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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.

RESPONDENT'S INITIAL BRIEF

Mark D. Chappell, Jr.
Mark D. Chappell
Graham L. Newman
William S. Detwiler
CHAPPELL, CHAPPELL & NEWMAN
4500 Fort Jackson, Blvd. Suite 250
PO Box 61170 (29260)
Columbia, South Carolina 29209
(803) 233-7050
markjr@chappell.law
mark@chappell.law
graham@chappell.law
will@chappell.law

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF THE ISSUES

1. Whether the Court of Appeals correctly held that *Wade v. Berkeley County*, 348 S.C. 224, 559 S.E.2d 586 (2002) controls this case and that § 15-78-70(d) of the Tort Claims Act permits a plaintiff to settle with a government employee individually and then sue the government employer, where the Court of Appeals expressly distinguished *Andrade v. Johnson*, 356 S.C. 238, 588 S.E.2d 588 (2003) as a non-Tort Claims Act, Uniform Contribution Among Tortfeasors Act ("UCATA") based decision which does not govern claims under the Act.

2. Whether the Office should be barred from asking this Court to narrow or overrule *Wade* where the Office affirmatively disclaimed reliance on § 15-78-70(d) before the circuit court and the Court of Appeals, litigated the case exclusively on a common-law *Andrade* theory, and raises its stare decisis attack on *Wade* for the first time before this Court.

INTRODUCTION

This matter is not a question of what the law should be as perceived by this Court, it is a question of what the law is as determined by the legislature and later interpreted by this Court in *Wade. See Wade v. Berkeley County*, 348 S.C. 224, 559 S.E.2d 586 (2002). In the twenty-four years following this Court's decision in *Wade*, the legislature has had ample opportunities to amend the law to change its intent as interpreted by this Court and has chosen not to do so. This Court's opinion in *Wade v. Berkeley County* is exactly on point with the Court of Appeals holding in *Whetstone*. *See Wade; see also Whetstone v. State of South Carolina, Office of the* Governor, 2023-001424, Op. No. 6133. As in *Wade*, Whetstone never reached a settlement "under the act."

The Office of the Governor has lost this case twice on appeal on the same reasoning – once at the Court of Appeals and once upon petition for rehearing – and now asks this Court to grant it a result it never actually argued for below. Before the Circuit Court and the Court of

Appeals, the Office was adamant that it was *not* relying on § 15-78-70(d) of the Tort Claims Act. The Office said so in its summary judgment memorandum, and said so again in its Petition for Rehearing when the Court of Appeals' initial opinion suggested otherwise. The Office's entire theory below was a common-law derivative liability defense drawn from *Andrade* – a decision about the UCATA that has nothing to do with the Tort Claims Act ("TCA") or this case. *See Andrade v. Johnson*, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001), *rev'd on other grounds*, 356 S.C. 238, 588 S.E.2d 588 (2003); S.C. Code Ann. § 15-38-65 (2005) ("The [UCATA] shall not apply to governmental entities.").

The Court of Appeals correctly apprehended the Petitioner's argument and rejected the Office's theory. It properly held that *Wade* is "factually on all fours with the present case" and is "controlling authority," and it explained in detail why *Andrade*, "based on the court's analysis of the Uniform Contribution Among Tortfeasors Act, which is expressly inapplicable to government entities", cannot supply the rule of decision in a TCA case. R.App.66-73. The court further relied on the South Carolina District Court's holding in *Newkirk v. Enzor* that the TCA displaces the common-law doctrine of respondeat superior altogether, so that "governmental entities are not additionally or alternatively liable under common-law vicarious liability doctrines." *Newkirk v. Enzor*, 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. *Id.*

Unable to escape that reasoning, the Office now performs an about face of their argument in their brief to this Court. Having told two lower courts that its motion did *not* rest on § 15-78-

70(d), the Office now devotes a substantial new portion of its Supreme Court brief arguing that *Wade,* the very decision construing § 15-78-70(d), is "egregiously wrong" and should now be "narrowed or overruled." That argument was not preserved, was not presented to the Court of Appeals in that form, and thus should not be entertained for the first time here before this Court. Even on the merits, this attempt by the Office to change their position would give government employers greater protection from suit than private employers enjoy. This is the exact opposite of what § 15-78-40 requires, the exact opposite of what the Court of Appeals correctly held below, and the exact opposite of the liberties afforded citizens by the Constitution.

This Court should affirm.

STATEMENT OF THE CASE

Suit was filed in the Richland County Court of Common Pleas on March 18, 2021 against Petitioner pursuant to the South Carolina Tort Claims Act ("SCTCA") for the tortious acts of its employee, Karen Campbell. R.App.15-17. Petitioner filed a Motion to Dismiss on April 16, 2021 claiming Campbell was not acting within the course and scope of her employment at the time of the wreck. R.App.21. After reviewing affidavits and hearing arguments on the Motion to Dismiss, the Circuit Court ruled that a factual dispute existed and denied Petitioner's Motion to Dismiss. R.App.2-10.

Petitioner then filed a Motion for Summary Judgment. R.App.26-27. This was followed by a Memorandum in Support, on January 18, 2023, claiming that the Covenant Not to Execute entered between Respondent, Karen Campbell and USAA extinguishes any claim against Respondent based on a theory of vicarious liability. R.App.28-37. On July 20, 2023, Respondent filed a Memorandum of Law in Opposition to Respondent's Motion for Summary Judgment. R.App.38-43.

On July 25, 2023, Petitioner's Motion for Summary Judgment was heard before the Honorable William A. McKinnon. R.App.50-60. Judge McKinnon granted Petitioner's Motion for Summary Judgment finding that based on South Carolina common law, the executed Covenant Not to Execute, Policy Release, and Settlement Agreement Respondent entered into with the employee, Ms. Campbell, operates as a release of the employer, the Office of the Governor, who is only derivatively liable. *Id.* On July 26, 2023, the Order granting Petitioner's Motion for Summary Judgment was filed with the Richland County Clerk of Court. R.App.2-10.

On August 2, 2023, Respondent timely filed a Motion for Reconsideration. R.App.44-49. Respondent's Motion for Reconsideration was denied in a Form 4 Order filed August 8, 2023. R.App.11-13. Appellant filed a Notice of Appeal on August 30, 2023 and served the notice upon Respondent on September 1, 2023. R. App.64.

The Court of Appeals reversed, holding that *Wade* controls and is "factually on all fours with the present case" and "controlling authority" that foreclosed the Office's argument. R.App.66-73.

The Office petitioned for rehearing stating that it did not move for summary judgment under § 15-78-70(d), so *Wade* cannot control. Instead, the Office now argued that it moved for summary judgment under the common-law rule that settling with an employee also releases the employer under a vicarious-liability theory. R.App.74-87. The Court of Appeals denied that petition. R.App.101-102.

The Court of Appeals did issue a substituted opinion in which a single sentence was changed in the background section and the Appellant's law firm name was changed to correct a scrivener's error. R.App.103-108

This Court granted Petitioner's Petition for a writ of certiorari.

STANDARD OF REVIEW

"An appellate court reviews a motion for summary judgment using the same standard employed by the circuit court." *Progressive Direct Ins. Co. v. Groves*, 438 S.C. 26, 31, 882 S.E.2d 464, 466 (2022) (citing *Traynum v. Scavens*, 416 S.C. 197, 201, 786 S.E.2d 115, 117 (2016)). "Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Montgomery v. CSX Transport, Inc.*, 376 S.C. 37, 47, 656 S.E.2d 20, 25 (2008).

STATEMENT OF THE FACTS

On April 23, 2019, Respondent Wanda Whetstone was involved in a vehicle collision in the 5000 block of Trenholm Road in Richland County, South Carolina. Appellant was travelling southbound on Trenholm Road when Karen Campbell, an employee of Petitioner, failed to yield the right of way while turning left onto Trenholm Road out of a business driveway and collided with Respondent. This collision caused injuries and damages to Respondent.

Respondent filed a claim with USAA, the insurance carrier of Petitioner's employee, Karen Campbell. Ms. Campbell's carrier offered the policy limits of $100,000.00 which was accepted by Respondent through a document entitled "STATE OF SOUTH CAROLINA COVENANT NOT TO EXECUTE, POLICY RELEASE, AND SETTLEMENT AGREEMENT". R.App.61. The Covenant Not to Execute specifically reads in part, "This Covenant is 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." Respondent also collected an additional $50,000.00 of underinsured coverages from two first party policies of insurance. *Id*.

Respondent 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. R.App.14-16. Pursuant to the "SCTCA", S.C. Code of Laws § 15-78-10 et. seq., Petitioner is responsible for the tortious acts of Ms. Campbell. As a result, this action was initiated on March 18, 2021, against Petitioner, Office of the Governor, seeking recovery for injuries sustained in the April 23, 2019 collision. *Id.*

ARGUMENT

I. The Court of Appeals correctly held that *Wade* controls.

A. *Wade* is indistinguishable from this case and *Andrade* does not control.

The Court of Appeals held that "*Wade* is factually on all fours with the present case," because "[a]s in this case, Wade's claim was a derivative liability claim in that there were no allegations of tortious conduct by the government entity outside of its employee's actions." *Whetstone v. State of South Carolina, Office of the* Governor, 2023-001424, Op. No. 6133 *citing Wade v. Berkeley County*, 348 S.C. 224, 559 S.E.2d 586 (2002). In both cases, a Plaintiff settled with a government employee individually before any TCA claim existed against the employer, and in both cases the employer argued that settlement barred the later claim. This Court held in *Wade* 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." *Wade*, 348 S.C. at 230-31, 559 S.E.2d at 589. The Court of Appeals faithfully applied that holding here.

The Court of Appeals correctly explained that "*Andrade*…involved common law negligence between private actors and was not a TCA case," and that "[t]he 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." *Whetstone*, 2023-001424, Op. No. 6133, 7. That distinction is not dispositive, because the General Assembly has expressly provided that "[t]he [UCATA] shall not apply to governmental entities." *See* S.C. Code Ann. § 15-38-65 (2005). A common law rule that this Court developed to reconcile the UCATA's indemnity and contribution principles with vicarious liability among *private* joint tortfeasors simply has no basis in a statutory scheme that expressly excludes the government from UCATA's operation.

B. The TCA intentionally displaces common-law respondeat superior, so *Andrade*'s indemnity driven rule cannot be grafted onto it.

The Court of Appeals grounded its holding in a structural point the Office still has not answered in its brief: the TCA does not merely regulate *how* a government entity is sued for an employee's tort – it replaces the common-law vicarious liability framework in its entirety. *Wade* established this framework. The Court of Appeals was persuaded by the reasoning in *Newkirk*, that "[t]he 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 under the Act; governmental entities are not additionally or alternatively liable under common-law vicarious liability doctrines." *See* *Newkirk* at 436.

That holding cuts directly against the Office's theory. *Andrade*'s rule exists to solve a problem specific to indemnity and contribution among *private* joint tortfeasors – namely, that allowing a plaintiff to sue a vicariously liable employer after releasing the employee would let the employer seek indemnity from the very employee the plaintiff meant to release, stripping the covenant not to sue of any real meaning and forbidding the contractual safeguards that

Campbell's carrier afforded her in this disputed factual matter. The TCA does not create indemnity rights running from the government back to its employees, and the Office has never identified any TCA provision that does. Without an indemnity mechanism to protect, the entire rationale for *Andrade*'s rule evaporates in the context of the Act. The Court of Appeals recognized as much when it observed that "[t]he 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." *Whetstone*, 2023-001424, Op. No. 6133 at 7.

C. The Office's "greater liability than a private employer" argument is backwards.

The Office insists that letting Whetstone's claim proceed makes the government *more* liable than a private employer, in direct tension with § 15-78-40's mandate that the government be liable "in the same manner and to the same extent as a private individual under like circumstances." *See* S.C. Code Ann. § 15-78-40. But this inverts the actual comparison. *Andrade*'s rule is not a generic feature of private-employer liability, rather it is a rule this very Court crafted specifically to prevent the indemnity corrosive circle that UCATA's contribution scheme would otherwise create between an employer and employee who are both technically before this court. Strip away the UCATA's specific indemnity concern as the General Assembly has done by declaring UCATA inapplicable to the government and there is no independent common-law principle left for the Office to invoke. Importing *Andrade*'s rule indiscriminately into the TCA without the indemnity problem it was designed to solve would not equalize government and private liability; it would hand the government a defense private employers use for a different reason entirely, while private employers facing ordinary vicarious-liability suits without UCATA involved remain fully exposed. If anything, adopting the Office's position would make government employers *harder* to hold accountable thank private ones in this precise procedural posture – the exact opposite of what § 15-78-40 requires and the opposite of what the Court of Appeals correctly avoided in their decision.

D. The Court of Appeals weighed and rejected the Office's policy arguments.

The Office devotes substantial briefing to warnings that affirming will discourage public service, threaten the public fisc, and let plaintiffs evade the Act's damages cap. The Court of Appeals considered this exact concern and still ruled for Whetstone, explaining that "allowing Appellant to settle with Campbell individually…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," but that 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. *See Wade* at 230, 559 S.E.2d at 589. "We find ourselves in the same position here." *Whetstone*, 2023-001424, Op. No. 6133 at 8. In Petitioner's argument for workability, their reasoning is flawed further in the common law analysis. Whatever force the Office's policy concerns carry, they are to be addressed by the General Assembly, not this Court. The Court of Appeals correctly recognized that its role was to apply the statute as written and as this Court already construed in *Wade*, not to rewrite it to reach a policy-preferred outcome.

E. *Wade* already considered and rejected the argument the Office now repackages as an overruling request.

The Court of Appeals observed that "the dissent in *Wade* criticized the majority opinion on the same grounds Respondent raises here" – namely, that the majority wrongly treated the employer and employee as akin to joint tortfeasors when, at common law, the employer would only be vicariously liable under respondeat superior. *See Wade III* at 533, 529 S.E.2d at 753-54

(Goolsby, J., dissenting). Yet "[o]ur supreme court nevertheless affirmed this part of the majority's opinion without addressing the dissent's interpretation." *Wade*, at 230-31, 559 S.E.2d at 589. In other words, this Court has already had the Office's exact substantive argument before it once, in the form of the *Wade III* dissent, and this Court affirmed anyway.[1] The Office is not presenting this Court with a new problem *Wade* never confronted. The Office is now asking the Court to reverse course on an issue it resolved with full calculated awareness of the competing view established twenty-four years prior – exactly the kind of settled, reasoned precedent that stare decisis is designed to protect.

II. The Office of the Governor's request to narrow or overrule *Wade* is an unpreserved, newly minted argument that should not be considered.

Before reaching the merits, this Court should recognize a fundamental and fatal flaw with the Office's brief: Petitioner asks this Court to overrule or narrow *Wade* based on an argument the Office never made below in that form, after having gone out of its way to disclaim the very statutory provision *Wade* construes and that the Court of Appeals found to be "factually on all fours" with Whetstone. R.App.66-73.

A. The Office disclaimed § 15-78-70(d) as the basis for its motion.

[1] The question of whether Campbell was in the course and scope of her employment is a matter of fact for the jury. In settling with Campbell, her carrier agreed to tender their policy limits as to oblige with their contractual obligations to her and avoid litigation where a genuine question of fact exists. As stated by the Court of Appeals, Campbell received 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* 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."). *Id.*

The record leaves no ambiguity. The Office's summary judgment memorandum stated it was "not moving for summary judgment here pursuant to the provisions of § 15-78-70(d)." R.App.29-38. When the Court of Appeals' original opinion characterized the Office's motion as resting on that subsection, the Office sought rehearing specifically to correct that characterization – not to argue that *Wade's* construction of § 15-78-70(d) was wrong or should be revisited. The substituted opinion the Court of Appeals issued in response changed only one single sentence, and the court's ultimate holding – that *Wade* controls and *Andrade* does not – remained exactly the same.

B. Having disclaimed § 15-78-70(d) below, the Office cannot now ask this Court to overrule the decision construing it.

It is black-letter law that a party may not use a subsequent appeal, let alone a petition for rehearing, to advance a new theory of the case after losing on the theory it actually presented. The Office cannot have it both ways: it cannot tell the Circuit Court and the Court of Appeals that its motion had nothing to do with § 15-78-70(d), secure a ruling on that basis, lose upon appeal, and then pivot in this Court to a full-scale stare decisis assault on the Supreme Court decision interpreting that very subsection – complete with a newly invented "last-antecedent" grammatical argument about the statute's punctuation and a batter of separation-of-powers and public-fisc policy arguments that appear nowhere in the record below. Appellate courts do not decide questions not put to the courts beneath them, and this Court should decline the Office's invitation to be the first tribunal in this litigation to consider whether *Wade* should be overruled.

C. The Office's own litigation conduct undercuts its "controlling authority" complaints.

The Office's core objection is that the Court of Appeals treated *Wade* as controlling despite the Office's insistence that it was not relying on § 15-78-70(d). But that objection proves too much. If the Office genuinely believed a distinct common-law defense survived independent of § 15-78-70(d), then the Office needed to explain why *Wade*'s construction of the TCA's exclusive-remedy scheme does not foreclose that defense – not simply assert that it was arguing something else. The Court of Appeals correctly did the work the Office avoided: it explained, at length, why the common-law rule in *Andrade* cannot coexist with the statutory scheme *Wade* construed. The Office's remedy for disagreeing with that analysis was to seek rehearing on the merits of that reasoning – which it largely did not do – not to manufacture an overruling argument for the first time in this Court.

III. Even under traditional stare decisis principles, *Wade* should not be disturbed.

Should this Court reach the stare decisis question at all, the traditional factors favor adherence to *Wade*, not its abandonment. *Wade*'s holding was not an off-hand aside, it was a considered construction of § 15-78-70(d)'s text, tested against a dissent raising the same joint tort-feasor concerns the Office now pressed, and affirmed anyway. Most tellingly, the General Assembly has had twenty-four years since *Wade* was decided to amend § 15-78-70(d) if it disagreed with this Court's interpretation, and has not done so to date. The silence from the General Assembly is a reliance this Court should respect, particularly where, as the Office concedes, the General Assembly's own legislative history is what drove the *Wade* Court's construction and decision in the first place. Furthermore, *Wade*'s rule has proven perfectly workable for over two decades and this very case demonstrates that Courts can apply it in a straightforward manner to materially identical facts as the Court of Appeals noted *Wade* to be "on all fours" with Whetstone. R.App.66-73.

CONCLUSION

The Court of Appeals correctly held that *Wade* controls, that *Andrade*'s UCATA-rooted common-law rule does not apply to claims under the Tort Claims Act, and that Whetstone's claim against the Office may proceed. The Office's request that this Court overrule or narrow *Wade* rests on an argument disclaimed by the lower Court and raises it for the first time in this Court. This Court should affirm the Court of Appeals and remand for further proceedings.

Respectfully submitted,

s/ Mark D. Chappell Jr.
Mark D. Chappell, Jr.
markjr@chappell.law
Mark D. Chappell
mark@chappell.law
Graham L. Newman
graham@chappell.law
William S. Detwiler
will@chappell.law
4500 Fort Jackson Blvd. Ste. 250
Columbia, SC 29209
P.O. Box 61170
Columbia, SC 29260
P: 803-233-7050
F: 803-233-0570

Counsel for Respondent