agent of SCE&G. The plaintiff executed a covenant not to sue with the agent contractor in which she agreed not to bring suit against the contractor, but specifically reserved the right to pursue a suit against SCE&G as the contractor's principal. *Id.* at 221–22, 546 S.E.2d at 667–68. After that plaintiff sued SCE&G, SCE&G moved for summary judgment on the plaintiff's vicarious-liability claims asserted against it arguing its vicarious liability was extinguished by the the plaintiff's executed settlement with the agent contractor. *Id.* The trial court granted the motion, and the plaintiff appealed. The Court of Appeals held the trial court properly granted SCE&G's motion for summary judgment. *Id.* at 221, 546 S.E.2d at 668.

At the outset, the Court of Appeals noted the question had not been answered in South Carolina. *Id.* at 223, 546 S.E.2d at 668–69. Critically, the court first held that form of the settlement

(a full release, covenant not to sue, or covenant not to execute) is not dispositive of the issue. *Id.* at 224, 546 S.E.2d at 669. Rather, the court observed "[t]he most important factor is the type of liability and the relationship *inter se* of the various allegedly liable parties rather than the type of document used to discharge liability." *Id.* The key question is "whether the liability arises *only* vicariously because of the negligence of another party or whether the parties are true joint tortfeasors, both being independently negligent toward the third party." *Id.* (emphasis in original).

The Court of Appeals concluded that, when the plaintiff executed the covenant not to sue with the agent, her claims against the agent were terminated, and, therefore, the derivative liability of the principal was extinguished. *Id.* at 226–27, 546. S.E.2d at 670. The court noted that this conclusion is bolstered by the fact vicariously liable employers/principals have full rights of indemnity against a tortfeasor employee/agent. *Id.* at 226, 546 S.E.2d at 670 (internal citations omitted). The court reasoned that if the employer/principal's vicarious liability was not terminated, then the employer/principal could seek full compensation from the employee/agent who had settled, which would strip the covenant not to sue of any real meaning. *Id.* Stated another way, extinguishing the employer/principal's derivative liability protects the settling employee/agent from an indemnity claim.

The Court of Appeals therefore held that South Carolina common law was clear that a covenant in favor of an agent released a principal: "[A] covenant not to sue, which ordinarily does not release another joint-tortfeasor from liability, does operate as a release of the master, liable only under *respondeat superior*, if given to the servant responsible." *Id.* (quoting *Seaboard Air Line R.R. v. Coastal Distrib.*, 273 F. Supp. 340, 343 (D.S.C. 1967)).

Here, *Andrade* mandates that Defendant's derivative liability was extinguished as a matter of law when Plaintiff settled her claim with Campbell. As noted in *Andrade*, the fact a covenant

not to execute was utilized is of no moment—even when the covenant reserves the option to assert other claims. Again, as the Court of Appeals noted, the type of document used to effectuate the settlement is not dispositive, but rather the analysis turns on the relationship between the parties and whether the employer's liability, if any, is solely vicarious. Thus, because Plaintiff's settlement with Campbell was accompanied by, and in consideration for, a covenant not to execute, summary judgment on Plaintiff's vicarious liability claim against Defendant is proper where Plaintiff has alleged that Defendant's liability arises only vicariously because of the purported negligence of Campbell. *See id.* at 226–27, 546 S.E.2d at 670 ("When [plaintiff] issued a covenant not to sue in [agent's] favor, any claims she had against [agent] were terminated. Thus, [principal's] derivative liability based upon [agent's] conduct was extinguished. . . . We hold the covenant not to sue issued in favor of . . . the agent, released . . . the vicariously liable principal."); *see also Oyuela-martinez v. Kuhn & Kuhn, LLC,* No. 2019-CP-10-00341, 2020 WL 12932358, at *2 (S.C.Com.Pl. May 28, 2020) (Judge Bentley Price holding that an employer's derivative liability was extinguished when the alleged tortfeasor employee executed a covenant not to execute with the employee), *aff'd Oyuela-Martinez v. Kuhn & Kuhn, LLC*, No. 2020-000932, 2022 WL 2826358 (S.C. Ct. App. July 20, 2022); S.C. 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.").

To the extent Plaintiff may cite to *Wade v. Berkeley County*, 348 S.C. 224, 559 S.E.2d 586 (2002),[1] in opposition to the instant Motion. There, the Supreme Court held that the plaintiff's

[1] It should be noted that *Andrade* was decided March 19, 2001. The *Andrade* decision came between the Court of Appeals' decision in *Wade* on April 3, 2000, and the Supreme Court's affirmance of *Wade* on February 4, 2002. Thus, it appears possible that the holding of *Andrade* may not have been available as a ground for summary judgment to Berkeley County at the time the *Wade* decisions were made.

execution of a covenant not to execute with a tortfeasor employee was not a "settlement" within the meaning of S.C. CODE ANN. § 15-78-70(d) of the Tort Claims Act such that a later claim against the employer, Berkeley County, was not statutorily barred. *Id.* In *Wade*, the plaintiff settled with a tortfeasor employee under a covenant not to execute and later sued the employer, Berkeley County, under a vicarious liability theory. *Id.* Berkeley County moved for summary judgment under § 15-78-70(d), which 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.

In applying the statute, the Supreme Court held that the settlement between the plaintiff and the tortfeasor employee was not made "under the act" within the meaning of the statute since no claim had been made against the County at the time of the settlement. *Id.* at 230, 559 S.E.2d at 588–89.

Wade is distinguishable. That case considered only the effect of S.C. CODE ANN. § 15-78-70(d) and did not address vicarious liability, the doctrine of respondeat superior, or the separate common-law principle that a settlement of a claim against an employee operates to extinguish the liability of the employer who is only derivatively liable. Defendant is not moving for summary judgment here pursuant to the provisions of § 15-78-70(d) but is instead moving for summary judgment based upon the common-law principles applicable to employers and employees. The statutory provisions of the Tort Claims Act are threshold requirements which a plaintiff must satisfy in order for sovereign immunity to be waived and liability asserted against a state entity. *See* S.C. CODE ANN. § 15-78-20(a) ("[I]t 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.").

Here, Defendant argues that, as an employer, any vicarious liability was extinguished upon the settlement between Plaintiff and Campbell based on common-law principles. Defendant's argument is not rooted in the provisions of the Tort Claims Act, but rather in the doctrine of respondeat superior and the principles of common law governing derivative liability recognized in *Andrade*. Defendant's status as an arm of the State is immaterial to its argument that any derivative liability as an *employer* was extinguished by Plaintiff's release of, and covenant not to execute against, Defendant's employee. Nothing in the Tort Claims Act changes this fact. The Act does not abrogate this common-law rule. *Cf. O'Laughlin v. Windham*, 330 S.C. 379, 384, 498 S.E.2d 689, 691 (Ct. App. 1998) ("A strong presumption . . . exists that the General Assembly does not intend to supplant common law principles when enacting legislation."). On top of this presumption, the Act requires that "[t]he provisions of this chapter . . . must be liberally construed in favor of limiting the liability of the governmental entity," which further supports the conclusion that this common-law rule protects Defendant here. S.C. CODE ANN. § 15-78-200. Finally, if Plaintiff is allowed to both settle with Campbell personally and proceed against Defendant, the intent of the Tort Claims Act would be entirely defeated since the Act was meant to insulate employees acting within the scope of their employment from liability and protect government entities from being liable when their employees act outside of the scope of their employment. Plaintiff is, however, trying to pursue both of these avenues of recovery, which should not be permitted. Plaintiff chose to pursue a claim against Campbell outside of the Tort Claims Act and should be bound by that decision. Plaintiff cannot release Campbell of liability and then later seek to recover from Defendant solely under a theory of derivative liability.

CONCLUSION

When Plaintiff signed the release and covenant not to execute in favor of Campbell, Defendant's derivative liability, if any, was extinguished as a matter of law. Defendant therefore respectfully requests this Court enter summary judgment in its favor.

s/David A. Anderson
David A. Anderson, SC Bar No. 11550
Hunter Adams, S.C. Bar No. 103526
RICHARDSON, PLOWDEN & ROBINSON, P.A.
P. O. Drawer 7788
Columbia, SC 29202
(803) 771-4400
danderson@richardsonplowden.com
hadams@richardsonplowden.com
ATTORNEYS FOR DEFENDANT OFFICE OF THE GOVERNOR

January 18, 2023

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS
Wanda Whetstone, Plaintiff(s), vs. State of South Carolina, Office of the Governor, Defendant(s).	Civil Action No. 2021CP4001276 **PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff, Wanda Whetstone, by and through her undersigned counsel, submits this Memorandum of Law in Opposition to Defendant's, Office of Governor (hereinafter "Governor"), Motion for Summary Judgment. The reasons for said opposition are that the provisions of the South Carolina Tort Claims Act, hereinafter "SCTCA", and the case law allow Plaintiff's claim to proceed and demand the denial of Defendant's Motion for Summary Judgment.

STATEMENT OF FACTS

This case arises subsequent to a car wreck occurring in the 5000 Block of Trenholm Road in Richland County, SC on April 23, 2021. Plaintiff was traveling southbound when Karen Campbell, an employee of "Governor", failed to yield the right of way when turning left into traffic out of a private drive and collided with plaintiff. This collision caused injuries and damages to Plaintiff.

Plaintiff filed a claim with USAA, the insurance carrier of employee of Defendant, Karen Campbell. Ms. Campbell's carrier offered the policy limits of $100,000 which was accepted by Plaintiff through a document entitled "STATE OF SOUTH CAROLINA COVENANT NOT TO EXECUTE, POLICY RELEASE, AND SETTLEMENT AGREEMENT". (EXHIBIT A) Defendant refers to the document as a release and covenant in Defendant's Memorandum, but the release portion of the title only refers to a "Policy Release" of USAA and not a release of any parties. The Covenant Not to Execute specifically reads in part, "This Covenant is not intended to and does not release any claim that the

undersigned may have against any other parties or that might be due from any other insurance company." (Exhibit A, ¶2)

The Plaintiff believes that at the time and place in question, Karen Campbell was acting within the course and scope of her employment with the Office of the Governor whereby Defendant "Governor" is called to answer for its agent and servant's actions pursuant to S.C. Tort Claims Act, S.C. Code of Laws §15-78-10 et. seq. As a result, this action was instituted on March 18, 2021 against Defendant, Office of the Governor.

Defendant has filed the subject Motion for Summary Judgment claiming that the Covenant Not to Execute entered between Plaintiff, Karen Campbell and USAA extinguishes any claim against Defendant based on a theory of vicarious liability.

SUMMARY JUDGMENT STANDARD

Summary Judgment Motions are controlled by SCRCP, Rule 56. Specifically Rule 56(c) states "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Summary judgment should not be granted unless there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Summary judgment should not be granted even where there is no dispute as to evidentiary facts if there is dispute as to the conclusions to be drawn from such facts. *Dowling v. Home Buyers Warranty Corporation*, 400 S.E.2d 143, 303 S.C. 295 (1991); *Baugus v. Wessinger*, 401 S.E.2d 169, 303 S.C. 412 (1991). "In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing the summary judgment." *Progressive Max Ins. Co. v Floating Caps, Inc.*, 404 S.C. 35, 42, 747 S.E. 2d 178, 181.

ARGUMENT

Plaintiff made a claim, and resolved the claim, against Karen Campbell, an employee of Defendant, Office of Governor, by and through the employee's personal automobile insurance carrier, USAA. Defendant claims this extinguishes the Plaintiff's claim against Defendant. However, because this claim is brought pursuant to the "SCTCA" this claim is governed by the case law and statutes of the "SCTCA" which allows Plaintiff's claim to proceed. Therefore, Plaintiff believes a denial of Defendant's Summary Judgment Motion should be entered by the Court.

Defendant claims that Plaintiff's resolution of a claim against employee of Defendant extinguishes the vicarious liability claim against Defendant as employer. Defendant's authority for the proposition is the case of *Andrade v. Johnson,* 345 S.C. 216, 546 S.E.2nd 665 (Ct. App. 2001). However, that case was not a case involving the "SCTCA". It is a case brought against a contractor who had a tenuous connection with SCE&G through a promotional campaign. The contractor was not an employee of SCE&G. The Court of Appeals ruled that the covenant not to sue entered into with the contractor also operated as a release of the principal when the principal is only derivatively liable.

In deciding *Andrade*, the Court pointed to common law that "in South Carolina, a master or principal only vicariously liable does not have an aliquot or proportional portion he or she ought to pay, but rather may shift the entire loss to the servant or agent actively responsible, and may recover in full from the servant" *Id.* at 225. As a result, the Court further points out that if the covenant released the servant, but not the master or principal, it would necessarily follow the master or principal could seek indemnification from the servant/agent which would mean the covenant would "effectively strip the covenant not to sue of any real meaning". *Id.* at 226.

Andrade is a case decided on the principle of indemnity and interpretation of the South Carolina Uniform Contribution Among Tortfeasers Act (hereinafter, "UCATA") S.C. Code Ann. §15-38-10 to 70 (Supp.2000). It is important to note that neither indemnity nor the UCATA are applicable to the SCTCA and its application.

The common law provided tort immunity to all governmental entities. It is only through the SCTCA that any right of claim is given in tort against governmental entities. The SCTCA is explicit in SC Code Ann. §15-78-70(c) that claims may be brought against the governmental entity for liability of an act of its employee. Further, the act does not provide for any indemnity for the governmental entity from their employees. This is a profound distinction from the one in *Andrade* cited by Defendant.

Andrade uses the "UCATA" in its decision by refusing to extend the UCATA to parties who are only vicariously liable. However, the UCATA expressly does not apply to governmental entities.

> **§15-38-65 Uniform Contribution Among Tortfeasors Act not applicable to governmental entities**:
>
> No payment shall be made from state appropriated funds or other public funds to satisfy claims or judgments against governmental entities or governmental employees acting within the scope of their official duties arising under the Uniform Contribution Among Tortfeasors Act. The South Carolina Tort Claims Act is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of his official duty. The Uniform Contribution Among Tortfeasors Act shall not apply to governmental entities.

In other words, the "UCATA", which was a significant basis of the *Andrade* decision, does not apply to the facts of the present case. As a result, the findings in *Andrade*, which is the bedrock of Defendant's argument, do not apply to the facts in the present case. It is apparent that "SCTCA" claims are different with the mechanisms for dealing with claims, indemnity and vicarious liability contained within the Act itself.

Our Supreme Court decided a case very similar to the facts in the subject case in the 2002 case of *Wade v. Berkeley County,* 348 S.C. 224, 559 S.E. 2d 586 (2002). It should be noted that *Wade* was decided subsequent to *Andrade* without mention of the *Andrade* decision or the vicarious liability holding in *Andrade*.

In *Wade*, a claim was brought against a driver in an automobile wreck and the case against the driver was settled by way of a "Covenant Not to Execute". The driver was then deleted as a defendant and his employer, County of Berkeley, was named as a party defendant claiming the County was liable

under the provisions of the "SCTCA". The County filed a Motion for Summary Judgment claiming the Covenant Not to Execute barred the tort action against the County. The Supreme Court found the Covenant was not a settlement within the SCTCA. The Court in *Wade* pointed to the SCTCA, S.C. Code §15-78-70(d) which provides:

> A settlement or judgement in an action or 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]

The Court determined that "under this chapter" applied to either a "settlement or judgment in an action" and a "settlement of a claim". The Court stated, "to invoke the provision of §15-78-70(d), there must be a settlement or judgment in an action under the Act or a settlement of a claim under the Act." *Id.* at 230.

The Court further reasons:

> Even though Wade was aware he might have an action against County under the Act when he and Pierce (driver/employee) executed the covenant not to execute, no action had been initiated, nor had any claim been filed, against County. At the time of the settlement, Wade had only initiated an action against Pierce in his individual capacity, not against County as Pierce's employer. Accordingly, at the time Wade and Pierce executed the settlement documents, there were no actions "under this chapter". Wade and Pierce's settlement did not invoke the provisions of 15-78-70(d) barring Wade from further action against the County.
>
> *Id.* at 230.

As in *Wade*, the Plaintiff in this action was aware she may have a claim against the Office of Governor when she executed the covenant with the Defendant's employee, no action had been initiated against Defendant, nor had any claim been filed against Defendant. Plaintiff had only initiated a claim against employee and employee's insurer in employee's individual capacity. Therefore, given the holding in *Wade*, Plaintiff's covenant and settlement with USAA did not invoke the provisions of §15-78-70(d) thereby allowing Plaintiff's claim against Defendant to proceed.

The Court in *Wade* went further to note the construction of §15-78-70(d) and its legislative history may not follow the intended policy of the SCTCA, but the Court is clear in ruling that:

> 15-78-70(d) permits a Plaintiff to maintain an action against a governmental employee in his individual capacity, settle, and then pursue an action against the governmental employer for the tort of his employee allegedly committed while in the scope of employment. This result circumvents that policy of the Act which is to protect employees from personal liability for torts committed while acting within the scope of employment...Nevertheless, our construction of the statute is limited by its legislature history.
>
> *Id.* at 230-231

The basis of Defendant's Motion for Summary Judgment and argument supporting the Motion is not based on the SCTCA which controls all aspects of claims against a governmental entity. Based upon the SCTCA and the rulings of the Courts interpreting the SCTCA, Defendant's Motion should be denied.

CONCLUSION

When Plaintiff signed the covenant with USAA and Karen Campbell, employee of Office of Governor, it did not constitute a settlement under the SCTCA. Given the case and statutory law, Defendant's Motion for Summary Judgment should be denied.

HARRIS, GRAVES & WILLIAMS, LLC

/s/Mitchell J. Williams

MITCHELL J. WILLIAMS
Attorney for Plaintiff
SC Bar No. 8002
P.O. Box 11566
Columbia, SC 29211
(803) 799-2911
mjw@harrisgraves.com

Columbia, South Carolina

Dated: July 20, 2023

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS
Wanda Whetstone, Plaintiff(s), vs. State of South Carolina, Office of the Governor, Defendant(s).	Civil Action No. 2021CP4001276 **MOTION FOR RECONSIDERATION**

TO: **THE HONORABLE WILLIAM A. MCKINNON, CIRCUIT COURT JUDGE,** Sixteenth Judicial Circuit, Moss Justice Center, 1675-1J York Highway, York, South Carolina 29745; and

DAVID A. ANDERSON, ESQ., RICHARDSON, PLOWDEN, CARPENTER & ROBINSON, P.A., PO Drawer 7788, Columbia, SC 29202

COMES NOW the Plaintiff, Wanda Whetstone, and, pursuant to the South Carolina Rules of Civil Procedure, Rule 59(e), makes her Motion to Reconsider as follows:

PROCEDURAL HISTORY

This matter came before this Honorable Court on July 25, 2023 pursuant to a Motion for Summary Judgment filed by Defendant on January 18, 2023. The action originated with the filing of a Summons and Complaint alleging Defendant, Office of the Governor, hereinafter "Governor", was responsible for the negligent acts of its employee, Karen Campbell, which occurred on April 23, 2019. This action was brought pursuant to the provisions of the S.C. Tort Claims Act (SCTCA), SC Code of Laws §15-78-10 et.seq.

This Court granted Defendant's Motion for Summary Judgment by way of an Order executed on July 26, 2023. This Motion is filed within 10 days of that Order pursuant to SCRCP, Rule 59(e).

QUESTIONS PRESENTED

I. Did the Court err in determining that Summary Judgment was proper for a governmental entity in a claim brought pursuant to the South Carolina Tort Claims Act when the plaintiff has previously entered into a Covenant Not to Execute with the individual employee of the governmental entity for the same occurrence?

FACTUAL STATEMENT OF THE CASE

This case arises subsequent to a car wreck occurring in the 5000 Block of Trenholm Road in Richland County, SC on April 23, 2021. Plaintiff was traveling southbound when Karen Campbell, an employee of "Governor", failed to yield the right of way when turning left into traffic out of a private drive and collided with plaintiff. This collision caused injuries and damages to Plaintiff.

Plaintiff filed a claim with USAA, the insurance carrier of employee of Defendant, Karen Campbell. Ms. Campbell's carrier offered the policy limits of $100,000 which was accepted by Plaintiff through a document entitled "COVENANT NOT TO EXECUTE, POLICY RELEASE, AND SETTLEMENT AGREEMENT". (Exhibit A) The Covenant Not to Execute specifically reads in part, "This Covenant is not intended to and does not release any claim that the undersigned may have against any other parties or that might be due from any other insurance company." (Exhibit A ¶2)

The Plaintiff believes that at the time and place in question, Karen Campbell was acting within the course and scope of her employment with the Office of the Governor whereby Defendant "Governor" is called to answer for its agent and servant's actions pursuant to S.C. Tort Claims Act, S.C. Code of Laws §15-78-10 et. seq. As a result, this action was instituted on March 18, 2021 against Defendant, Office of the Governor.

Defendant filed the subject Motion for Summary Judgment claiming that the Covenant Not to Execute entered between Plaintiff, Karen Campbell and USAA extinguishes any claim against Defendant based on a theory of vicarious liability. The Court ruled on August 26, 2023 for defendant on the Motion for Summary Judgment by way of entry of an Order.

ARGUMENT

I. **Did the Court err in determining that Summary Judgment was proper for a governmental entity in a claim brought pursuant to the South Carolina Tort Claims Act when the plaintiff has previously entered into a Covenant Not to Execute with the individual employee of the governmental entity for the same occurrence?**

The facts in the present case are very similar to the facts in the case of Wade v. Berkeley County, 348 S.C. 224, 559 S.E. 2d 586 (2002) to allow a case to proceed against a governmental entity. In Wade, a claim was brought by a plaintiff in an automobile wreck and the case against the opposing driver was settled by way of a "Covenant Not to Execute" with the opposing driver's insurance carrier. The opposing driver was then deleted as a Defendant and his employer, County of Berkeley, was named as a party Defendant claiming the County was liable under the provision of SCTCA. The County filed a Motion for Summary Judgment claiming the Covenant Not to Execute barred the tort action against the County. The Supreme Court found the Covenant was not a settlement within the SCTCA. The Court in *Wade* pointed to the SCTCA, S.C. Code §15-78-70(d) which provides:

> A settlement or judgement in an action or 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]

The Court determined that "under this chapter" applied to either a "settlement or judgment in an action" and a "settlement of a claim". The Court stated, "to invoke the provision of §15-78-70(d), there must be a settlement or judgment in an action under the Act or a settlement of a claim under the Act." *Id.* at 230.

The Court further reasons:

> Even though Wade was aware he might have an action against County under the Act when he and Pierce (driver/employee) executed the covenant not to execute, no action had been initiated, nor had any claim been filed, against County. At the time of the settlement, Wade had only initiated an action against Pierce in his individual capacity, not against County as Pierce's employer. Accordingly, at the time Wade and Pierce executed the settlement documents, there were no actions "under this chapter". Wade and Pierce's settlement did not invoke the provisions of 15-78-70(d) barring Wade from further action against the County.
>
> *Id.* at 230.

As in *Wade*, the Plaintiff in this action was aware she may have a claim against the Office of Governor when she executed the covenant with the Defendant's employee, no action had been initiated against Defendant, nor had any claim been filed against Defendant. Plaintiff had only initiated a claim against employee and employee's insurer in employee's individual capacity. Therefore, given the holding

in *Wade*, Plaintiff's covenant and settlement with USAA did not invoke the provisions of §15-78-70(d) thereby allowing Plaintiff's claim against Defendant to proceed.

The Court in *Wade* went further to note the construction of §15-78-70(d) and its legislative history may not follow the intended policy of the SCTCA, but the Court is clear in ruling that:

> 15-78-70(d) permits a Plaintiff to maintain an action against a governmental employee in his individual capacity, settle, and then pursue an action against the governmental employer for the tort of his employee allegedly committed while in the scope of employment. This result circumvents that policy of the Act which is to protect employees from personal liability for torts committed while acting within the scope of employment...Nevertheless, our construction of the statute is limited by its legislature history.
>
> *Id.* at 230-231

Defendant's Motion for Summary Judgment, argument supporting the Motion and the Court's Order is not based on the SCTCA. It instead relies on the Common Law finding of the Court of Appeals in the case of *Andrade v. Johnson,* 345 S.C. 216, 546 S.E.2nd 665 (Ct. App. 2001) which was not a SCTCA case. *Andrade* was a case where a consumer settled with a contractor by way of a "Covenant Not to Execute". The consumer then filed an action against SCE&G which had a very tenuous connection with the contractor through a preferred network of contractors.

In deciding *Andrade*, the Court pointed to common law that "in South Carolina, a master or principal only vicariously liable does not have an aliquot or proportional portion he or she ought to pay, but rather may shift the entire loss to the servant or agent actively responsible, and may recover in full from the servant" (emphasis in original) *Id.* at 225. As a result, the Court further points out that if the covenant released the servant, but not the master or principal, it would necessarily follow the master or principal could seek indemnification from the servant/agent which would mean the covenant would "effectively strip the covenant not to sue of any real meaning". *Id.* at 226.

Andrade is a case decided on the principle of indemnity and interpretation of the South Carolina Uniform Contribution Among Tortfeasers Act (hereinafter, "UCATA") S.C. Code Ann. §15-38-10 to 70

(Supp.2000). It is important to note that neither indemnity nor the UCATA are applicable to the SCTCA and its application.

The common law provided tort immunity to all governmental entities. It is only through the SCTCA that any right of claim is given in tort against governmental entities. The SCTCA is explicit in SC Code Ann. §15-78-70(c) that claims may be brought against the governmental entity for liability of an act of its employee. Further, the act does not provide for any indemnity for the governmental entity from their employees. This is a profound distinction from the one in *Andrade* cited by Defendant.

Andrade uses the "UCATA" in its decision by refusing to extend the UCATA to parties who are only vicariously liable. However, the UCATA expressly does not apply to governmental entities.

> **§15-38-65 Uniform Contribution Among Tortfeasors Act not applicable to governmental entities**:
>
> > No payment shall be made from state appropriated funds or other public funds to satisfy claims or judgments against governmental entities or governmental employees acting within the scope of their official duties arising under the Uniform Contribution Among Tortfeasors Act. The South Carolina Tort Claims Act is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of his official duty. The Uniform Contribution Among Tortfeasors Act shall not apply to governmental entities.

In other words, the "UCATA", which was a significant basis of the *Andrade* decision, does not apply to the facts of the present case. As a result, the findings in *Andrade*, which is the bedrock of Defendant's argument and the Court's Order, do not apply to the facts in the present case. It is apparent that "SCTCA" claims are different with the mechanisms for dealing with claims, indemnity and vicarious liability contained within the Act itself.

This Court ultimately granted Defendant "Governors" Motion for Summary Judgment finding the *Andrade* case to be applicable. Plaintiff respectfully requests the Court to reconsider the granting of Defendant's Motion for Summary Judgment in that:

1) SCTCA is the controlling statutory law in determining cases brought within the act, and

2) The case of *Wade v. Berkeley County* is the controlling authority in the present case; and

3) *Andrade* does not apply in the present action as it is decided based on indemnity and the UCATA which are both inapplicable in SCATA cases.

WHEREFORE, the Plaintiffs pray that the Court reconsider its judgment in the above matter as requested above and amend and reissue the Order in this matter accordingly.

HARRIS, GRAVES & WILLIAMS, LLC

/s/ Mitchell J. Williams

MITCHELL J. WILLIAMS
Attorney for Plaintiff
SC Bar No. 8002
P.O. Box 11566
Columbia, SC 29211
(803) 799-2911
mjw@harrisgraves.com

Columbia, South Carolina

Dated: August 2, 2023

USAA Casualty Insurance Company

STATE OF SOUTH CAROLINA COVENANT NOT TO EXECUTE, POLICY RELEASE, AND SETTLEMENT AGREEMENT COUNTY OF RICHLAND

Member Name	Claim Number	Date of Loss
Karen P Campbell	008345106 - 018	04/23/2019

In consideration of the total sum of ($100,000.00) dollars, sufficiency of which is hereby acknowledged, the undersigned, hereby covenant and forever discharge Karen P Campbell and their property agents, servants, employees, heirs, successors, and assigns, none of whom admits any liability to the undersigned, but expressly deny such liability, from any and all claims, demands, damages, actions, and causes of actions, or suits of any kind or nature whatsoever, and more particularly on account of all injuries and damages, known or unknown, both to person and property of the undersigned which have resulted or may in the future develop from an automobile accident on April 23, 2019 in Columbia South Carolina

This Covenant is not intended to and does not release any claim that the undersigned may have against any other parties or that might be due from any other insurance company. The undersigned expressly reserves the right to prosecute a legal action in tort against Karen P Campbell solely for the purpose of establishing a claim for any such benefits due from any other party or insurance company for the purpose of establishing a claim for such benefits under such policy or policies. For the consideration recited above, the undersigned specifically agree and convenant that they will never seek to execute any judgment obtained against the releasees and will not seek to collect any such judgment from the personal assets of the releasees. If any judgment is obtained against the releasees, the undersigned agree to seek to collect such judgment only from another party or carriers.

The undersigned further agree and covenant that if a verdict is returned against the releasees, they will take such steps as are necessary to mark the judgment paid and satisfied as soon as is legally practicable without making any effort to collect any amount from the releasees.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 2nd (Day) day of July (Month), 20 20

Signed, sealed, and delivered in the presence of:

Wanda Whetstone 07/02/2020

EXHIBIT "A"

61269-0318
Page 1 of 1

State of South Carolina)
)
County of Richland) Circuit Court
2021CP4001276

Wanda Whetstone)
)
v.) Transcript of Record
)
State of South Carolina,)
Office of the Governor)

July 25, 2023
Richland, South Carolina

B E F O R E:

The Honorable William A. McKinnon, Judge.

A P P E A R A N C E S (All present by video or telephone):

Mitchell J. Williams
Attorney for the Plaintiff

David Anderson
Attorney for the Defendant

Debra Price, CER-985
Transcriber

THE COURT: Mr. Anderson, we got a busy morning. So let me stop you. I think I've got a pretty good handle on your argument, if that's okay.

Let me turn to Mr. Williams.

MR. ANDERSON: Thank you, Your Honor.

THE COURT: Mr. Williams, in the memo, you tell me I should look at the release language. The release language is definitely a release. It's not a -- I mean, it says, in consideration of a hundred thousand dollars, the undersigned forever discharges Karen P. Campbell and the property from any and all claims. I mean, that's a full release, isn't it?

MR. WILLIAMS: I'm sorry, it's a covenant not to execute and it's a fairly standard covenant.

THE COURT: Well, it says discharge. What does fully discharge mean?

MR. WILLIAMS: Well, I think that as far as she is concerned, there is a discharge, but the additional language makes it very clear that she, the plaintiff, would have a right to bring a claim against any other parties and to initiate a suit against Ms. Campbell for the purpose of recovering from any additional insurance coverages. So the release is -- if you look at the title of it, it's a little confusing because it has release on one line, but it's a policy release is what's found actually in the language that's there.

The thing to understand here I think that's important is that this is different because it's under the South Carolina Tort Claims Act. And the Tort Claims Act is different in the way that it handles and deals with vicarious liability. The Andrade or Andre (phonetic) case, it's not a Tort Claims Act case. It's a case dealing with a contractor who has SCEG that sort of promotes them through this program that they have.

THE COURT: Well, right. But unless there's a provision in the Tort Claims Act to the contrary, the Tort Claims Act applies standard tort law. And understanding tort law, if you release the agent, the principal is released, too.

MR. WILLIAMS: Well, and that's where, as Mr. Anderson brought up, the Wade case is very important because the case in Andrade, it basically was decided based upon the Uniform Contribution Among Tortfeasors Act. That act does not apply to the South Carolina Tort Claims Act. In fact, it expressly in the Uniform Contribution Among Tortfeasors Act it says that it does not apply to governmental entities. And so that is very clear in 15-38-65. So we don't believe that Andre's holdings applies to this case at all.

In fact, it's interesting to note that the Wade v. Berkeley County case was decided subsequent to the Andrade case.

THE COURT: What's the citation for Wade?

MR. WILLIAMS: I'm sorry, sir?

THE COURT: What's the citation for Wade?

MR. WILLIAMS: Wade is 348 S.C. 344 (sic), and I have the Southeastern Second cite as well.

THE COURT: I've already got it. One minute. Okay.

MR. WILLIAMS: Okay.

THE COURT: Tell me that cite again.

MR. WILLIAMS: 348 --

THE COURT: Okay.

MR. WILLIAMS: -- S.C. 344 (sic).

MR. ANDERSON: It's 224, Your Honor.

THE COURT: Okay. Because that's not bringing it up either. S.C. 224?

MR. ANDERSON: That's correct, Your Honor.

THE COURT: Okay. Now I've got it.

MR. WILLIAMS: Okay. I apologize.

THE COURT: It's okay.

MR. WILLIAMS: I wrote it down wrong. But in Wade, what the court says is that a settlement or judgment under this chapter that it does constitute a complete bar to any further action against an employee or governmental entity by reason of the same occurrence. But the court determined that under this chapter requires that there actually be a claim that's brought under the chapter. And in fact, the language in Wade is important to note.

What the court says is 15-78-70(d) permits a plaintiff to

maintain an action against a governmental employee in his individual capacity, settle, and then pursue an action against the governmental employer for the tort that his employee allegedly committed while in the scope of employment. And the court notes that that circumvents some of the intent or the policy of the act. But based on the legislative history, the court says, we don't have any other choice but to allow this to occur.

And that's the exact situation that we have in this case where the plaintiff maintained an action against the governmental employee in their individual capacity, and then they settled, and then they pursued an action against the government. And according to Wade, which I said, was decided subsequent to Andrade --

THE COURT: Mr. Williams, just a second. Now I just read Wade. Wade isn't on this issue. I mean, in Wade, it's not -- it's a covenant not to execute. And the question is whether a covenant not to execute triggers the statutory provision barring any other claim. That's not the issue in this case, is it? I mean, that --

MR. WILLIAMS: I believe that it is. I believe it's exactly --

THE COURT: The defendant is not asserting the Tort Claims Act provision that's cited in Wade. They're saying, under the common law, this is a settlement not a covenant not

Anderson, I'm inclined to rule against you because, I mean, the contract is ambiguous. And I think if the claim is going to go to a jury, then I think the jury is going to have to make a decision as to what that contract means. I don't think I can rule -- because in order to rule in your favor, I have to rule as a matter of law there's only one permissible interpretation of this contract, correct?

MR. ANDERSON: Your Honor, I think our courts have looked at this. If you look at the -- at least in the Wade action and Andrade action, they looked at the -- they talked a covenant not to execute and whether a covenant not to execute is a release, and they both found that it is a release. And in this particular action --

THE COURT: Okay. So now Andrade you're telling me says, even if the document is not a release but just a covenant not to execute, that document excuses the principal as well?

MR. ANDERSON: Yes, Your Honor. That's what the court found in --

THE COURT: Okay. Well, let me take -- okay. What's the citation for that?

MR. ANDERSON: The Andrade case, Your Honor, is 345 S.C. 216.

THE COURT: All right.

MR. ANDERSON: And at 3 -- I don't know if the Court would like me to --

THE COURT: Okay. Go ahead, yeah.

MR. ANDERSON: To page 328 of that decision. It states, "when Andrade issued a covenant not to sue" --

THE COURT: Page 328?

MR. ANDERSON: Well, it's page 6 of the -- it depends on -- it says, id at 328. It's on --

THE COURT: Right. But that's a citation, isn't it, to Black's Law Dictionary, I think?

MR. ANDERSON: Yes, Your Honor. I've got a -- it's page -- it's under the law analysis. Oh, excuse me, 669.

THE COURT: There we go. Okay. That's the same pagination I have, okay, 669. Go ahead.

MR. ANDERSON: It states, "when Andrade issued a covenant not to sue in Johnson's favor, any claims she had against him were terminated. Thus, the SCEG's derivative liability based upon Johnson's conduct was extinguished. Where we define the covenant released Johnson but not SCEG, it would necessarily follow the SCEG could seek indemnification from Johnson and recover the entire amount of any verdict against it from him. This would effectively strip the covenant not to sue of any real meaning and result in what the court in Nelson v. Gillette described as a corrosive cycle of indemnity. The right to contribution exists only in situations involving joint tortfeasors."

Here, Your Honor, we don't have joint tortfeasors. We

have basically the principal and -- the agent and the principal. They are one. It's not like there's multiple tortfeasors that are involved in multiple layers of liability or degrees of liability. Here, you have simply it's vicarious liability derivative from Ms. Campbell being negligent; therefore, her negligence is imputed to the governor's office.

THE COURT: Okay. Let me read.

(Pause)

MR. ANDERSON: Your Honor --

THE COURT: Hold on. Let me read. All right. Yes, sir, I've finished.

MR. ANDERSON: Your Honor, the common law of this state as I'm reading -- quoting from Andrade, "the common law of this state provides that a covenant not to sue an employee operates as an acquittal of the employer who is only derivatively liable. A covenant not to sue would be" --

THE COURT: Mr. Anderson, I've got -- I've read it. It's okay. Let me --

Okay. Mr. Williams, I'm about to rule for Mr. Anderson. I think Andrade controls. Andrade says it doesn't matter whether it's a covenant not to execute or whether it's a release. If it's principal-agent, it's not joint tortfeasors and the principal is released. I mean, I don't -- I mean, it is exactly -- now, it's got a red flag in Russell (phonetic). I would look to see what the negative treatment is.

MR. WILLIAMS: Yes, Your Honor. The negative treatment indicates that it's regarding -- the underlying court indicated that the -- they concluded that the dealer agreement provides evidence of a contractual duty, and by SCEG to oversee the proper installation. And the court, the Supreme Court, overruled that and said their interpretation that neither agreement did not comport with that.

THE COURT: That there's --

MR. WILLIAMS: What they --

THE COURT: There's no discussion of the principal-agent release. Okay. I'm just looking, okay.

MR. WILLIAMS: That's correct, Your Honor.

MR. ANDERSON: Your Honor, if I might. One of the important things about Andrade to understand is that in the language there -- and you probably read it just a moment ago -- but the court points to common law of South Carolina. In South Carolina a matter of principal, who's only vicariously liable that they don't have a proportional portion that they all have to pay, but they can instead shift the entire loss to the employee. And under the common law, they have that right to do that if they choose to do that. So they can recover in full back from their servant.

THE COURT: Right.

MR. ANDERSON: That was a big part in Andrade.

THE COURT: I hear you.

MR. ANDERSON: They said, if that covenant is there, then that person's been released. How can we allow this employer or this master to bring a claim back against them? Well, none of that exists under the Tort Claims Act. The Tort Claims Act in fact says the employee has no responsibility and it all belongs to that of the governmental entity. So the Andrade case --

THE COURT: Slow down.

MR. ANDERSON: Yes.

THE COURT: You said the Tort Claims Act says the employee has no liability at all?

MR. WILLIAMS: Your Honor, may I? It doesn't. It doesn't state --

THE COURT: Hold on. Let me hear from Mr. -- because Mr. Williams, in that case, why did the defendant settle with you?

MR. WILLIAMS: Okay. Well, the Tort Claims Act -- because the claim wasn't brought under the Tort Claims Act.

THE COURT: Okay.

MR. WILLIAMS: The Tort Claims Act specifically -- what it specifically says is that the actions should be brought in the name of the entity and not in the name of the employee or the individual.

THE COURT: Right.

MR. WILLIAMS: And so that's what the Tort Claims Act specifically says. And what we can take from that is that

there is no right for the governmental entity to go back against their own employee to recover as there is in common law and as there was in Andrade and was one of the factors that the court looked at in deciding Andrade.

THE COURT: If you bring the claim under the tort's claims act, which you did not.

MR. WILLIAMS: Well, I have now. But initially, it was not brought under the Tort Claims Act. It was brought against the individual person, yes.

THE COURT: I think I've heard enough. Counsel, I appreciate it. This is a tough issue, but I think Andrade is controlling. I'm going to rule for the defense in this case.

COURT'S RULING

MR. ANDERSON: Thank you, Your Honor.

THE COURT: So Mr. Anderson, will you draft me an order?

MR. ANDERSON: Yes, Your Honor.

THE COURT: Okay.

MR. WILLIAMS: Thank you, Your Honor.

MR. ANDERSON: Thank you, Your Honor.

THE COURT: Yes. I appreciate it, gentlemen.

(End of Transcript of Record)

USAA Casualty Insurance Company

STATE OF SOUTH CAROLINA COVENANT NOT TO EXECUTE, POLICY RELEASE, AND SETTLEMENT AGREEMENT COUNTY OF RICHLAND

Member Name	Claim Number	Date of Loss
Karen P Campbell	008345106 - 018	04/23/2019

In consideration of the total sum of ($100,000.00) dollars, sufficiency of which is hereby acknowledged, the undersigned, hereby covenant and forever discharge Karen P Campbell and their property agents, servants, employees, heirs, successors, and assigns, none of whom admits any liability to the undersigned, but expressly deny such liability, from any and all claims, demands, damages, actions, and causes of actions, or suits of any kind or nature whatsoever, and more particularly on account of all injuries and damages, known or unknown, both to person and property of the undersigned which have resulted or may in the future develop from an automobile accident on April 23, 2019 in Columbia South Carolina

This Covenant is not intended to and does not release any claim that the undersigned may have against any other parties or that might be due from any other insurance company. The undersigned expressly reserves the right to prosecute a legal action in tort against Karen P Campbell solely for the purpose of establishing a claim for any such benefits due from any other party or insurance company for the purpose of establishing a claim for such benefits under such policy or policies. For the consideration recited above, the undersigned specifically agree and convenant that they will never seek to execute any judgment obtained against the releasees and will not seek to collect any such judgment from the personal assets of the releasees. If any judgment is obtained against the releasees, the undersigned agree to seek to collect such judgment only from another party or carriers.

The undersigned further agree and covenant that if a verdict is returned against the releasees, they will take such steps as are necessary to mark the judgment paid and satisfied as soon as is legally practicable without making any effort to collect any amount from the releasees.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 2nd Day day of July Month, 20 20

Signed, sealed, and delivered in the presence of:

Wanda Whetstone 07/02/2020

EXHIBIT "A"

61269-0318
Page 1 of 1

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF RICHLAND	)	**FIFTH JUDICIAL CIRCUIT**
Wanda Whetstone,	)	Civil Action No. 2021-CP-40-1276
	)	
Plaintiff,	)	
	)	
v.	)	**AFFIDAVIT OF KAREN P. CAMPBELL**
	)	
State of South Carolina, Office of the Governor,	)	
	)	
Defendants.	)	
	)	

I, Karen P. Campbell, having first been duly sworn, hereby depose, declare, and state as follows:

1. I am over the age of eighteen (18) and am of sound mind and competent to give this Affidavit, and if called upon to testify with respect to the matters set forth herein, I could and would competently do so.

2. I am currently employed by the Office of the Governor of the State of South Carolina and serve as Special Assistant to the First Lady and Governor's Mansion Director. I have served in this position for approximately four (4) years.

3. My duties in connection with my current employment include managing the operation of the Governor's Mansion Complex.

4. On April 23, 2019, during my lunch break, I was running a personal errand to my personal bank when I was involved in a minor automobile accident with Ms. Wanda Whetstone. I was driving my personal vehicle at the time of the accident and was not performing any duty related to the above-referenced position or acting within the scope of my employment. This errand

occurring during my lunch break and had nothing to do with my employment or position with the Office of the Governor.

5. It is my understanding that Ms. Whetstone previously made a claim against my personal insurance company related to this accident and subsequently settled or resolved that claim with my personal insurance company.

6. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

FURTHER AFFIANT SAYETH NOT.

This 7th day of April, 2021.

Karen P. Campbell

Karen P. Campbell

SWORN TO AND SUBSCRIBED BEFORE ME
this 7th day of April, 2021.

Notary Public for the State of South Carolina

My Commission Expires: 8/17/2027

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

William A. McKinnon Presiding Judge, Sixteenth Judicial Circuit

---

Case No. 2021CP4001276

Wanda Whetstone

Appellant,

v.

State of South Carolina, Office of the Governor

Respondent.

NOTICE OF APPEAL

Wanda Whetstone appeals the order of the Honorable William A. McKinnon dated August 8, 2023 on Appellant's Motion to Reconsider. Appellant received electronic notice of entry of this order on August 8, 2023.

August 30, 2023
Date

Mitchell J. Williams
Harris, Graves and Williams, LLC
P.O. Box 11566
Columbia, SC 29211
Attorney for Appellant
(803) 799-2911

Other Counsel of Record:

Attorney for Respondent
David A. Anderson, Esq.
Richardson, Plowden, Carpenter & Robinson, P.A.
Po Drawer 7788
Columbia,SC 29202

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Case No. 2023-001424

Wanda Whetstone

Appellant,

v.

State of South Carolina,
Office of the Governor

Respondent.

CERTIFICATE OF COUNSEL

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

Mitchell J. Williams, Esquire
Harris, Graves & Williams, LLC
PO Box 11566
Columbia, SC 29211
(803) 799-2911
Attorney for Appellant

Dated: November 30, 2023

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

Case No. 2023-001424

Wanda Whetstone

Appellant,

v.

State of South Carolina,
Office of the Governor

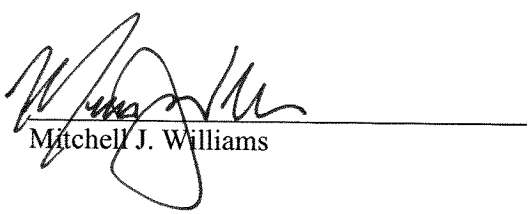
Respondent.

CERTIFICATE OF SERVICE

Mitchell J. Williams says that he is the Attorney for the Appellant, with offices at 2725 Devine Street, Columbia, SC, and that on November 30, 2023, he served a copy of the Record on Appeal via electronic mail to:

David A. Anderson
Carmen V. Ganjehsani
Hunter W. Adams
RICHARDSON, PLOWDEN &
ROBINSON, P.A.
1900 Barnwell Street
Columbia, South Carolina 29201

Thomas A. Limehouse, Jr.
Chief Legal Counsel
Wm. Grayson Lambert
Senior Litigation Counsel
Erica Wells Shedd
Deputy Legal Counsel
OFFICE OF THE GOVERNOR
South Carolina State House
1100 Gervais Street
Columbia, South Carolina 29201



Mitchell J. Williams

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

CATHERINE S. HARRISON
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211

1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

January 21, 2026

Mr. David Allen Anderson, Esquire
Richardson Plowden & Robinson, PA
PO Drawer 7788
Columbia SC 29202

Mr. Thomas Ashley Limehouse, Jr., Esquire
PO Box 338
Charleston SC 29402

Mr. William Grayson Lambert, Esquire
South Carolina State House
1100 Gervais Street
Columbia SC 29201

Mrs. Erica Wells Shedd, Esquire
1100 Gervais Street
Columbia SC 29201

Ms. Carmen Vaughn Ganjehsani, Esquire
1900 Barnwell Street
Columbia SC 29201

Mr. Hunter Weston Adams, Esquire
P.O. Drawer 7788
Columbia SC 29202

Mr. Mark Dale Chappell, Jr., Esquire
PO Box 61170

Chappell, Chappell And Newman
Columbia SC 29260

Mr. Mark D. Chappell, Esquire
PO Box 61170
Columbia SC 29260

Mr. William Sellars Detwiler, Esquire
Chappell, Chappell, & Newman
PO Box 61170
Columbia SC 29260

Re: Wanda Whetstone v. Office of the Governor
Appellate Case No. 2023-001424

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

Jasmine D. Smith, Deputy

CLERK

cc: The Honorable William A. McKinnon

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wanda Whetstone, Appellant,

v.

State of South Carolina, Office of the Governor,
Respondent.

Appellate Case No. 2023-001424

Appeal From Richland County
William A. McKinnon, Circuit Court Judge

Opinion No. 6133
Heard October 7, 2025 – Filed January 21, 2026

REVERSED

Mark D. Chappell and Mark Dale Chappell, Jr., of Chappell Smith & Arden, of Columbia; and William Sellars Detwiler, of Chappell, Chappell & Newman, Attorneys, LLC, of Columbia, all for Appellant.

David Allen Anderson, Carmen Vaughn Ganjehsani, and Hunter Weston Adams, all of Richardson Plowden & Robinson, PA, of Columbia; Thomas Ashley Limehouse, Jr., of Limehouse LLC, of Charleston; and William Grayson Lambert and Erica Wells Shedd, of Columbia, all for Respondent.

CURTIS, J.: This case concerns whether section 15-78-70(d) of the South Carolina Tort Claims Act (TCA) bars a plaintiff from settling with a government

employee in her individual capacity and then filing a separate negligence lawsuit against her employer, the State of South Carolina, Office of the Governor (Respondent) under the TCA. Appellant argues the South Carolina Supreme Court unequivocally answered this question in the negative in *Wade v. Berkeley County*, 348 S.C. 224, 559 S.E.2d 586 (2002), and the circuit court erred in relying on common law principles of derivative liability, rather than the court's holding in *Wade*. We agree and reverse.

I. BACKGROUND

Appellant Wanda Whetstone was injured in a motor vehicle accident and sued Karen Campbell, who she alleged was the at-fault driver. Appellant filed claims against Campbell's personal liability and underinsured motorist policies and recovered the policy limits. As part of the settlements, Appellant signed a Settlement Agreement and a Covenant Not to Execute which specifically preserved her right to pursue claims against "any other parties."

After settling with Campbell individually, Appellant filed a lawsuit against Respondent, alleging that Campbell was acting within the scope of her employment at the time of the accident and that Respondent "should be called to answer for its agent and servant's actions under the doctrine of *respondeat superior* and pursuant to the [TCA]." Appellant's complaint alleged Respondent was negligent through the actions of its employee, Campbell, and made no additional claims against Respondent (such as negligent hiring, supervision, and training).

Respondent initially moved for summary judgment on the basis that Campbell was not acting within the scope of her employment at the time of the accident. The circuit court denied the motion, citing the parties' conflicting affidavits concerning the nature of Campbell's excursion at the time of the accident.

Respondent then moved for summary judgment a second time, arguing that under section 15-78-70(d) of the TCA, Appellant's settlement with Campbell extinguished her claims against Respondent. The court granted the motion, citing this court's holding in *Andrade v. Johnson*, that settlement of a claim against an employee "operates as an acquittal of the employer who is only derivatively liable." 345 S.C. 216, 226, 546 S.E.2d 665, 670 (Ct. App. 2001). This appeal followed.

II. STANDARD OF REVIEW

"In reviewing the grant of summary judgment, this [c]ourt applies the same standard as the circuit court." *Braden's Folly, LLC v. City of Folly Beach*, 439 S.C. 171, 190, 886 S.E.2d 674, 684 (2023). "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (quoting Rule 56(c), SCRCP).

III. LAW/ANALYSIS

"The South Carolina Tort Claims Act is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of his official duty." S.C. Code Ann. § 15-38-65 (2005). "An employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor[e] except as expressly provided for in subsection (b)." S.C. Code Ann. § 15-78-70(a) (2005). Subsection (b) states that the TCA does not cover circumstances where "the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-70(b) (2005). 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. § 15-78-70(d) (2005).

Appellant argues the controlling authority applicable to this case is *Wade v. Berkeley County*, 348 S.C. 224, 559 S.E.2d 586 (2002). We agree. The plaintiff in *Wade* was injured in an automobile accident and filed a lawsuit against the at-fault driver, Pierce, in his individual capacity. *Id.* at 226, 559 S.E.2d at 586–87. During the discovery period, Wade settled with Pierce's personal liability insurer and executed a Covenant Not to Execute Judgment. *Id.* Wade subsequently amended his complaint, dismissing Pierce and naming Berkeley County as a defendant, alleging the county was liable under the TCA as Pierce's employer. *Id.* at 226, 559 S.E.2d at 587. The trial court granted summary judgment in favor of Berkeley County, finding that once Wade settled with Pierce, he was barred from bringing any further action against the County pursuant to section 15-78-70(d). *Id.* The Court of Appeals reversed, finding the Covenant Not to Execute was not a settlement as contemplated by the TCA, and Wade was therefore not barred from

bringing a subsequent action against the county.[1] *Id.* at 227–28, 230, 559 S.E.2d at 586.

Our supreme court reversed this court's holding that the Covenant was not a settlement agreement within the meaning of section 15-78-70. *Id.* at 228, 559 S.E.2d at 588. However, the court affirmed the Court of Appeals' holding that the previous settlement did not bar Wade from pursuing a separate action against the county. *Id.* at 230, 559 S.E.2d at 589. The court examined the statute's legislative history and held that there must be a settlement or judgment in an action or claim *under the TCA* before a government defendant may invoke the bar against further action. *Id*. at 230, 559 S.E.2d at 588–89. At the time Wade executed the covenant, no TCA action had been initiated against Berkeley County, nor had any claim been filed against it. *Id*. at 230, 559 S.E.2d at 589. The court therefore found that there were no actions pending "under [the TCA]," and that the settlement with Pierce did not bar subsequent action against his employer. *Id*. The court noted:

> As illustrated by the facts of this case, § 15-78-70(d) permits a plaintiff to maintain an action against a governmental employee in his individual capacity, settle, and then pursue an action against the governmental employer for the tort of his employee allegedly committed while in the scope of employment. This result circumvents that policy of the Act which is to protect employees from personal liability for torts committed while acting within the scope of employment. Nevertheless, our construction of the statute is limited by its legislative history.

Id. at 230–31, 559 S.E.2d at 589 (citation omitted).

We find *Wade* is factually on all fours with the present case. *See Wade III,* 339 S.C. at 516–18, 529 S.E.2d at 745–46 (describing the factual and procedural history). As in this case, Wade's claim was a derivative liability claim in that there

[1] This court heard *Wade* twice. During the first hearing, this court reversed the trial judge's ruling granting the County's motion for summary judgment. *Wade v. Berkeley County*, 339 S.C. 495, 529 S.E.2d 734 (Ct. App. 1999) ("Wade II"). This court then affirmed the previous panel's decision on a rehearing *en banc*. *Wade v. Berkeley County*, 339 S.C. 513, 529 S.E.2d 743 (Ct. App. 2000) ("Wade III").

were no allegations of tortious conduct by the government entity outside of its employee's actions. *Id*.

In this case, the trial court found the holding in *Wade* was limited to the threshold issue of whether a plaintiff may *file* a lawsuit against a government entity under these circumstances but did not explicitly address whether the common law principles of *respondeat superior* apply in a TCA case. The trial court relied on this court's holding in *Andrade*, that settlement of a claim against an employee "operates as an acquittal of the employer who is only derivatively liable." 345 S.C. at 226, 546 S.E.2d at 670. *Andrade*, however, involved common law negligence between private actors and was not a TCA case. *Id*. at 219–20, 546 S.E.2d at 667. The portions of *Andrade* cited by the circuit court were based on the court's analysis of the Uniform Contribution Among Tortfeasors Act, which is expressly inapplicable to government entities. *See* S.C. Code Ann. § 15-38-65 (2005) ("The [UCATA] shall not apply to governmental entities."). The TCA's language makes no distinction between derivative liability claims and claims against both employer and employee as joint tortfeasors. It is the exclusive remedy for all claims against an employee of a governmental entity. We are persuaded by the South Carolina District Court's holding in *Newkirk v. Enzor*, that the TCA replaces the common law doctrine of *respondeat superior*, which does not apply to TCA cases. 240 F. Supp. 3d 426, 436 (D.S.C. 2017) ("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.").[2]

We recognize, as our supreme court noted in *Wade*, that allowing Appellant to settle with Campbell individually (knowing that she was potentially acting within

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[2] We note that the dissent in *Wade III* criticized the majority opinion on the same grounds Respondent raises here. *Wade III,* 339 S.C. at 533, 529 S.E.2d at 753–54 (Goolsby, J., dissenting). Specifically, the dissent argued that the majority wrongly treated the employer and employee as joint tortfeasors, when at common law, the employer would only be vicariously liable under the doctrine of *respondeat superior*. *Id*. Our supreme court nevertheless affirmed this part of the majority's opinion without addressing the dissent's interpretation. *Wade*, 348 S.C. at 230-31, 559 S.E.2d at 589.

the scope of her employment) and then pursue a separate claim against Respondent appears contrary to the TCA's purpose, "which is to protect employees from personal liability for torts committed while acting within the scope of employment." *Wade*, 348 S.C. at 230–31, 559 S.E.2d at 589. The *Wade* court acknowledged this discrepancy but nonetheless found the express language of section 15-78-70(d), combined with the legislative history, demanded this result. *Id.* We find ourselves in the same position here.[3]

IV. CONCLUSION

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*, 348 S.C. 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. Thus, we find the common law bar to employer liability discussed in *Andrade* is not applicable in this case.

REVERSED.

WILLIAMS, C.J., and THOMAS, JJ., concur.

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[3] In settling with Plaintiff, Campbell did, however, receive the benefit of limiting any potential individual liability she would have been exposed to if the jury ultimately found she was *not* acting within the scope of her employment at the time of the accident. *See Wade III*, 339 S.C. at 529, 529 S.E.2d at 752 (Hearn, J., concurring) ("The dissent would place [Driver] 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 [Plaintiff], [Driver] and his insurance carrier would be exposed to a judgment which they otherwise could have avoided by a reasonable settlement. [Driver] and his insurance carrier are placed in a worse position than an ordinary tortfeasor simply by virtue of [his] employment with the County.").

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 FOR REHEARING

David A. Anderson
Carmen V. Ganjehsani
Hunter W. Adams
RICHARDSON, PLOWDEN & ROBINSON, P.A.
1900 Barnwell Street
Columbia, South Carolina 29201
(803) 771-4400
danderson@richardsonplowden.com
cganjehsani@richardsonplowden.com
hadams@richardsonplowden.com

Wm. Grayson Lambert
Chief Legal Counsel
Erica W. Shedd
Deputy Legal Counsel
Tyra S. McBride
Deputy Legal Counsel
Cameron R. Cox
Deputy Legal Counsel
OFFICE OF THE GOVERNOR
South Carolina State House
1100 Gervais Street
Columbia, South Carolina 29201
(803) 734-2100
glambert@governor.sc.gov
eshedd@governor.sc.gov
tmcbride@governor.sc.gov
ccox@governor.sc.gov

Counsel for Respondent

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INTRODUCTION

The Court's opinion misapprehends the Governor's argument. In fact, it rules on an argument the Governor never made. Rehearing is therefore warranted. *See* Rule 221(a), SCACR.

The Court said this case asks "whether section 15-78-70(d) of the South Carolina Tort Claims Act (TCA) bars a plaintiff from settling with a government employee in her individual capacity and then filing a separate negligence lawsuit against her employer." *Whetstone v. Off. of the Governor*, No. 2023-001424, 2026 WL 175291, at *1 (S.C. Ct. App. Jan. 21, 2026). And because the Supreme Court has held that section 15-78-70(d) does not forbid such claims, this Court said that *Wade v. Berkeley County*, 348 S.C. 224, 559 S.E.2d 586 (2002), controlled.

But *Wade* is the reason the Governor did *not* move for summary judgment based on section 15-78-70(d). Instead, the Governor invoked the same common-law immunity rule that any private employer could assert after an employee settles with a plaintiff. *See, e.g.*, Governor's Br. 4, 9–12. He relied on that rule because, absent an exception, the Tort Claims Act makes a governmental entity "liable for [its] torts in the same manner and to the same extent as a private individual under like circumstances." S.C. Code Ann. § 15-78-40. So if a private employer wouldn't be liable under these circumstances, the Governor cannot be liable either.

And if the Governor never made the only argument addressed in *Wade*, *Wade* is neither "controlling authority" nor "on all fours" here. *Whetstone*, 2026 WL 175291, at *2. Although *Wade* means that section 15-78-70(d) did not bar Whetstone's claim, the *Wade* court never addressed—because no one asked—whether the common-law defense that the Governor asserted would bar that claim. By relying on *Wade* here, the Court transmogrifies *Wade* into a sweeping decision that turns the Tort Claims Act on its head. The Court should therefore grant the Petition, withdraw its opinion, and issue a new opinion affirming the judgment below.

BACKGROUND

A. Campbell and Whetstone are in a car accident

As it relates to this Petition, the facts are undisputed: Wanda Whetstone was driving down Trenholm Road in Columbia when Karen Campbell pulled out of a parking lot and collided with Whetstone. Whetstone accused Campbell of being negligent and injuring her in various ways.

Whetstone filed a claim with Campbell's insurance company. That claim was resolved for $100,000, and in exchange, Whetstone "discharge[d]" Campbell "from any and all claims" and "agree[d] and covenant[ed] that [Whetstone] will never seek to execute any judgment obtained against the releasees and will not seek to collect any such judgment from the personal assets of the releasees." R. p. 46.

B. Procedural history

After settling with Campbell, Whetstone sued the Office of the Governor. Campbell was the Special Assistant to the First Lady and Governor's Mansion Director when the accident happened, and Whetstone claimed that Campbell was acting in the scope of her employment. Whetstone asserted a single claim "under the doctrine of respondeat superior and pursuant to the S.C. Tort Claims Act." R. p. 16.

The Office moved for summary judgment based on Whetstone's settlement with Campbell, relying on this Court's decision in *Andrade v. Johnson*, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001), *reversed on other grounds* 356 S.C. 238, 588 S.E.2d 588 (2003). The circuit court granted that motion.

This Court reversed, holding that *Wade* controls. The Governor now petitions for rehearing.

REASONS FOR GRANTING THE PETITION

I. The Court misapprehended the Governor's argument.

A. The Governor did not rely on section 15-78-70(d).

The Governor did not move for summary judgment under section 15-78-70(d). That section does not appear in his motion to dismiss. *See* R. pp. 22–23. It appeared in his memorandum in support of that motion only to explain why *Wade* didn't control. *See* R. pp. 30–31. In fact, that memorandum said that the Governor "is *not* moving for summary judgment here pursuant to the provisions of § 15-78-70(d)." R. p. 31 (emphasis added). So too on appeal. This subsection appeared in his brief only to explain why *Wade* didn't apply. *See* Governor's Br. 1, 8–9.

Instead, the Governor's argument in circuit court and here was based on the common-law rule "that the release of claims against an employee also acts as a release of claims against the employer under a vicarious liability theory." *Id.* at 1; *see also* R. p. 22 (summary judgment motion); R. p. 31 (summary judgment memo). Or as he put it at oral argument in this Court, "The Office of the Governor moved for summary judgment under the *Andrade* rule, as it's allowed to under 15-78-40. This case has nothing to do with subsection -70(d), and that's why *Wade* doesn't control." Oral Argument Video 21:24–21:36, *Whetstone v. Off. of the Governor*, No. 2023-001424 (S.C. Ct. App.) (Lambert).

Yet the Court's opinion focuses on section 15-78-70(d), saying "[t]his case concerns the meaning of" that subsection. *Whetstone*, 2026 WL 175291, at *1. This followed from the Court's statement that the Governor "moved for summary judgment a second time, arguing that under section 15-78-70(d) of the TCA, [Whetstone]'s settlement with Campbell extinguished her claim against" the Office. *Id.* But as just explained—with cites to the Record on Appeal—section 15-78-70(d) was *not* the Governor's argument below. He even expressly disclaimed relying on that

statute. R. p. 31. The Court therefore misapprehended the Governor's argument on appeal.

B. *Wade* does not preclude the Governor's argument.

Wrongly saying that the Governor had moved under section 15-78-70(d) is crucial because it led the Court to apply *Wade* as "controlling authority." *Id.* at *2. But *Wade* held only that section 15-78-70(d) doesn't bar claims like those here. It never addressed whether the Governor's common-law defense would bar them. *Wade* therefore cannot control.

The Court's opinion cannot be saved by insisting that *Wade* compels the Court's conclusion, no matter what the Governor argued. *Wade* is a case about—and only about—section 15-78-70(d). That's because "[a]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991). And the only question asked there was whether section 15-78-70(d) applied.

In *Wade*, the county moved for summary judgment under "§ 15-78-70, subsection D" as "a complete bar" to that plaintiff's claim. Pet.App.95, 98.[*] The circuit court granted summary judgment to the county based on section 15-78-70(d). *Id.* at 91–93. This Court's en banc opinion focused on that subsection and "h[e]ld § 15–78–70(d) d[id] not bar Wade's action against the County under the Tort Claims Act" because the covenant not to execute was not a settlement and that the plaintiff's claim against the employee was not a claim under the Tort Claims Act. *Wade v. Berkeley Cnty.*, 339 S.C. 513, 528, 529 S.E.2d 743, 751 (Ct. App. 2000). When the case reached the Supreme Court, the county's issues on appeal focused on section 15-78-70(d). *See* Pet.App.205. When the concept of respondeat superior issue showed up later, it was only in the

[*] The Petition Appendix includes only the record on appeal and the briefs from the Supreme Court's *Wade* docket. These documents are included in this appendix for this Court's convenience.

context of how this Court's conclusion on section 15-78-70(d) was inconsistent with the common-law rule. *See id.* at 225–28. It was not—and this is important—to argue that the common-law rule was why the county should prevail. (Nor could the county have argued that it prevailed under the common law because the county had not raised that issue below. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).)

Given the county's basis for seeking summary judgment, the circuit court's decision, this Court's en banc decision, and the briefing in the Supreme Court, it's no surprise that the Supreme Court's decision focused on whether section 15-78-70(d) prohibited Wade from pursuing his claim against the county. The court's holding was specific and narrow: "§ 15–78–70(d) permits a plaintiff to maintain an action against a governmental employee in his individual capacity, settle, and then pursue an action against the governmental employer for the tort of his employee allegedly committed while in the scope of employment." 348 S.C. at 230, 559 S.E.2d at 589.

So even if *Wade* "permits" a plaintiff to do what Whetstone did here under section 15-78-70(d), *Wade* says nothing about whether any other provision of law prohibits it. And how could *Wade* have done so? The only issue facing the Supreme Court in *Wade* was whether the circuit court properly granted summary judgment to the county under section 15-78-70(d). For the Supreme Court to have said anything more about the Tort Claims Act would've made that court the misbehaved child our judiciary has denounced. *Austin*, 306 S.C. at 19, 409 S.E.2d at 817.

It doesn't matter therefore if the facts here and in *Wade* are similar because the defendants' legal arguments about those facts are different. Rather than invoking section 15-78-70(d) like the county did in *Wade*, the Governor chose another legal rule—one that wasn't addressed in *Wade*. *Wade* therefore cannot be "controlling" here, *Whetstone*, 2026 WL 175291, at *2, and it does not preclude the Governor from making the argument that he did.

II. The Governor's argument is correct.

Because *Wade* does not foreclose the Governor's argument, the only question left is whether the Governor's common-law argument under *Andrade* is correct. It is. The Tort Claims Act did not take common-law tort defenses away from state agencies. To the contrary, it preserved them.

The Tort Claims Act waived some of the State's sovereign immunity. *See* S.C. Code Ann. § 15-78-20(a). To effectuate that waiver, the Act provides "the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents." *Id.* § 15-78-20(b). And where the Act doesn't preserve sovereign immunity or limit the government's liability in some way, it makes a government entity "liable for [its] torts in the same manner and to the same extent as a private individual under like circumstances." *Id.* § 15-78-40.

In other words, the ceiling of government liability is that of a private person. A government entity can be less liable than a private defendant, but never more. Thus, if a private defendant would not be liable in a case, a government entity could not be liable. Any other conclusion reads section 15-78-40 out of the Code. *See CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("we must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous" (internal quotation mark omitted)). So if a private defendant can claim the benefit of the *Andrade* rule, *see* 345 S.C. at 227, 546 S.E.2d at 670, so can the Governor.

None of the four points in the Court's opinion can rebut this conclusion. *First*, the Court thought that this rule didn't apply here because *Andrade* "involved common law negligence between private actors and was not a TCA case." *Whetstone,* 2026 WL 175291, at *2. But that's why the rule *should* apply here: If a private employer is not vicariously liable after a covenant not

to execute with an employee, then a government entity cannot be liable in that situation. Otherwise, the government entity would be liable not "to the same extent," but to a greater extent, "as a private individual under like circumstances." S.C. Code Ann. § 15-78-40.

Second, the Court tried to dismiss *Andrade*'s discussion as being one about UCATA, "which is inapplicable to governmental entities." *Whetstone*, 2026 WL 175291, at *2. That misreads *Andrade*. The question there was not whether UCATA supplies the rule the Governor relies on here. Rather, it was the opposite: whether UCATA changed the existing "common law of this state," which "provides that a covenant not to sue an employee operates as an acquittal of the employer who is only derivatively liable." 345 S.C. at 226, 546 S.E.2d at 670. This Court answered *no*, UCATA "does not change the common law." *Id. Andrade* thus reaffirms a longstanding defense that a private employer can invoke. Because the Governor is liable only to the same extent as a private person under like circumstances, the Governor can assert this defense too.

Third, the Court's observation that the Tort Claims Act "makes no distinction between derivative liability claims and claims against both employer and employee as joint tortfeasors" misapplies the Act and misses the point of *Andrade*. *Whetstone,* 2026 WL 175291, at *2. Because the Tort Claims Act "constitutes the exclusive remedy for any tort committed by an employee of a governmental entity," S.C. Code Ann. § 15-78-70(a), the government entity and its employee can *never* be joint tortfeasors. Either (1) the employee was within the scope of her employment, so the plaintiff must sue the government entity, or (2) the employee was "not within the scope of his official duties" or his actions "constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude," so the plaintiff must sue the employee. *Id.* § 15-78-70(b). So when the Tort Claims Act requires a plaintiff to sue the government employer for the employee's tort, the

Act fully embraces the concept of derivative, or vicarious, liability. *See id.* §§ 15-78-70(a)–(b).

Fourth, the Court's reliance on *Newkirk v. Enzor,* 240 F. Supp. 3d 426 (D.S.C. 2017), is misplaced. That case explains why *Andrade* does apply. *Newkirk* simply recognized that, under the Tort Claims Act, either the government employer is liable *or* the employee is liable, "but not both." *Id.* at 436. In other words, unlike in traditional doctrine of respondeat superior, a plaintiff could not sue the government employer *and* the employee under the Tort Claims Act. And the reason "the doctrine of respondeat superior . . . is inapplicable against South Carolina governmental entities," as *Newkirk* rightly says, is because "[g]overmental entities are vicariously liable for their employees' torts only as provided by the statute." *Id.* That is, they are considered vicariously liable still, but only "in the same manner and to the same extent as a private individual under like circumstances." S.C. Code Ann. § 15-78-40. Because a "covenant not to sue an employee operates as an acquittal of the [private] employer who is only [vicariously] liable," *Andrade*, 345 S.C. at 226, 546 S.E.2d at 670, it acquits the Governor here too. So, if the Court is "persuaded by the . . . holding in *Newkirk*," *Whetstone*, 2026 WL 175291, at *2, it should grant the petition.

III. At the very least, the Court should call on the Supreme Court to reconsider *Wade.*

This Court, of course, cannot overrule the Supreme Court. But if this Court reads *Wade* so broadly as to give every plaintiff in a Tort Claims Act case the absolute right to sue the employee individually and then to sue the government entity, this Court should, in denying the petition, request that the Supreme Court grant certiorari to reconsider *Wade* for two reasons.

The first is that *Wade* is methodologically flawed. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). To that end, "[a] statute should be given a reasonable and

practical construction consistent with the purpose and policy expressed in the statute." *Garvin v. State*, 365 S.C. 16, 21, 615 S.E.2d 451, 453 (2005). Even the Supreme Court in *Wade* (like the Court here) recognized that its reading of section 15-78-70(d) "circumvents that policy of the Act . . . to protect employees from personal liability for torts committed while acting within the scope of employment." 348 S.C. at 230–31, 559 S.E.2d at 589. The Supreme Court reached that seemingly awkward conclusion based on legislative history. *Id.* at 231, 559 S.E.2d at 589. Legislative history concerning one subsection, however, cannot overcome the expressed purpose in the Act's text. *See Smith v. Tiffany*, 419 S.C. 548, 555, 799 S.E.2d 479, 483 (2017) ("statutory interpretation begins (and often ends) with the text of the statute"); S.C. Code Ann. § 15-78-40. So even if section 15-178-70(d) wouldn't stop what Whetstone did here (settle with the employee, then sue the government employer), there's no sound reason, from a statutory-interpretation perspective, to expand that conclusion into a sweeping rule that applies to the entire Tort Claims Act.

The second reason to call for the Supreme Court to grant certiorari is that the implications of such a broad rule are horrific. Indeed, the Court seems to appreciate as much. *See Whetstone*, 2026 WL 175291, at *3 (this result "appears contrary to the TCA's purpose"). Consider just a few results. One, people will be discouraged from working for government. Plaintiffs are now incentivized to sue the government employee first. Indeed, there's no reason not to, even if the Tort Claims Act makes employees "not liable" for torts within their official duties. S.C. Code Ann. § 15-78-70(a). So much for getting the best and brightest citizens into public service.

Two, the broad rule creates an end run around the Tort Claims Act's "exclusive remedy for any tort committed by [its] employee." *Id.* Settling with an employee first must assume that employee was outside the scope of employment, but suing the government entity requires the

employee to be within that scope. So much for the General Assembly's policy decision about how to handle liability for government's torts.

And three, a second bite at the apple for the plaintiff puts the public fisc at risk to compensate a plaintiff beyond the Tort Claims Act's cap. *Id.* § 15-78-120(a). So much for the balance the General Assembly crafted between compensating injured people and protecting public funds.

CONCLUSION

The Court should grant the petition, withdraw its opinion, and issue a new opinion affirming the judgment below.

Respectfully submitted,

s/Wm. Grayson Lambert
Wm. Grayson Lambert (S.C. Bar No. 101282)
Chief Legal Counsel
Erica W. Shedd (S.C. Bar No. 104287)
Deputy Legal Counsel
Tyra S. McBride (S.C. Bar No. 103750)
Deputy Legal Counsel
Cameron R. Cox (S.C. Bar No. 107824)
Deputy Legal Counsel
OFFICE OF THE GOVERNOR
South Carolina State House
1100 Gervais Street
Columbia, South Carolina 29201
(803) 734-2100
glambert@governor.sc.gov
eshedd@governor.sc.gov
tmcbride@governor.sc.gov
ccox@governor.sc.gov

David A. Anderson
S.C. Bar No. 11550
Carmen V. Ganjehsani
S.C. Bar No. 73515
Hunter W. Adams
S.C. Bar No. 103526
RICHARDSON, PLOWDEN & ROBINSON, P.A.
1900 Barnwell Street
Columbia, SC 29201
(803) 771-4400
danderson@richardsonplowden.com
cganjehsani@richardsonplowden,com
hadams@richardsonplowden.com

Counsel for Respondent

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.

CERTIFICATE OF SERVICE

I certify that this *Petition for Rehearing* was served on counsel of record on February 2, 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/Wm. Grayson Lambert
Wm. Grayson Lambert
Counsel for Respondent

The South Carolina Court of Appeals

Wanda Whetstone, Appellant,

v.

State of South Carolina, Office of the Governor,
Respondent.

Appellate Case No. 2023-001424

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied. The attached opinion is substituted for the previous opinion, which is withdrawn.

C.J.

J.

J.

Columbia, South Carolina

FILED
Mar 20 2026

cc:
David Allen Anderson, Esquire
Thomas Ashley Limehouse, Jr., Esquire
William Grayson Lambert, Esquire

Erica Wells Shedd, Esquire
Carmen Vaughn Ganjehsani, Esquire
Hunter Weston Adams, Esquire
Mark Dale Chappell, Jr., Esquire
Mark D. Chappell, Esquire
William Sellars Detwiler, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wanda Whetstone, Appellant,

v.

State of South Carolina, Office of the Governor,
Respondent.

Appellate Case No. 2023-001424

Appeal From Richland County
William A. McKinnon, Circuit Court Judge

Opinion No. 6133
Heard October 7, 2025 – Filed January 21, 2026
Withdrawn, Substituted, and Refiled March 20, 2026

REVERSED

Mark D. Chappell and Mark Dale Chappell, Jr., and William S. Detwiler, of Chappell, Chappell & Newman, Attorneys, LLC, of Columbia, all for Appellant.

David Allen Anderson, Carmen Vaughn Ganjehsani, and Hunter Weston Adams, all of Richardson Plowden & Robinson, PA, of Columbia; Thomas Ashley Limehouse, Jr., of Limehouse LLC, of Charleston; and William Grayson Lambert and Erica Wells Shedd, of Columbia, all for Respondent.

CURTIS, J.: This case concerns whether section 15-78-70(d) of the South Carolina Tort Claims Act (TCA) bars a plaintiff from settling with a government

employee in her individual capacity and then filing a separate negligence lawsuit against her employer, the State of South Carolina, Office of the Governor (Respondent) under the TCA. Appellant argues the South Carolina Supreme Court unequivocally answered this question in the negative in *Wade v. Berkeley County*, 348 S.C. 224, 559 S.E.2d 586 (2002), and the circuit court erred in relying on common law principles of derivative liability, rather than the court's holding in *Wade*. We agree and reverse.

I. BACKGROUND

Appellant Wanda Whetstone was injured in a motor vehicle accident and sued Karen Campbell, who she alleged was the at-fault driver. Appellant filed claims against Campbell's personal liability and underinsured motorist policies and recovered the policy limits. As part of the settlements, Appellant signed a Settlement Agreement and a Covenant Not to Execute which specifically preserved her right to pursue claims against "any other parties."

After settling with Campbell individually, Appellant filed a lawsuit against Respondent, alleging that Campbell was acting within the scope of her employment at the time of the accident and that Respondent "should be called to answer for its agent and servant's actions under the doctrine of *respondeat superior* and pursuant to the [TCA]." Appellant's complaint alleged Respondent was negligent through the actions of its employee, Campbell, and made no additional claims against Respondent (such as negligent hiring, supervision, and training).

Respondent initially moved for summary judgment on the basis that Campbell was not acting within the scope of her employment at the time of the accident. The circuit court denied the motion, citing the parties' conflicting affidavits concerning the nature of Campbell's excursion at the time of the accident.

Respondent then moved for summary judgment a second time, arguing that Appellant's claims against Respondent under the TCA were extinguished as a matter of law when Appellant settled with Campbell. The court granted the motion, citing this court's holding in *Andrade v. Johnson*, that settlement of a claim against an employee "operates as an acquittal of the employer who is only derivatively liable." 345 S.C. 216, 226, 546 S.E.2d 665, 670 (Ct. App. 2001). This appeal followed.

II. STANDARD OF REVIEW

"In reviewing the grant of summary judgment, this [c]ourt applies the same standard as the circuit court." *Braden's Folly, LLC v. City of Folly Beach*, 439 S.C. 171, 190, 886 S.E.2d 674, 684 (2023). "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (quoting Rule 56(c), SCRCP).

III. LAW/ANALYSIS

"The South Carolina Tort Claims Act is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of his official duty." S.C. Code Ann. § 15-38-65 (2005). "An employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor[e] except as expressly provided for in subsection (b)." S.C. Code Ann. § 15-78-70(a) (2005). Subsection (b) states that the TCA does not cover circumstances where "the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-70(b) (2005). 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. § 15-78-70(d) (2005).

Appellant argues the controlling authority applicable to this case is *Wade v. Berkeley County*, 348 S.C. 224, 559 S.E.2d 586 (2002). We agree. The plaintiff in *Wade* was injured in an automobile accident and filed a lawsuit against the at-fault driver, Pierce, in his individual capacity. *Id.* at 226, 559 S.E.2d at 586–87. During the discovery period, Wade settled with Pierce's personal liability insurer and executed a Covenant Not to Execute Judgment. *Id.* Wade subsequently amended his complaint, dismissing Pierce and naming Berkeley County as a defendant, alleging the county was liable under the TCA as Pierce's employer. *Id.* at 226, 559 S.E.2d at 587. The trial court granted summary judgment in favor of Berkeley County, finding that once Wade settled with Pierce, he was barred from bringing any further action against the County pursuant to section 15-78-70(d). *Id.* The Court of Appeals reversed, finding the Covenant Not to Execute was not a settlement as contemplated by the TCA, and Wade was therefore not barred from

bringing a subsequent action against the county.[1] *Id.* at 227–28, 230, 559 S.E.2d at 586.

Our supreme court reversed this court's holding that the Covenant was not a settlement agreement within the meaning of section 15-78-70. *Id.* at 228, 559 S.E.2d at 588. However, the court affirmed the Court of Appeals' holding that the previous settlement did not bar Wade from pursuing a separate action against the county. *Id.* at 230, 559 S.E.2d at 589. The court examined the statute's legislative history and held that there must be a settlement or judgment in an action or claim *under the TCA* before a government defendant may invoke the bar against further action. *Id*. at 230, 559 S.E.2d at 588–89. At the time Wade executed the covenant, no TCA action had been initiated against Berkeley County, nor had any claim been filed against it. *Id*. at 230, 559 S.E.2d at 589. The court therefore found that there were no actions pending "under [the TCA]," and that the settlement with Pierce did not bar subsequent action against his employer. *Id*. The court noted:

> As illustrated by the facts of this case, § 15-78-70(d) permits a plaintiff to maintain an action against a governmental employee in his individual capacity, settle, and then pursue an action against the governmental employer for the tort of his employee allegedly committed while in the scope of employment. This result circumvents that policy of the Act which is to protect employees from personal liability for torts committed while acting within the scope of employment. Nevertheless, our construction of the statute is limited by its legislative history.

Id. at 230–31, 559 S.E.2d at 589 (citation omitted).

We find *Wade* is factually on all fours with the present case. *See Wade III,* 339 S.C. at 516–18, 529 S.E.2d at 745–46 (describing the factual and procedural history). As in this case, Wade's claim was a derivative liability claim in that there

[1] This court heard *Wade* twice. During the first hearing, this court reversed the trial judge's ruling granting the County's motion for summary judgment. *Wade v. Berkeley County*, 339 S.C. 495, 529 S.E.2d 734 (Ct. App. 1999) ("Wade II"). This court then affirmed the previous panel's decision on a rehearing *en banc*. *Wade v. Berkeley County*, 339 S.C. 513, 529 S.E.2d 743 (Ct. App. 2000) ("Wade III").

were no allegations of tortious conduct by the government entity outside of its employee's actions. *Id*.

In this case, the trial court found the holding in *Wade* was limited to the threshold issue of whether a plaintiff may *file* a lawsuit against a government entity under these circumstances but did not explicitly address whether the common law principles of *respondeat superior* apply in a TCA case. The trial court relied on this court's holding in *Andrade*, that settlement of a claim against an employee "operates as an acquittal of the employer who is only derivatively liable." 345 S.C. at 226, 546 S.E.2d at 670. *Andrade*, however, involved common law negligence between private actors and was not a TCA case. *Id*. at 219–20, 546 S.E.2d at 667. The portions of *Andrade* cited by the circuit court were based on the court's analysis of the Uniform Contribution Among Tortfeasors Act, which is expressly inapplicable to government entities. *See* S.C. Code Ann. § 15-38-65 (2005) ("The [UCATA] shall not apply to governmental entities."). The TCA's language makes no distinction between derivative liability claims and claims against both employer and employee as joint tortfeasors. It is the exclusive remedy for all claims against an employee of a governmental entity. We are persuaded by the South Carolina District Court's holding in *Newkirk v. Enzor*, that the TCA replaces the common law doctrine of *respondeat superior*, which does not apply to TCA cases. 240 F. Supp. 3d 426, 436 (D.S.C. 2017) ("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.").[2]

We recognize, as our supreme court noted in *Wade*, that allowing Appellant to settle with Campbell individually (knowing that she was potentially acting within

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[2] We note that the dissent in *Wade III* criticized the majority opinion on the same grounds Respondent raises here. *Wade III,* 339 S.C. at 533, 529 S.E.2d at 753–54 (Goolsby, J., dissenting). Specifically, the dissent argued that the majority wrongly treated the employer and employee as joint tortfeasors, when at common law, the employer would only be vicariously liable under the doctrine of *respondeat superior*. *Id*. Our supreme court nevertheless affirmed this part of the majority's opinion without addressing the dissent's interpretation. *Wade*, 348 S.C. at 230-31, 559 S.E.2d at 589.

the scope of her employment) and then pursue a separate claim against Respondent appears contrary to the TCA's purpose, "which is to protect employees from personal liability for torts committed while acting within the scope of employment." *Wade*, 348 S.C. at 230–31, 559 S.E.2d at 589. The *Wade* court acknowledged this discrepancy but nonetheless found the express language of section 15-78-70(d), combined with the legislative history, demanded this result. *Id.* We find ourselves in the same position here.[3]

IV. CONCLUSION

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*, 348 S.C. 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. Thus, we find the common law bar to employer liability discussed in *Andrade* is not applicable in this case.

REVERSED.

WILLIAMS, C.J., and THOMAS, JJ., concur.

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[3] In settling with Plaintiff, Campbell did, however, receive the benefit of limiting any potential individual liability she would have been exposed to if the jury ultimately found she was *not* acting within the scope of her employment at the time of the accident. *See Wade III*, 339 S.C. at 529, 529 S.E.2d at 752 (Hearn, J., concurring) ("The dissent would place [Driver] 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 [Plaintiff], [Driver] and his insurance carrier would be exposed to a judgment which they otherwise could have avoided by a reasonable settlement. [Driver] and his insurance carrier are placed in a worse position than an ordinary tortfeasor simply by virtue of [his] employment with the County.").