

RECEIVED

Apr 27 2026

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.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY 1

 I. Whetstone admits that the Court of Appeals didn't address the Governor's argument 1

 II. The Court of Appeals' decision is wrong 2

 A. Whetstone, like the Court of Appeals, overreads *Wade* 2

 B. Whetstone does not account for section 15-78-40 3

 C. Suing and settling with an employee first is incompatible with other parts of the Tort Claims Act 5

 III. This case is cert-worthy 6

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Andrade v. Johnson,
345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001)..... 4, 5

Kerr v. Richland Mem’l Hosp.,
383 S.C. 146, 678 S.E.2d 809 (2009) 1, 4

Newkirk v. Enzor,
240 F. Supp. 3d 426 (D.S.C. 2017)..... 5

Wade v. Berkeley Cnty.,
348 S.C. 224, 559 S.E.2d 586 (2002) 2

Statutes

S.C. Code Ann. § 15-78-40..... 4, 5

S.C. Code Ann. § 15-78-60(5)..... 4

S.C. Code Ann. § 15-78-70(a) 5, 6

S.C. Code Ann. § 15-78-70(b)..... 5

REPLY

The Office of the Governor petitioned for certiorari because the Court of Appeals has created a roadmap for every plaintiff—despite the plain text of the Tort Claims Act—to sue a government employee, settle, and then sue the government employer. Whetstone does not deny that this is the result of the Court of Appeals’ decision. In fact, she embraces it, calling whether the General Assembly “intended” that result the “primary issue” here. Return 4. That alone confirms that this Court should grant the Petition.

The rest of Whetstone’s Return points to the same conclusion. For instance, Whetstone admits that the Governor’s Office did *not* seek summary judgment under section 15-78-70(d). *E.g.*, *id.* at 5. So there’s no way the Court of Appeals could have “correctly . . . apprehended . . . the issue[]” here, *id.* at 1, when it treated a decision on section 15-78-70(d) alone as “controlling,” Pet.App.92.

And there’s no way to reconcile the Court of Appeals’ conclusion with the rest of the Tort Claims Act. A government employer’s liability may never “exceed that of a private entity.” *Kerr v. Richland Mem’l Hosp.*, 383 S.C. 146, 149, 678 S.E.2d 809, 811 (2009). Yet that’s always going to be the result because the Court of Appeals has used section 15-78-70(d) to eliminate a longstanding common-law defense available to private employers. The rest of the Tort Claims Act—especially sections 15-78-40 and 15-78-70(a)—forbids that result.

The Court should therefore grant the Petition.

I. Whetstone concedes the Court of Appeals didn’t address the Governor’s argument.

The Governor petitioned for certiorari because the Court of Appeals “misunderstood the Governor’s argument.” Pet. 6. Whetstone’s response confirms as much. She acknowledges that “[t]he record (motion and memorandum) shows the Governor expressly disclaimed moving under

§ 15-78-70(d) and instead relied on the common law rule (*Andrade*) concerning the effect of a covenant not to execute of an employee on an employer's derivative liability." Return 5; *see also id.* at 6.

That concession exposes the threshold error below. If the Governor did not move for summary judgment under section 15-78-70(d), then treating *Wade v. Berkeley County*, 348 S.C. 224, 559 S.E.2d 586 (2002), as "controlling authority" made no sense. Pet.App.92. And it leaves unanswered the dispositive question that the Petition presents: Why a motion not filed under section 15-78-70(d) should be governed by a precedent addressing only that provision.

II. The Court of Appeals' decision is wrong.

Whetstone gets the issue right. She correctly notes that the "primary issue" is whether the General Assembly intended to allow a plaintiff to pursue a claim against a government employer after settling with the employee. Return 4. But Whetstone gets the answer wrong. She treats *Wade* like an affirmative right, while effectively reading section 15-78-40 out of the Code. Her defense of the decision below cannot withstand scrutiny because that decision cannot withstand scrutiny.

A. Whetstone, like the Court of Appeals, overreads *Wade*.

Whetstone says that the facts of *Wade* and this case "are analogous," so *Wade* must control. Return 5. Not at all. The Governor didn't argue what the county in *Wade* argued because this Court had already rejected an argument under section 15-78-70(d). *See* Pet. 8. Similar facts do not matter if the legal arguments are different (and Whetstone has admitted that the legal arguments are different, *see* Return 5, 6).

Still, Whetstone insists this case presents a "statutory question" that *Wade* resolves. Return 5-6. That's wrong no matter how the Court construes it.

On the one hand, if the "statutory question" refers only to section 15-78-70(d), Whetstone

concedes the Governor’s point. As Whetstone admits, the Governor expressly disclaimed reliance on that provision in moving for summary judgment. So if Whetstone’s “statutory question” is that provision, then this argument rests on a provision that was never invoked.

Alternatively, if Whetstone is using “statutory question” in a broader sense—that is, the meaning of the Tort Claims Act as a whole—she simply assumes the very point in dispute. She presumes that *Wade* resolved that broader question without demonstrating that *Wade* ever addressed it. But Whetstone never explains how *Wade* extends beyond section 15-78-70(d). The Governor walked through that case’s history, showing how it must be limited to section 15-78-70(d). *See* Pet. 6–7. That section does not create an affirmative right to do so as part of the Tort Claims Act.

Whetstone effectively concedes as much. At one point describes *Wade* as interpreting section 15-78-70(d) as merely “*not bar[ring]* an action against a governmental employee in his individual capacity where no Tort Claims Act action existed against the employer at the time of the employee settlement.” Return 6 (emphasis added). So Whetstone admits that *Wade* is about section 15-78-70(d) and section 15-78-70(d) is only a “non-bar.”* That concession confirms that this case turns on other parts of the Tort Claims Act, not *Wade*.

B. Whetstone does not account for section 15-78-40.

Although Whetstone says that the “Court of Appeals’ ruling harmonizes *Wade* with § 15-78-40 and the Act’s text and intended purpose,” Return 7, that’s not so. Under the Court of Appeals’ decision (and Whetstone’s defense of it), a government entity may not assert the

* At one point in her Return, Whetstone appears to quote *Wade*, but the quote is actually from the Court of Appeals’ description of *Wade*. *Compare* Return 8 (first sentence of first full paragraph), *with* Pet.App.95 (conclusion of Court of Appeals’ opinion, which cites—but does not quote—*Wade*). The Court can read *Wade* and conclude that *Wade* does not create a sweeping, absolute right to sue a government employer after settling with a government employee.

common-law rule from *Andrade v. Johnson*, 345 S.C. 216, 227, 546 S.E.2d 665, 670 (Ct. App. 2001). This conclusion leaves the government entity *more* liable than a private litigant would be. That’s incompatible with section 15-78-40 because a government entity may be liable only “to the same extent as” that private employer. S.C. Code Ann. § 15-78-40.

To be sure, the Governor hasn’t argued here that a government employer should have “greater protections than private employers.” Return 7. In some instances, that’s true. *See, e.g.*, S.C. Code Ann. § 15-78-60(5) (immunity for discretionary acts). But that’s not the issue here. The issue here is ensuring that a government employer is not more liable than a private one because “at no time did the Legislature intend government liability to exceed that of a private entity.” *Kerr*, 383 S.C. at 149, 678 S.E.2d at 811.

Whetstone never explains how the Act does not allow the Governor’s Office to assert the *Andrade* rule. *See* Return 7–9. Section 15-78-40 expressly ties a government employer’s liability to the liability of a “private” defendant. S.C. Code Ann. § 15-78-40. A case (like *Andrade*) explaining a private defendant’s liability is therefore directly relevant to whether the Governor’s Office could be liable here.

In straining to avoid this conclusion, Whetstone makes some of the same points as the Court of Appeals. First, she says *Andrade* involved the Uniform Contribution Among Tortfeasors Act. *See* Return 8. That observation (again) misreads *Andrade*. As the Governor has explained, *Andrade* held that UCATA did *not* abrogate the common-law rule “that a covenant not to sue an employee operates as an acquittal of the employer who is only derivatively liable.” Pet. 10–11 (quoting 345 S.C. at 226, 546 S.E.2d at 670). That common-law rule is what the Governor’s Office moved for summary judgment under. UCATA has nothing to do with that rule.

Second, Whetstone claims that *Newkirk v. Enzor*, 240 F. Supp. 3d 426 (D.S.C. 2017), helps

her. *See* Return 8. *Newkirk* doesn't. Again, as the Governor explained in his Petition, *Newkirk* did not abrogate any rule but merely explained that the Tort Claims Act, not common-law respondeat superior, establishes how a plaintiff must bring a claim of derivate liability against a government employer. *See* Pet. 11–12. And—at most—a government employer is liable “to the same extent as” private persons, who could invoke the rule recognized in *Andrade*. S.C. Code Ann. § 15-78-40.

Whetstone's one argument that the Court of Appeals didn't make—that a jury can adjudicate facts about the Office's liability and that the Governor is trying to “expand” the Tort Claims Act—is equally unavailing. Return 8. The Governor's argument doesn't turn on any facts about what Campbell was (or wasn't) doing at the time of the accident. It's a legal argument any private employer could invoke: Settling with the employee releases the employer on a vicarious liability theory. And the plain text of section 15-78-40 allows him to make that argument. No jury needed. No new legal doctrines required.

C. Suing and settling with an employee first is incompatible with other parts of the Tort Claims Act.

Not only does Whetstone fail to reconcile her reading of *Wade* with section 15-78-40, but she also ignores another major flaw in her position: section 15-78-70(a). Under that provision, “[a]n employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor except as expressly provided for in subsection (b).” S.C. Code Ann. § 15-78-70(a). Subsection (b) provides exceptions for “conduct was not within the scope of [the employee's] official duties” or conduct that “constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.” *Id.* § 15-78-70(b).

Whetstone has never claimed that Campbell's conduct fell within subsection (b)'s exceptions. And for good reason. Whetstone's sole claim “under the doctrine of respondeat

superior and pursuant to the S.C. Tort Claims Act” is premised on the idea the exceptions don’t apply. Pet.App.17 (complaint).

If “Campbell was within the scope of her employment with the Office of the Governor,” Pet.App.16 (complaint), then Campbell “is not liable” personally for any tort, S.C. Code Ann. § 15-78-70(a). The Tort Claims Act is clear on that point. Whetstone’s reading of *Wade* cannot be squared with section 15-78-70(a)’s plain language. A plaintiff must proceed against *either* the employee *or* the government employer. A plaintiff may not proceed against the employee and *then* against the government employer. Indeed, Whetstone never explains how she could settle with Campbell and then—consistent with the Tort Claims Act—sue the Office on what she herself calls a “respondeat superior” theory because “Campbell was within the scope of her employment with the Office” when the accident occurred, Pet.App.16, 17

Put another way, allowing the Governor’s Office to invoke *Andrade*’s rule does not “deny plaintiffs” like Whetstone any “statutory remedies.” Return 8. Instead, it simply requires plaintiffs like Whetstone to comply with all parts of the Tort Claims Act.

III. This case is cert-worthy.

A. There are no preservation or scope issues. Whetstone claims that the Governor “now presses a distinct common law defense or reframes [his] arguments.” Return 9. That’s not correct, and Whetstone’s argument is inconsistent with the rest of her Return. *See id.* at 5, 6 (recognizing that the Governor did not move for summary judgment under section 15-78-70(d)). The Governor has *always* made the same argument: As he explained in his summary judgment memo in circuit court, he “[wa]s not moving for summary judgment here pursuant to the provisions of § 15-78-70(d) but [wa]s instead moving for judgment based upon the common-law principles applicable to employers and employees.” Pet.App.32. That’s the argument that he made in the Court of Appeals.

See Governor’s Ct. App. Br. 1, 8–9. It’s the argument he made in his rehearing petition in the Court of Appeals. *See* Pet.App.79–80. And it’s the argument he makes now in the Petition. *See* Pet. 5–6. Though the Court of Appeals failed to grasp the Governor’s argument, the Governor’s argument has been consistent from the beginning.

B. When it comes to why this case is important, Whetstone doesn’t dispute any of the consequences that follow from the Court of Appeals’ reading of *Wade*. *See* Pet. 14–15. Whetstone instead pushes these results aside, calling them “merits disagreements.” Return 9. Again, that’s not accurate. To be sure, the Governor disagrees with the Court of Appeals’ analysis, but the reasons why this Court should grant certiorari are on top of, not in lieu of, that disagreement.

In other words, the Court should grant the Petition not simply to correct an erroneous decision that impacts the parties here. The Court should grant the Petition to avoid discouraging people from entering public service, undercutting the General Assembly’s policy decision, and hindering the public fisc.

CONCLUSION

The Court should grant the petition.

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

Counsel for Petitioner