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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. 2026-000850

Case No. 2021-CP-40-01276

WANDA WHETSTONE,..Respondent,

v.

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

BRIEF OF PETITIONER

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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STATEMENT OF THE ISSUES

1. In *Wade v. Berkeley County*, this Court held 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." 348 S.C. 224, 230, 559 S.E.2d 586, 589 (2002). Does *Wade* create, as the Court of Appeals effectively held and despite section 15-78-40, an absolute right for a plaintiff to settle with the employee and then sue the government employer, even if the employer would have other common-law defenses to that suit based on the settlement?

2. If *Wade* stretches as far as the Court of Appeals held, should *Wade* be narrowed or overruled so that *Wade* does not conflict with the rest of the Tort Claims Act and cause horrific consequences for government entities and the public?

INTRODUCTION

The Tort Claims Act is "the exclusive remedy for any tort committed by an employee of a governmental entity." S.C. Code Ann. § 15-78-70(a). Because that exclusive remedy lies against the government employer, the employee is generally "not liable" for a tort committed "while acting within the scope of his official duty." *Id.* But when the Act substitutes the government employer as the proper defendant, it does not expand the employer's liability beyond ordinary tort principles. Instead, the government is liable only "in the same manner and to the same extent as a private individual under like circumstances." *Id.* § 15-78-40. And under settled law, a private employer is released from vicarious liability when its employee settles with a plaintiff. *See Andrade v. Johnson*, 345 S.C. 216, 227, 546 S.E.2d 665, 670 (Ct. App. 2001), *rev'd on other grounds*, 356 S.C. 238, 588 S.E.2d 588 (2003).

That rule decides this case. Whetstone's only claim against the Office of the Governor is a respondeat superior claim based on Campbell's alleged negligence. Pet.App.17. But Whetstone settled with Campbell before suing the Office. Pet.App.59. So just as a private employer would not be liable on these facts, neither is the Office. It's that simple.

The Court of Appeals reached the opposite result only by misconstruing the Office's argument and misreading this Court's decision in *Wade v. Berkeley County*. The Office moved for summary judgment under the common-law rule that an employee's settlement with a plaintiff also releases the employer from vicarious liability, Pet.App.32, so judgment should have been granted under section 15-78-40. Yet the Court of Appeals treated *Wade*—a decision about section 15-78-70(d) only—as "controlling authority." Pet.App.92. That move transformed *Wade*'s narrow statutory holding into a broad rule that strips government employers of a defense that private employers enjoy, ignoring section 15-78-40 and the "Legislature['s] inten[tion]" that "government liability [should not] exceed that of a private entity." *Kerr v. Richland Mem'l Hosp.*, 383 S.C. 146, 149, 678 S.E.2d 809, 811 (2009).

The answer to the first question presented is therefore "no." *Wade* does not create a right to settle with a government employee and then sue the government employer, regardless of other Tort Claims Act defenses. *Wade* held only that "§ 15–78–70(d) permits" a plaintiff's later "action against the governmental employer" after settling with a "governmental employee." 348 S.C. at 230, 559 S.E.2d at 589. It did not address whether the common-law defense recognized in *Andrade* separately barred such later actions under section 15-78-40. That's why the Office invoked that common-law, "private individual" defense instead of section 15-78-70(d): A decision rejecting one statutory bar is not a decision abolishing every other defense the Act preserves.

The answer to the second question presented follows from the same point. If *Wade* means what the Court of Appeals thought it means, then *Wade* should be narrowed or overruled.

Otherwise, *Wade* cannot be reconciled with the Tort Claims Act. If *Wade* forecloses the State's ability to invoke a common-law defense that a private employer enjoys, then the State is no longer liable "in the same manner and to the same extent as a private individual under like circumstances." S.C. Code Ann. § 15-78-40. And if a plaintiff can pursue the employee first and then sue the government employer, the Act is no longer the "exclusive remedy for any tort committed by a[government] employee." *Id.* § 15-78-70(a). So *Wade* must be limited to section 15-78-70(d) or overruled. Anything else undermines the cornerstone of the Tort Claims Act.

The Court of Appeals' contrary rule makes government liability greater than private liability, converts the Act's exclusive remedy into a cumulative one, and gives plaintiffs a roadmap around ordinary derivative-liability rules. This Court should therefore reverse and reinstate the circuit court's grant of summary judgment to the Office.

STATEMENT OF THE CASE

A. Campbell settles with Whetstone after a car accident.

As it relates to this appeal, 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 her. Pet.App.16. Campbell was the special assistant to the First Lady and the director at the Governor's Mansion when the accident happened, and Whetstone claimed Campbell was "within the scope of her employment" at the time of the accident. Whetstone accused Campbell of being negligent and injuring her in various ways. *Id.*

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." Pet.App.59.

B. Whetstone sues the Governor's Office after settling with Campbell.

1. After settling with Campbell, Whetstone sued the Office of the Governor. Whetstone asserted a single claim "under the doctrine of respondeat superior and pursuant to S.C. Tort Claims Act." Pet.App.17.

The Office moved for summary judgment based on Whetstone's settlement with Campbell, relying on the common-law rule applied in *Andrade* that any private employer may invoke. Pet.App.23–24. The Office expressly denied that it was relying on section 15-78-70(d) in seeking summary judgment. Pet.App.32. The circuit court granted that motion. Pet.App.10.

2. The Court of Appeals reversed, holding that *Wade* controls. Despite the Office's unequivocal statement in circuit court, the Court of Appeals wrote that the Office moved for summary judgment, "arguing that under section 15-78-70(d)" Whetstone's "settlement with Campbell extinguished her claims against" the Office. Pet.App.68. *Wade* was therefore, according to the Court of Appeals, "factually on all fours with the present case" and "controlling authority" that foreclosed the Office's argument. Pet.App.69–70.

The Office petitioned for rehearing. It explained that it did *not* move for summary judgment under section 15-78-70(d), so *Wade* cannot control. Instead, it had moved for summary judgment under the common-law rule that settling with an employee also releases the employer under a vicarious-liability theory. Pet.App.77–84. The Court of Appeals denied that petition. Pet.App.89.

It did, however, issue a substituted opinion. The only change was a single sentence in the background section. The original opinion said that the Office moved for summary judgment "arguing that under section 15-78-70(d) of the TCA, [Whetstone's] settlement with Campbell extinguished her claims against [the Office].” Pet.App.68. The substituted opinion just generalized the point, noting that the Office moved for summary judgment “arguing that [Whetstone’s] claims under the TCA were extinguished as a matter of law when [Whetstone] settled with Campbell.” Pet.App.91. That generic “under the TCA” statement still didn’t capture the Office’s actual argument, and the rest of the substituted opinion did not change anything in the Court of Appeals’ analysis, nor did it change the Court of Appeals’ opening sentence that “[t]his case concerns . . . section 15-78-70(d)” or that *Wade* is “controlling authority.” Pet.App.90, 92.

3. This Court granted the petition for a writ of certiorari.

STANDARD OF REVIEW

The Court reviews a grant of summary judgment under “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 whenever “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).

ARGUMENT

I. The Office of the Governor is not liable to Whetstone on her respondeat superior theory.

At the outset, it’s important to be clear what this case is about—and what this case is not about. Whetstone’s sole claim against the Office is—in her own words—that the Office is liable “under the doctrine of respondeat superior and pursuant to S.C. Tort Claims Act.” Pet.App.16. She claims that Campbell was negligent while “within the scope of her employment with the Office,” so the Office, as Campbell’s employer, is liable for that negligence. *Id.* In other words, her theory of liability is derivative, and the Tort Claims Act supplies both the path to that liability and the limits on it. Whetstone does not allege that the Office was somehow independently negligent, such as for negligently supervising Campbell. *See, e.g.*, *Brockington v. Pee Dee Mental Health Ctr.*, 315 S.C. 214, 217, 433 S.E.2d 16, 17 (Ct. App. 1993) (claims "based on *respondeat superior*" and "negligent supervision" are different).

With that in mind, turn first to the Tort Claims Act and then to South Carolina tort law, which combine to make clear that the Office cannot be liable to Whetstone here.

A. A government employer is liable only to the same extent that a private defendant would be on those facts.

Until 1985, the State enjoyed complete immunity from tort claims. *See McCall v. Batson*, 285 S.C. 243, 246, 329 S.E.2d 741, 742 (1985). That changed with *McCall* and the Tort Claims Act. Since then, the State and its entities have generally been subject to tort liability for their agents' acts. S.C. Code Ann. § 15-78-20(b). The overarching goal was to start treating the State like a "private entrepreneur" who "may be readily held liable for negligence of his employees." *Id.* § 15-78-20(a).

Yet this waiver of immunity is limited. Those limits include not only the many exceptions enumerated by the General Assembly, *see, e.g.*, *id.* § 15-78-60, but also the Act's baseline rule that a government entity is only "liable for [its] torts in the same manner and to the same extent as a private individual under like circumstances," *id.* § 15-78-40. And the General Assembly mandated that those limitations on the State's liability "must be liberally construed in favor of limiting the liability of the State." *Id.* § 15-78-20(f); *accord id.* § 15-78-200 (same).

Since no exception applies here, section 15-78-40 sets the measure for the government's liability. And that measure is also a ceiling. As this Court put it, section 15-78-40 shows that "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. So if a private employer wouldn't be liable to Whetstone on these facts, the Office cannot be liable either.

B. A private defendant would not be liable on these facts.

1. As the circuit court correctly explained, in South Carolina, "settlement of a claim against an employee 'operates as an acquittal of the employer who is only derivatively liable.'" Pet.App.6 (quoting *Andrade*, 345 S.C. at 226, 546 S.E.2d at 670). Courts have applied this rule for decades. *See, e.g.*, *Seaboard Air Line R. Co. v. Coastal Distrib. Co.*, 273 F. Supp. 340, 343 (D.S.C. 1967).

Andrade shows this rule in action. There, June Andrade contracted with Jimmy Johnson to install a new HVAC system in her home after he held himself out as part of SCE&G's quality-dealer program. Andrade was dissatisfied with the work, so she sued Johnson. 345 S.C. at 219–21, 546 S.E.2d at 667. She also sued SCE&G for "vicarious or derivative liability" based on Johnson's conduct. *Id.* at 221, 546 S.E.2d at 667–68. Andrade settled with Johnson before trial and signed a covenant not to sue. *Id.* The trial court then granted SCE&G summary judgment on Andrade's vicarious-liability claims. *Id.*

The Court of Appeals affirmed. Andrade's settlement with Johnson meant SCE&G couldn't be vicariously liable for Johnson's conduct. The court explained that the "type of document used to discharge liability" was not the critical question. *Id.* at 224, 546 S.E.2d at 669. Rather, the inquiry had to focus on "the type of liability and the relationship *inter se* of the various allegedly liable parties." *Id.* Was one party liable "*only* vicariously because of the negligence of another party" or was that party a "true joint tortfeasor[]" and thus "independently negligent toward the third party"? *Id.* This distinction matters in part because it goes to the difference between indemnity (the right to shift an entire loss from one who is passively at fault to someone who is actively at fault) and contribution (the right to recover part of a loss from someone else who is actively at fault). *Id.* at 225, 546 S.E.2d at 670. If Andrade could still sue SCE&G for vicarious liability, SCE&G could then seek indemnification from Johnson, which "would effectively strip the covenant not to sue of any real meaning." *Id.* at 226, 546 S.E.2d at 670. Thus, the covenant not to sue "terminated" Andrade's claims against Johnson, which in turn "extinguished" "SCE&G's derivative liability."[1] *Id.*

Indemnity may have been discussed more thoroughly, but it was not the lone justification for the common-law rule the court reaffirmed. *Andrade* identified at least three justifications. First, "the agreement discharges the primary liability and thus extinguishes the secondary liability." *Id.* at 224, 546 S.E.2d at 669. Second, "the secondarily liable party's right to indemnification renders the covenant illusory." *Id.* And third, "the secondarily liable party is not a true tortfeasor," so releasing the true tortfeasor—the employee—naturally releases the secondarily liable employer. *Id.* Together, those reasons show the rule is rooted in derivative liability. That is why *Andrade* made the "most important factor" "the type of liability and the relationship" among "the various allegedly liable parties." *Id.* And that is why the defense is available when the relationship is purely derivative—when the employer is liable "only vicariously because of the negligence of another party"—but not when the employer is "independently negligent toward the third party." *Id.*

2. At bottom, then, *Andrade* turns on the derivative nature of the employer's liability. That is why the court's third justification matters most here: the secondarily liable employer "is not a true tortfeasor." *Id.* That principle tracks this Court's earlier analysis of vicarious liability. When the "master's liability rests solely upon . . . [a] servant's conduct," the Court explained, "a verdict against the master alone is illogical, and cannot stand." *Chapman-Storm Lumber Corp. v. Minnesota-S.C. Land & Timber Co.*, 183 S.C. 31, 34, 190 S.E. 117, 118 (1937). "The reason for

[1] Though this Court reversed *Andrade*, it did so on the different issue of whether SCE&G owed an independent duty to Andrade to ensure that Johnson properly installed the HVAC system. *See* 356 S.C. at 245–46, 588 S.E.2d at 592.

the rule is perfectly apparent," the Court continued. *Id.* "[I]f the . . . servant is without blame in his conduct, the . . . master cannot be held blame-able because of that same conduct." *Id.*

That same logic supports the rule reaffirmed in *Andrade*. If the employer's liability exists only through the employee's negligence, then releasing the employee from liability necessarily removes the only basis for holding the employer vicariously liable. The plaintiff cannot extinguish liability against the directly negligent actor and then preserve the same liability against an employer whose only alleged fault is derivative of that actor's conduct. As the District of South Carolina put it, "if he, through whom liability derives is exonerated, the only rational basis for liability against the party secondarily and derivat[iv]ely liable is lost." *Seaboard Air Line R. Co.*, 273 F. Supp. at 343. "Any other rule would be both illogical and unjust." *Id.*

So it's unsurprising that other States follow this rule too. Indeed, Mississippi described it as a majority rule, observing that "[a] majority of states have adopted the position that the release of a tortfeasor thereby releases the tortfeasor's principal for all claims of vicarious liability." *J&J Timber Co. v. Broome*, 932 So. 2d 1, 7 (Miss. 2006). In Illinois, for instance, "any settlement between the agent and the plaintiff must also extinguish the principal's vicarious liability." *Gilbert v. Sycamore Mun. Hosp.*, 622 N.E.2d 788, 797 (Ill. 1993). Or under Michigan law, "a valid release of an agent for tortious conduct operates to bar recovery against the principal on a theory of vicarious liability." *Theophelis v. Lansing Gen. Hosp.*, 424 N.W.2d 478, 481 (Mich. 1988). Minnesota follows the "well-established common law rule . . . that the release of the agent releases the principal from vicarious liability." *Booth v. Gades*, 788 N.W.2d 701, 707 (Minn. 2010). In the same way, Nebraska holds that "in a tort action based exclusively on the alleged negligence of an employee or agent, a valid release of that employee-agent releases the employer or principal from liability." *Dickey v. Meier's Est.*, 197 N.W.2d 385, 388 (Neb. 1972). North Dakota put it succinctly: "the release of a servant for tortious acts also released the master from vicarious liability." *L.C. v. R.P.*, 563 N.W.2d 799, 801 (N.D. 1997). In Oklahoma, "where the servant was released, the plaintiff was not entitled to recover from the master." *Burke v. Webb Boats, Inc.*, 37 P.3d 811, 813 (Okla. 2001). And South Dakota provides that the "release of an agent is a release of the principal even when the release contains an express reservation and where the claim is premised on the single act of the agent." *Est. of Williams ex rel. Williams v. Vandeberg*, 620 N.W.2d 187, 191 (S.D. 2000).

Because section 15-78-40 of the Tort Claims Act incorporates the liability principles that govern private employers, this widespread rule supplies the rule of decision here. When a plaintiff settles with the directly liable employee, an employer facing only derivative liability is released too. *See Andrade*, 345 S.C. at 226, 546 S.E.2d at 670.

3. The Court of Appeals' efforts to limit *Andrade* fall flat. For starters, the Court of Appeals ignored the very existence of the defense recognized in *Andrade*, dismissing the entire discussion as one about the Uniform Contribution Among Tortfeasors Act, "which is expressly inapplicable to governmental entities." Pet.App.94. That misreads *Andrade*. The question there was not whether UCATA supplies the rule the Governor's Office relies on here. It was the opposite: whether UCATA changed the "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. The *Andrade* court answered *no*, UCATA "does not change the common law." *Id. Andrade* thus reaffirmed a longstanding defense that a private employer can invoke. *See, e.g.*, *Seaboard Air Line R. Co.*, 273 F. Supp. at 343 ("a covenant not to sue . . . operate[s] as a release of the master").

That matters here because, once *Andrade* is understood as a common-law defense available to private employers, the Court of Appeals' remaining reasons for refusing to apply it rest on misunderstandings of the Tort Claims Act. The first reason misunderstands section 15-78-40's private-party baseline. The second misunderstands section 15-78-70's treatment of derivative liability. And the third compounds both mistakes.

First, the Court of Appeals thought that the *Andrade* rule didn't apply here because *Andrade* "involved common law negligence between private actors and was not a TCA case." Pet.App.94. But that conflates the *source* of the cause of action against a government entity with the *extent* of the entity's liability. No one disputes that the Tort Claims Act provides a cause of action against the Office. *See* S.C. Code Ann. § 15-78-50(a). But the extent of the Office's liability under the Act is only that of a "private individual under like circumstances." *Id.* § 15-78-40.

So the fact that *Andrade* "involved common law negligence between private actors" is exactly why the rule *should* apply here. It supplies the private-party baseline that section 15-78-40 incorporates. If, under the common law, 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 either. Otherwise, the government entity would be liable not "to the same extent as," but to a greater extent than, "a private individual under like circumstances." S.C. Code Ann. § 15-78-40. There's nothing odd about that result. After all, this Court has often considered common-law defenses in ascertaining the State's liability under the Tort Claims Act. *See, e.g.*, *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 307 S.C. 161, 165, 414 S.E.2d 138, 140 (1992) (the jury should have been instructed "regarding assumption of the risk" in a Tort Claims Act case).

Second, the Court of Appeals' observation that the Tort Claims Act "makes no distinction between derivative liability claims and claims against both employer and employee as joint tortfeasors" misunderstands section 15-78-70. Pet.App.94. True, the Act does not treat the government entity and employee as ordinary joint tortfeasors. But that is 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), so the government entity and its employee can *never* be joint tortfeasors for the same scope-of-employment tort. 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 h[er] official duties" or her 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). Thus, when the Tort Claims Act requires a plaintiff to sue the government employer for the employee's tort, the Act does not eliminate the concept of derivative, or vicarious, liability. It just channels that liability to the statutory defendant alone. *See id.* §§ 15-78-70(a)–(b).

The Legislature expressly embraced this concept too. The impetus for the Act was "[t]he General Assembly['s] find[ing] that while a private entrepreneur may be readily held liable for negligence of his employees," the "government did not have" that same "duty" to carefully oversee its own employees on the job. *Id.* § 15-78-20(a). That finding speaks in vicarious-liability terms. It compares the government to a private employer "held liable for negligence of his employees." Courts have also long understood the Act as a form of vicarious liability. *See, e.g.*, *Smith v. Reg'l Med. Ctr. of Orangeburg & Calhoun Cntys.*, 394 S.C. 110, 116, 713 S.E.2d 656, 659 (Ct. App. 2011) (discussing the Act in terms of "vicarious liability"); *Doe-4 v. Horry Cnty.*, No. 4:16-cv-03136-AMQ, 2018 WL 3227277, at *4 (D.S.C. July 2, 2018) (Quattlebaum, J.) (same); *Tarashuk v. Orangeburg Cnty.*, No. 5:19-cv-02495-JMC, 2022 WL 969752, at *14 n.11 (D.S.C. Mar. 30, 2022) (Childs, J.) (Tort Claims Act plaintiff brought "claims grounded in respondeat superior liability").

Third, the Court of Appeals' reliance on *Newkirk v. Enzor*, 240 F. Supp. 3d 426 (D.S.C.

2017), compounds both errors. Indeed, that case confirms both points that the Court of Appeals missed. *Newkirk* recognized that, under the Tort Claims Act, either the government employer is liable *or* the employee is liable, "but not both." *Id.* at 436. So unlike the traditional doctrine of respondeat superior, a plaintiff cannot sue the government employer *and* the employee under the Tort Claims Act. The reason that "the doctrine of respondeat superior . . . is inapplicable against South Carolina governmental entities," as *Newkirk* rightly says, is because "[g]overnmental entities are vicariously liable for their employees' torts *only as provided by the statute*." *Id.* (emphasis added). In other words, *Newkirk* recognizes that the Act doesn't eliminate vicarious liability but just channels "vicarious liability" "by . . . statute." *Id.* And under that statute, the government is vicariously liable "in the same manner and to the same extent as a private individual under like circumstances." S.C. Code Ann. § 15-78-40.

C. The Office is not liable to Whetstone here.

Once the Court of Appeals' misunderstandings are corrected, *Andrade* supplies the private-party rule of decision under section 15-78-40. And that rule is fatal to Whetstone's claim. Like Andrade, Whetstone settled her claim against the primary tortfeasor. *See* Pet.App.59. Like Andrade, Whetstone asserted a claim against the primary tortfeasor's principal under a respondeat superior theory. *See* Pet.App.16–18. So like Andrade, Whetstone's settlement with the primary tortfeasor should "release[]" "the vicariously liable principal," *i.e.*, the Office. *Andrade*, 345 S.C. at 227, 546 S.E.2d at 670. The circuit court got that analysis correct. The Court of Appeals got it wrong.

II. *Wade* does not change this result.

The Court of Appeals resisted *Andrade* and its decisive weight under section 15-78-40 because it saw this Court's decision in *Wade* as "controlling authority." Pet.App.92. In the Court of Appeals' view, *Wade* gives a plaintiff an absolute right to pursue a claim against a government employee individually, settle with the employee, and then sue the government employer. That cannot be right. *Wade* itself and the rest of the Tort Claims Act confirm as much.

A. The Court of Appeals overread *Wade*.

1. *Wade* is a narrow decision about what section 15-78-70(d) allows. It says nothing about what the rest of the Tort Claims Act prohibits. Reading *Wade* for what it held leaves *Wade* untouched while giving effect to the rest of the Act.

Start with the arguments that the parties advanced in *Wade*. The county there moved for summary judgment under "§ 15-78-70, subsection D" as "a complete bar" to the plaintiff's claim. *Wade* Sup. Ct. Record on Appeal 19, 22. Under that subsection, "[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).

The circuit court granted summary judgment to the county based on section 15-78-70(d). *Wade* Sup. Ct. Record on Appeal 15–17. So naturally, the Court of Appeals' en banc opinion reversing the circuit court 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 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) (en banc).

When the case reached this Court, the county's issues on appeal focused (unsurprisingly) on section 15-78-70(d). *See Wade* Sup. Ct. Pet.'s Br. 1 (Jan. 9, 2001). Nothing concerned the vicarious liability notions codified in section 15-78-40. In fact, no one even referenced respondeat superior until later in the briefing, and it was only to show how the Court of Appeals' conclusion *on section 15-78-70(d)* was inconsistent with the common-law rule. *See id.* at 21–24. It was not—and this is important—to argue that a common-law defense via section 15-78-40 was why the county should prevail. (Nor could the county have prevailed under a common-law defense in this way, as it 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, the Court of Appeals' en banc decision, and the briefing in this Court, it's no surprise that this Court's decision focused only on whether section 15-78-70(d) prohibited Wade from pursuing his claim against the county. As such, 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), *id.*, *Wade* said nothing about whether another provision of the Tort Claims Act prohibits it. And how could *Wade* have done so? The only issue facing this Court was whether the circuit court properly granted summary judgment to the county under section 15-78-70(d), and appellate courts "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).

It doesn't matter if "*Wade* is factually on all fours with" this case, Pet.App.93, because the legal arguments about those facts are different. *Wade* therefore cannot be "controlling." Pet.App.92. The Court of Appeals reached the opposite conclusion only by generalizing the Office's basis for summary judgment, saying that it argued that Whetstone's claims "under the

TCA were extinguished as a matter of law when [Whetstone] settled with Campbell."[2] Pet.App.91. That's true at a high level, but it strips out the dispositive distinction. The Office did not rely on section 15-78-70(d). Instead, it relied on a "private individual['s]" common-law defense that section 15-78-40 makes available to the government.

2. The Court of Appeals' view of *Wade* cannot be squared with the rest of the Tort Claims Act. Most obviously, if private employers can invoke *Andrade* but the government cannot, then the government faces greater liability than its private counterparts.

Again, the *ceiling* of government liability under the Act is that of a private person. The General Assembly's waiver of the State's sovereign immunity was limited. *See* S.C. Code Ann. § 15-78-20(a). The Tort Claims Act sought to treat the State like a "private entrepreneur" who "may be readily held liable for negligence of his employees." *Id.* So 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. But "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.

In other words, a government entity can be *less* liable than a private defendant. *See, e.g.*, S.C. Code Ann. § 15-78-60(5) (immunity for discretionary acts). But a government entity can never be *more* liable. That's why the Tort Claims Act did not take common-law tort defenses away from state agencies. Rather, it preserved them. *E.g.*, *Strange*, 307 S.C. at 165, 414 S.E.2d at 140

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[2] Of course, this overly generalized statement came only after the Court of Appeals originally said that the Office "moved for summary judgment . . . under section 15-78-70(d)." Pet.App.68. That's incorrect. That section does not appear in the motion for summary judgment. *See* Pet.App.23–24. And it appeared in the memorandum in support of that motion only to explain why *Wade* didn't control. *See* Pet.App.32. In fact, that memorandum said that the Office was "*not* moving for summary judgment here pursuant to the provisions of § 15-78-70(d)." Pet.App.32 (emphasis added).

(government defendant could rely on assumption of the risk); *cf.* S.C. Code Ann. § 15-78-20(b) ("expressly preserv[ing]" other immunities). So if a private defendant could invoke a common-law defense to foreclose liability in a case, a government entity must be able to do the same. And because a private defendant can claim the benefit of the *Andrade* rule, so can the Office. The Court of Appeals' conclusion to the contrary wrongly reads section 15-78-40 (not to mention 15-78-20) out of the Code. *See CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (rule against superfluity).

Those aren't the only conflicts created by a broad reading of *Wade*. The Tort Claims Act provides the "exclusive remedy for any tort committed by [a government] employee." S.C. Code Ann. § 15-78-70(a). Not only does section 15-78-70(a) say that a claim under the Act is the "exclusive remedy," but that section also explicitly declares that an employee "who commits a tort while acting within the scope of his official duty is not liable therefor."[3] *Id.*

The Court of Appeals' reading of *Wade* erases this subsection too. If nothing in the Tort Claims Act prevents a plaintiff from settling with an employee and then suing the State, then the Act's remedy is no longer "exclusive." Instead, it's cumulative. Whetstone therefore cannot reconcile her settlement with Campbell with her claim against the Governor's Office because her claim against the Office is not the only (that is, the exclusive) remedy she seeks. *Cf. I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420–21, 526 S.E.2d 716, 723 (2000) ("an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal").

Worse yet, the Court of Appeals' expansion of *Wade* ignores the legislature's command to

[3] There are, of course, the exceptions for "conduct was not within the scope of [the employee's] 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). But those aren't implicated here, and Whetstone has never claimed otherwise.

"liberally construe[]" the Tort Claims Act "in favor of limiting the liability of the State." *Id.* § 15-78-20(f). All *Wade* said was that section 15-78-70(d) does not bar claims like the ones here. The Court of Appeals, however, read *Wade* to say that, because that provision doesn't bar these types of claims, neither can the rest of the Tort Claims Act. That is exactly how *not* to read a statute that "must be liberally construed in favor of limiting the liability of the State." *Id.* Depriving the Office of a common-law defense in the face of the General Assembly's rule of construction would flout the "cardinal rule of statutory construction" to "effectuate the intent of the legislature," *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000), and improperly waive the "State['s] immun[ity] from suit" absent "it[s] express[] consent," *Melton v. Crowder*, 317 S.C. 253, 255, 452 S.E.2d 834, 835 (1995).

B. If *Wade* is as sweeping as the Court of Appeals held, *Wade* should be narrowed or overruled.

1. If *Wade* does reach as far as the Court of Appeals said, then *Wade* poses serious problems. One, it will discourage people from working in government. Government employees are generally supposed to be "not liable" for torts within the scope of their official duties. S.C. Code Ann. § 15-78-70(a). That's a significant protection in a litigation-happy world. Yet under the Court of Appeals' decision, plaintiffs are now incentivized to pursue the government employee first. Indeed, there's no reason not to. That's a disincentive to public service.

Two, this broad interpretation of *Wade* defies the separation of powers. *See* S.C. Const. art. I, § 8. The General Assembly enjoys "plenary authority to make policy decisions on behalf of the state," *ArrowPointe Fed. Credit Union v. Bailey*, 438 S.C. 573, 581, 884 S.E.2d 506, 510 (2023), and that authority is what the Court allowed the General Assembly to exercise after the Court abrogated the common-law sovereign immunity rule, *McCall*, 285 S.C. at 246, 329 S.E.2d at 742 (delaying abrogation's effect to give the legislature time to act). The General Assembly determined that its statutory scheme would be the "exclusive remedy for any tort committed by an employee." S.C. Code Ann. § 15-78-70(a). But under the Court of Appeals' reading of *Wade*, this legislative policy decision is judicially thwarted, and employees can be liable *along with* their government employers.

And three, *Wade's* broad interpretation creates a second bite at the apple for plaintiffs, putting the public fisc at risk to compensate them beyond the Tort Claims Act's cap. *Id.* § 15-78-120(a). Instead of the $300,000 limit, a plaintiff can obtain a judgment or settlement from the government employee first, and then that plaintiff may seek to recover more damages from the government.

2. So if *Wade* is as broad as the Court of Appeals has indicated, it should be either narrowed or overruled. To be sure, narrowing *Wade* is a solution here. Instead of overruling it, the Court could confirm that *Wade* must be construed as a narrow holding about section 15-78-70(d) only. If it's limited that way, a government defendant could still invoke the *Andrade* rule and be released from liability under section 15-78-40 if a plaintiff sues after settling with an employee. The Tort Claims Act would still be functioning as the General Assembly intended. And the Office would be released from liability on Whetstone's claim.

3. But if the Court does not see limiting *Wade* as a viable option, the only choice is to overrule *Wade*. And overruling it would not be a heavy lift. The broad version of *Wade* is egregiously wrong and stare decisis cannot save it.

First, *Wade* ignored both cardinal rules of construction. In the first place, it ignored "[t]he cardinal rule of statutory construction . . . to ascertain and effectuate the intent of the legislature." *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581. "[T]he best evidence" of which is "the text of a statute." *Id.* Yet rather than sticking to the text, the Court's analysis in *Wade* focused exclusively on legislative history. 348 S.C. at 230–31, 559 S.E.2d at 589. Though legislative history might occasionally offer some guidance, courts are rightly wary about giving that history too much weight. *Cf. Planned Parenthood S. Atl. v. State*, 445 S.C. 600, 616 n.6, 916 S.E.2d 299, 307 n.6 (2025) (cautioning that the Court's "reliance on legislative history in this case should be read narrowly"). The Court's conclusion—if it was as broad as the Court of Appeals claimed—cannot be squared with the plain text of the rest of the Tort Claims Act. Because the text is "the best evidence of the legislative intent," it must prevail over any legislative history when it's as clear as the Tort Claims Act is. *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581.

In the second place, the *Wade* Court ignored the "other cardinal and familiar rule of construction" to read statutes "as a consistent whole." *Crescent Mfg. Co. v. Tax Comm'n*, 129 S.C. 480, 492, 124 S.E. 761, 765 (1924). This Court has emphasized that rule in this specific context, saying it "must" "read the Tort Claims Act as a whole." *Kerr*, 383 S.C. at 149, 678 S.E.2d at 811. Yet a broad reading of *Wade* cannot be reconciled with the whole Act. *Wade* defies the statutory scheme enacted by the General Assembly requiring plaintiffs to sue government entities—not government employees—for torts that those employees commit within the scope of their employment. *See* S.C. Code Ann. § 15-78-70(a). And its result leaves the government more liable than a private person would be—something "at no time . . . the Legislature intend[ed]." *Kerr*, 383 S.C. at 149, 678 S.E.2d at 811.

In fact, *Wade* itself acknowledged its shortcomings. The Court admitted 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. That admission matters twice over. It shows that *Wade's* holding was at odds with the General Assembly's intent, and it confirms that *Wade* reached its result only by isolating section 15-78-70(d) from the statutory scheme the Act created.

Second, *Wade*'s isolated reading of section 15-78-70(d) is wrong as a textual matter. Section 15-78-70(d) bars later actions after either "a settlement or judgment in an action *or* a settlement of a claim under this chapter." S.C. Code Ann. § 15-78-70(d) (emphasis added). That "or" matters. It separates the provision into two categories that represent "a complete bar to any further action by the claimant": one for "settlement[s] . . . in an action," and one for "settlement[s] of a claim under this chapter." *Wade*'s reading treated "under this chapter" as if it modified both categories, but that reading violates the last-antecedent rule because there is no comma after "settlement of a claim." *See Comm'rs of Pub. Works of the City of Laurens v. City of Fountain Inn*, 428 S.C. 209, 219–20, 833 S.E.2d 834, 839 (2019) (Few, J., concurring) (explaining that a modifying clause usually includes a comma before the preceding phrase if the modifying clause applies to multiple preceding phrases).

Applying "under this chapter" to only "settlement of a claim" makes sense. It preserves this subsection's two distinct parts. First, a settlement or judgment in *any* lawsuit bars a subsequent lawsuit against the employee or government entity about "the same occurrence," S.C. Code Ann. § 15-78-70(d), and second, a settlement of any Tort Claims Act claim (whether pre- or post-litigation) bars such a lawsuit. That reading is consistent with the policy of the Tort Claims Act. Plus, it avoids the superfluity problem *Wade* created because any "settlement . . . in an action . . . under this chapter" would also be the "settlement of a claim under this chapter." The correct reading gives independent force to both parts of this subsection.

But whatever "under this chapter" modifies, it's implausible to read section 15-78-70(d) as giving a plaintiff a right to settle with an employee and then sue the government employer—notwithstanding any other defense the Act creates or preserves. Nothing in this section stretches that far or reaches across the Tort Claims Act to limit the scope of section 15-78-40. And that's the key here: The correct, narrow reading of section 15-78-70(d) ensures that the Governor's Office is not more liable than a private party would be.

Third, stare decisis cannot make up for *Wade*'s shortcomings. "[S]tare decisis is not an inexorable command." *McLeod v. Starnes*, 396 S.C. 647, 654, 723 S.E.2d 198, 202 (2012). There is "no virtue in sinning against light or persisting in palpable error," and "[t]here should be no blind adherence to a precedent which, if it is wrong, should be corrected at the first practical moment." *Id.* Under the traditional stare decisis framework, whether a case should be overruled involves multiple considerations. Factors include the quality of the precedent's reasoning, the workability of the precedent, and reliance interests. *See Ramos v. Louisiana*, 590 U.S. 83, 121 (2020) (Kavanaugh, J., concurring in part). Those factors all support overruling *Wade*.

Quality of the reasoning. As explained, the broad reading of *Wade* is "egregiously wrong." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022). It's at odds with how this Court interprets statutes, as well as the text and structure of the Tort Claims Act. Standing by *Wade* therefore "serves no . . . laudable purpose." *Joseph v. S.C. Dep't of Lab., Licensing & Regul.*, 417 S.C. 436, 451, 790 S.E.2d 763, 770 (2016).

Workability. The broad reading of *Wade* is unworkable. How can a court square allowing a plaintiff to sue a government employer after settling with the employee when the Tort Claims Act declares that the Act is "the exclusive remedy for any tort committed by an employee of a governmental entity"? S.C. Code Ann. § 15-78-70(a). Either an employee is within the scope of employment or outside of it. *Wade* creates the untenable situation in which a plaintiff must claim an employee was both, not one or the other.

Reliance interests. No one can reasonably rely on *Wade*. No one plans to be hurt by a government employee in the course of the employee's work such that the person can settle with the employee and then sue the government employer too. No person, no business—no one—has ordered any affairs based on *Wade*. Nothing about how people go about their daily lives would change if the Court overrules *Wade*. Overruling *Wade* would simply put people in the same position vis-à-vis the government as they are with private employers.

CONCLUSION

The Court should reverse the Court of Appeals and reinstate the summary judgment.

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