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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.

REPLY BRIEF OF PETITIONER

Wm. Grayson Lambert
Chief Legal Counsel
Erica W. Shedd
Deputy Legal Counsel
Tyra S. McBride
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

Counsel for Petitioner

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REPLY

The Office's argument is a simple syllogism. The major premise is that section 15-78-40 sets the ceiling of a government entity's liability under the Tort Claims Act. The minor premise is that a private employer would not be liable on the facts here. And the conclusion is that the Office therefore cannot be liable on these facts. The Office then explained how *Wade* changes nothing in that analysis because *Wade* was limited to a different provision of the Tort Claims Act.

Whetstone rebuts none of this. In fact, she does not even dispute the major premise. She concedes that section 15-78-40 measures the government's liability by that of a private defendant. *See* Red Br. 8. Her responses reach only the minor premise and the conclusion, and neither withstands scrutiny. Those arguments rely on a mistaken historical timeline and misread cases. The common law's settle-then-sue prohibition predates UCATA and the Tort Claims Act, and allowing the Office to invoke it here puts the Office in the exact position a private litigant would be in . . . just as section 15-78-40 demands.

Wade cannot rescue her. Properly read, it resolves only a question about section 15-78-70(d) that this case does not present. So even if the facts here and there are similar, the different legal rules that the defendant in each case has relied on mean that *Wade* does not control here. But if that case sweeps as broadly as Whetstone contends, it could not stand. So either way, the Court should reverse.

But before going any further, it's worth clarifying one mistake that stretches across Whetstone's brief: The Office is not changing its position to rely on section 15-78-70(d) now. *Contra* Red Br. 1–2. The Office has never relied on that provision for why it should prevail here. That's why section 15-78-70(d) never appears in Part I of the Office's opening brief. *See* Blue Br. 5–13. The Office discusses section 15-78-70(d) only in Part II of its brief. There, the Office explains why *Wade* does not sweep as broadly as the Court of Appeals said, *see id.* at 14–18, and alternatively, if *Wade* is that broad, why the Court should narrow or overrule it, *see id.* at 18–23.

I. The Office is not liable to Whetstone under the Tort Claims Act.

The Tort Claims Act makes a government 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. The Act, in other words, preserves for a government entity any defenses that a private defendant could assert. *See* Blue Br. 16–17. That's why this Court held that the Highway Department was entitled to an assumption-of-the-risk instruction when it was sued over the condition of a road after the plaintiff crashed on a rainy night. *See Strange v. S.C. Dep't of Highways & Pub. Transp.*, 307 S.C. 161, 165, 414 S.E.2d 138, 140 (1992). Allowing a government entity to assert these common-law defenses is the only way to fulfill "the Legislature['s] inten[t]" that a government defendant's liability 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).

One defense that a private defendant enjoys is the common-law rule that "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." *Seaboard Air Line R. Co. v. Coastal Distrib. Co.*, 273 F. Supp. 340, 343 (D.S.C. 1967). Rather than attacking the rule in section 15-78-40, Whetstone challenges the scope of the common-law settle-then-sue prohibition that the Office invoked and claims that applying that rule here makes the Office less liable than a private defendant. Neither argument has merit.

A. The common-law rule that the Office relies on is not as narrow as Whetstone claims.

Whetstone questions the general applicability of this settle-then-sue prohibition, arguing that the rule doesn't apply outside UCATA cases. In her telling, *Andrade* represents a "common law rule that this Court *developed* to reconcile the UCATA's indemnity and contribution principles with vicarious liability among *private* joint tortfeasors," so that rule "has no basis in a statutory scheme that expressly excludes the government from UCATA's operation." Red Br. 7 (first emphasis added). Her argument is doubly wrong.

1. Her argument cannot be reconciled with history. The common-law rule that a covenant not to sue an agent also releases the principal from any vicarious liability theory goes back decades. *See, e.g.*, *Seaboard Air Line R. Co.*, 273 F. Supp. at 343. In fact, courts have applied this concept for centuries. *See, e.g.*, *Evans v. Raper*, 74 N.C. 639, 643 (1876) ("The legal effect of the covenant is, therefore, to release and discharge the principal in the judgment; and nothing more appearing, it follows from all the authorities that the surety is also discharged. Any discharge or modification of the principal's liability, without the consent of the surety, absolutely discharges the surety . . . ."); *Potter v. Green*, 88 Mass. 442, 444 (1863) ("It is well settled that an agreement to extend the time for the payment of a debt, given to the principal without the assent of the surety, will discharge the surety. So will a release, or a covenant not to sue, or any agreement which changes the obligation of the principal under the contract."); *Brown v. Williams*, 4 Wend. 360, 366 (N.Y. Sup. Ct. 1830) ("If therefore the holder releases the principal debtor, he ought not to recover against the endorsers; for by releasing the debt, he discharges the principal from all liability upon the note to the endorsers, as well as to himself.").

After this common-law rule was already well established, South Carolina enacted UCATA in 1988. *See* 1988 S.C. Acts No. 432, § 5. Section 15-38-65, which declares that UCATA "shall not apply to governmental entities," came another six years later. *See* 1994 S.C. Acts No. 497, Part II, § 107A.

That timeline proves that this common-law rule came first, so that rule cannot be "UCATArooted." Red Br. 13. In fact, *Andrade* confirms UCATA "does not change" that rule. *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). UCATA merely establishes a framework for defendants who are "jointly or severally liable in tort for the same injury." S.C. Code Ann. § 15-38-20(A). UCATA has nothing to say about any theories of derivative liability, like Whetstone's here. *See* Pet.App.16 (Whetstone's complaint: "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." (emphasis added)). And *Andrade* did not alter the common-law rule for derivative liability when a plaintiff releases an agent and then sues the principal. 345 S.C. at 226, 546 S.E.2d at 670.

2. This rule "is not [based] merely upon the theory" of indemnity, as Whetstone portrays it (while citing no authority). *Seaboard Air Line R. Co.*, 273 F. Supp. at 343; *contra* Red Br. 7–8. Instead, there are at least two other rationales for the common-law rule: The agreement to discharge the primary liability "extinguishes the secondary liability," and "the secondarily liable party is not a true tortfeasor." *Andrade*, 345 S.C. at 224, 546 S.E.2d at 669; *see also* Blue Br. 8. Whetstone never engages with either of those rationales, which this Court has consistently embraced. *See, e.g.*, *Chapman-Storm Lumber Corp. v. Minnesota-S.C. Land & Timber Co.*, 183 S.C. 31, 34, 190 S.E. 117, 118 (1937) ("[I]f the . . . servant is without blame in his conduct, the . . . master cannot be held blame-able because of that same conduct."). And Whetstone never explains why this common-law rule should not apply beyond the indemnity context. Or put another way, she offers no reason why limiting the rule would be anything but "illogical and unjust." *Seaboard Air Line R. Co.*, 273 F. Supp. at 343.

3. Nor does the Tort Claims Act eliminate this common-law rule. Whetstone insists that the Tort Claims Act "replaces the common-law vicarious liability framework in its entirety" and makes "the doctrine of respondeat superior . . . inapplicable to claims against South Carolina governmental entities or their employees." Red Br. 7 (cleaned up). That's not accurate. Common-law vicarious liability was not the roadblock to suing government entities before 1985. Sovereign immunity was. *See McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). The Tort Claims Act abrogated that immunity and created a statutory framework for suits against the government. To be sure, that Act modifies parts of the common law, but it generally incorporates the common law of tort. That's why the Act can include provisions like section 15-78-40 that base the government's liability on the liability of a private defendant in a tort case. So, contrary to Whetstone's assertion, *see* Red Br. 7, the Office has explained how the Tort Claims Act works with common-law vicarious liability theory.

This same misunderstanding of the Tort Claims Act drove the Court of Appeals' flawed distinctions of *Andrade*. *See* Blue Br. 10–13; Pet.App.94. Whetstone is quick to cite what the Court of Appeals said about *Andrade*, *see* Red Br. 6–7, but she does not (presumably because she cannot) rebut the Office's points on this front. Most prominently, she points to *Newkirk v. Enzor*, 240 F. Supp. 3d 426 (D.S.C. 2017), for the idea that vicarious liability has no role in the Tort Claims Act. *See* Red Br. 7. But as the Office explained, *Newkirk* shows how the concept of vicarious liability has been incorporated into the Act: "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." 240 F. Supp. 3d at 436. It's a statutory vicarious-liability doctrine, rather than a common-law one, but the concept is the same. Whetstone's primary case therefore undermines her argument.

B. The Office would not be less liable than a private defendant.

Whetstone's final argument that touches on the Office's syllogism goes to the conclusion. Whetstone insists that allowing the Office to invoke the common-law rule here makes it less liable than a private litigant. That's wrong.

The common law "provides that a covenant not to sue an employee operates as an acquittal of the employer who is only derivatively liable." *Andrade*, 345 S.C. at 226, 546 S.E.2d at 670. So if a plaintiff executed a covenant not to sue a private principal's agent, then the principal would be released too. That's clear from *Andrade*, in which June Andrade's covenant not to sue Jimmy Johnson released SCE&G too. *Id.*

Applying it here—with Whetstone's covenant not to execute against Campbell, Pet.App.59, also releasing the Office—puts the Office in the exact position SCE&G was in. And that's exactly what section 15-78-40 calls for. On the other hand, not allowing the Office to assert this rule as a defense would make the Office more liable than a private defendant would be on these facts. And that's exactly what section 15-78-40 forbids.

Thinking about the question from a private defendant's perspective confirms this conclusion. Contrary to Whetstone's claim, "private employers facing ordinary vicarious-liability suits without UCATA involved" do not "remain fully exposed." Red Br. 8. Any private employer can invoke the common-law rule and prevail, just like SCE&G in *Andrade*. And just like the Office here, under the circuit court's ruling. The Office is no better off and no worse off than any private defendant under this common-law rule.

II. *Wade* does not (or at least should not) change this conclusion.

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

1. Whetstone is quick to quote the Court of Appeals calling this case "on all fours" with

Wade, *e.g.*, Red Br. 2, 6, 10, but deciding cases isn't a fact-matching exercise. It is, rather, a determination of "what the *law* is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (emphasis added). "Those who apply the rule to particular cases, must of necessity expound and interpret *that rule*." *Id.* (emphasis added). And the "rule" at issue in *Wade* differs entirely from the rule at issue here.

The county in *Wade*, of course, sought summary judgment under section 15-78-70(d), but the Office here did not. Whetstone never responds to this point. That's critical because different legal rules can result in different outcomes on the same facts. *See* Blue Br. 15–16. In other words, even if *Wade*'s facts are "indistinguishable" from this case, Red Br. 6, that does not mean that the outcome is the same because cases that are "based on completely different statutory provisions" "are of no help." *State v. Bishop*, 241 S.C. 459, 461, 128 S.E.2d 914, 915 (1962).

Whetstone's failure to explain why *Wade* reaches beyond section 15-78-70(d) is all the more inexplicable given that she quotes that case's holding: "*§ 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." Red Br. 6 (emphasis added) (quoting *Wade v. Berkeley Cnty.*, 348 S.C. 224, 230, 559 S.E.2d 586, 589 (2002)). Whetstone therefore acknowledges that *Wade*'s holding focuses on that subsection, but she cannot demonstrate how the holding goes beyond that subsection. *See* Blue Br. 14–15 (detailing why *Wade*'s holding is limited).

2. Nor does Whetstone reconcile the broad reading of *Wade* with the rest of the Tort Claims Act. If *Wade* prohibits a government defendant from raising the common-law settle-then-sue prohibition, how is the Tort Claims Act "the exclusive remedy for any tort committed by an employee of a governmental entity"? S.C. Code Ann. § 15-78-70(a). Or how is "[a]n employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor"? *Id.* How can Whetstone recover from Campbell *and* the Office if the Tort Claims Act requires her to recover from Campbell *or* the Office? *See* Red Br. 10 n.1 (claiming it is a "matter of fact for the jury" whether Campbell was in the course of employment). Or how is the Act "be[ing] liberally construed in favor of limiting the liability of the State"? *Id.* § 15-78-20(f). Whetstone never says.

Thus, Whetstone is wrong when she accuses the Office of failing to confront *Wade* head-on. *See* Red Br. 12. The Office has "explain[ed] why *Wade*[] . . . does not foreclose" the common-law argument the Office raised, *id.*, in the circuit court, Pet.App.32, in the Court of Appeals, Office Ct. App. Br. 8–9; Pet.App.80–81, and in this Court. But to do it again (briefly): *Wade* held that section 15-78-70(d) did not bar a post-settlement suit, but it does not follow that *no* provision in the Tort Claims Act bars it.

B. *Wade* cannot stand if it's as broad as Whetstone and the Court of Appeals say.

1. For starters, the Office has properly put the argument before this Court, and this Court granted certiorari. There was no basis to press this argument affirmatively in the trial court because the Office didn't move for summary judgment under section 15-78-70(d) (as in that forum, *Wade* would have been an insurmountable hurdle). Pet.App.32. Nor was there a reason to ask the Court of Appeals to overrule *Wade*. Only this Court can overrule one of its decisions, *cf. Payne v. Taslimi*, 998 F.3d 648, 654 (4th Cir. 2021) ("it remains the Supreme Court's prerogative alone to overrule one of its precedents" (internal quotation mark omitted)), and "[t]his Court does not require parties to engage in futile actions in order to preserve issues for appellate review," *Staubes v. City of Folly Beach*, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000). Now that the Office is in a forum that can overrule or narrow *Wade*, the Office has squarely raised that question (and then, only as an alternative argument).

And Whetstone misapprehends that argument. The Office isn't asking the Court to overrule *Wade* so that the Office may obtain summary judgment under section 15-78-70(d). *Contra* Red Br. 11. The Office is simply asking the Court to overrule (or narrow) *Wade*, if *Wade*'s holding means that *no other provision* of the Tort Claims Act prohibits what Whetstone did here, so that the Office may prevail under the common-law rule that section 15-78-40's plain text permits the Office to invoke.

2. Whetstone's brief response on stare decisis fails. *See* Red Br. 12. Her supposedly "[m]ost telling[]" argument is that the General Assembly hasn't amended section 15-78-70(d) since *Wade*. *Id.* But that puts too much weight on legislative inaction. *Cf. Planned Parenthood S. Atl. v. State*, 445 S.C. 600, 616 n.6, 916 S.E.2d 299, 307 n.6 (2025) (warning that legislative history "should be read narrowly"). After all, "legislative inaction cannot legitimize a flawed analysis nor does it alter [this Court's] obligation to rely on the plain language of a statute." *State v. Ramsey*, 409 S.C. 206, 213, 762 S.E.2d 15, 18 (2014). That's particularly so when there was no reason for the General Assembly to have thought that *Wade* stretched as far as the Court of Appeals applied it here.

Whetstone's workability argument fails too. *See* Red Br. 12. The Court of Appeals' reading of *Wade* creates a dangerous roadmap for plaintiffs to undermine the fundamental structure of the Tort Claims Act. The broad *Wade* interpretation will eviscerate the Act's either–or liability structure for employees and government entities. This rule is not workable in a way that is consistent with the Act. And that's the problem. It doesn't matter whether the rule can be mechanically applied by lower courts.

Whetstone makes another argument that sounds in stare decisis when she says that this

Court has already rejected the Office's arguments. *See* Red Br. 9–10. Yet again, Whetstone is off base. She argues that this Court rejected similar arguments made by a dissenting Court of Appeals judge in *Wade* (although she wrongly attributes language from the court below to this Court, *see* Red Br. 10 (quote in the first two lines is from Pet.App.94, not *Wade*)). But as the Court of Appeals noted in that very sentence that Whetstone quotes, this Court decided *Wade* "without addressing the dissent's interpretation." Pet.App.94. This Court therefore has not considered the Office's argument. *Cf. United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (a "case is not a binding precedent on [a] point" when that point was not "discussed in the opinion"). Plus, that dissent in *Wade* was focused on the construction of section 15-78-70(d), so there's no way—even if this Court in *Wade* had taken up the dissent's point—that any discussion of the dissent would have addressed the Office's section 15-78-40 argument. *See Wade v. Berkeley Cnty.*, 339 S.C. 513, 531, 529 S.E.2d 743, 753 (Ct. App. 2000) (en banc) (Goolsby, J., dissenting).

And regardless, *Wade* is still only a single decision. "[S]tare decisis is far more a respect for a body of decisions as opposed to a single case standing alone." *McLeod v. Starnes*, 396 S.C. 647, 654, 723 S.E.2d 198, 203 (2012). In fact, "[w]hen the court is asked to follow the line marked out by a single precedent case it is not at liberty to place its decision on the rule of *stare decisis* alone, without regard to the grounds on which the antecedent case was adjudicated." *State v. Williams*, 13 S.C. 546, 554 (1880) (quoted in *McLeod*, 396 S.C. at 654, 723 S.E.2d at 202). As the Office explained in its opening brief, *Wade* (if as broad as the court below read it to be) is poorly reasoned, both as a textual matter and under the rules of statutory construction. *See* Blue Br. 19–22. Whetstone offers no substantive response to any of those arguments.

Finally, the broad version of *Wade* produces incongruous and harmful results. *See* Blue Br. 18–19. Whetstone does not dispute this, but instead she dismisses the Office's concerns as mere policy arguments rejected by the Court of Appeals and more properly addressed to the General Assembly. *See* Red Br. 9. No doubt, "[t]he General Assembly has 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). The Office never suggested that this Court arrogate that authority. Rather, its "policy" arguments demonstrate the flaws in *Wade*'s statutory-interpretation analysis because there is no way that the General Assembly would have intended that result in passing the Tort Claims Act. *See* Blue Br. 18–19. Indeed, both the *Wade* Court and the Court of Appeals here recognized that their decisions go against the Act's policy and logic.

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
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

Counsel for Petitioner