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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable David P. Caraker, Jr.

Appellate Case No. 2026-000074

Delores Holloway and Sherica Powell Respondents,

v.

Jolly Ehiabhi, Anagkaso, LLC DBA Anagkaso Logistic,
The South Carolina Ports Authority,
and Randy David Anderson Defendants,

AND

The South Carolina Ports Authority Appellant,

v.

American Millennium Insurance Company Third-Party Defendant.

Initial Brief of Respondents

Delores Holloway and Sherica Powell

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Statement of Issues on Appeal

- I. Whether this appeal should be dismissed because the circuit court's orders denying the South Carolina Ports Authority's Rule 12(b)(6) motions to dismiss are interlocutory orders that neither involve the merits nor affect a substantial right under S.C. Code Ann. § 14-3-330.
- II. Whether the circuit court correctly held that S.C. Code Ann. § 15-78-70(d) does not bar Respondents' claims against the South Carolina Ports Authority, where (a) a private liability insurer funded and executed covenants not to execute with Respondents; (b) when the covenants were signed, no action had been filed and no claim had been presented against the Ports Authority under the Tort Claims Act; and (c) the Ports Authority paid nothing, signed nothing, and objected to the covenants.

Statement of the Case

On January 24, 2025, Respondents Delores Holloway and Sherica Powell each filed a Summons and Complaint in the Georgetown County Court of Common Pleas against Jolly Ehiabhi; Anagkaso, LLC DBA Anagkaso Logistic; Randy David Anderson; and the South Carolina Ports Authority (“SCPA”). (R. p. ____) (Holloway Compl.; Powell Compl.). SCPA answered on April 18, 2025. (R. p. ____) (SCPA Answer).

On May 14, 2025, SCPA moved to dismiss each Complaint under Rule 12(b)(6), SCRCP, contending that the covenants not to execute Respondents had signed with American Millennium Insurance Company (“AMIC”) barred further action under S.C. Code Ann. § 15-78-70(d). (R. p. ____) (SCPA Mot. to Dismiss). The same day, SCPA amended its Answers to assert Third-Party Complaints against AMIC for bad faith and breach of contract, based on AMIC’s decision to enter the same covenants. (R. p. ____) (SCPA Am. Answer & Third-Party Compl.). AMIC moved to dismiss the Third-Party Complaints. (R. p. ____) (AMIC Mot. to Dismiss). (SCPA’s brief dates AMIC’s motions June 16, 2026, Initial Br. of Appellant at 2; the motions preceded the September 25, 2025, hearing, so the year appears to be a typographical error.)

The circuit court heard all motions by Webex on September 25, 2025. (R. p. ____) (Tr. 1). On October 13, 2025, the court denied SCPA’s motions to dismiss, holding that the covenants were “pursuant to an indemnity agreement between two parties, and by a private insurance company, thus not under the Tort Claims Act.” (R. p. ____) (Order Denying Mot. to Dismiss at 4). The court separately stayed AMIC’s motions to dismiss pending AMIC’s federal declaratory judgment action. (R. p. ____) (Order Denying Mot. to Reconsider § III).

SCPA moved to reconsider under Rule 59(e), SCRCP. On December 29, 2025, the court denied reconsideration, reasoning that naming a governmental entity as a covenantee or insured “does not convert an insurance settlement into a settlement ‘under the Act,’” and that holding

otherwise “would allow any settlement, so long as a governmental entity is named, to operate as a statutory bar, regardless of whether the governmental entity actually settled a Tort Claims Act claim.” (R. p. ____) (Order Denying Mot. to Reconsider at 2).

SCPA served Notices of Appeal on January 13, 2026. This Court requested memoranda on appealability, and Respondents argued the orders are not immediately appealable. On April 14, 2026, this Court allowed the appeal to proceed, expressly stating that its order “does not finally determine whether the underlying orders are subject to immediate review” and that “[n]othing prevents Respondent from raising the question of appealability as an issue in the appellate brief.” (Order, Apr. 14, 2026). The appeals were consolidated.

Statement of Facts

The collision. On January 24, 2023, Defendant Randy Anderson drove a tractor-trailer into the rear of Ms. Holloway's vehicle while she was stopped in northbound traffic on County Line Road in Georgetown County. (R. p. ____) (Order Denying Mot. to Dismiss at 1). The impact drove her vehicle into the car ahead, which struck another. *Id.* Ms. Powell was Ms. Holloway's passenger. (R. p. ____) (Powell Compl. ¶ 11). Anagkaso owned the tractor; the chassis and container were owned or controlled by SCPA. (R. p. ____) (Order Denying Mot. to Dismiss at 1-2). Ms. Holloway was catastrophically injured, with medical bills exceeding \$1 million. (R. p. ____) (Tr. 9:11-14). (The settlement documents describe the date as January 25 or 26, 2023; no party disputes that all documents concern the same occurrence.)

The Chassis Interchange Agreement. Under its Chassis Interchange Agreement with SCPA, Anagkaso agreed to defend and indemnify SCPA against claims "arising directly or indirectly from or in connection with" its "possession, use, condition, or operation of the Chassis," and to name SCPA as an additional insured on its liability insurance. (R. p. ____) (Chassis Interchange Agreement §§ 10, 13, filed as part of AMIC Mot. to Dismiss Ex. 5). AMIC issued that policy, with a \$1,000,000 per-accident limit. (R. p. ____) (Agm't at 1).

The covenants. Before any lawsuit was filed, AMIC resolved the claims of multiple claimants and exhausted its \$1,000,000 limit. (R. p. ____) (Tr. 12:9-18; 13:3-7). On October 18, 2024, Ms. Holloway signed a document titled "Settlement Agreement" that describes itself as an "Agreement and Covenant Not to Execute." (R. p. ____) (Agm't at 1, 5). Ms. Powell signed a materially identical document on October 19, 2024. (R. p. ____) (Powell Agm't). The agreement is "between American Millenium Insurance Company, as liability insurance carrier for" Anderson, Ehiabhi, Anagkaso, and SCPA (the "Covenantees"), those same parties (the "Insured"), and the

claimant. (R. p. ____) (Agm't at 1). AMIC paid Ms. Holloway \$812,414.96 and Ms. Powell \$58,960.87 "of the liability policy limit." (R. p. ____) (Agm't at 1-2). SCPA paid nothing.

The covenants' operative terms preserve Respondents' claims:

- The recitals state that the claimant "is unwilling to provide a release that might be construed to prevent the prosecution of a claim for underinsured motorist coverage benefits, additional liability coverage and/or excess liability coverage(s)." (R. p. ____) (Agm't at 1).
- Paragraph 1 provides that the claimant "reserves the right to attempt to establish that Claimant is legally entitled to recover damages from Insureds," and limits the covenant to "attempting to collect any damages or any other sum directly from Covenantees and/or their assets." It adds that "no provision contained herein releases any rights of Claimant against any underinsured motorist carrier, additional liability carrier, and/or excess liability insurance carrier(s)." (R. p. ____) (Agm't at 2, ¶ 1).
- Paragraph 2 defers any release until a future event occurs, such as final adjudication of the claimant's claims for additional liability or excess coverage. (R. p. ____) (Agm't at 2-3, ¶ 2).
- Paragraph 3 expressly contemplates entry of a "judgment against Insureds" up to the amount of other available coverage. (R. p. ____) (Agm't at 3, ¶ 3).
- Paragraph 7 provides that the instrument may be pleaded as a satisfaction of judgment and "as a complete bar to and release of any claim *against the assets of* Insureds." (R. p. ____) (Agm't at 4, ¶ 7) (emphasis added).
- Paragraph 8 provides: "Notwithstanding anything to the contrary, Claimant does not waive, limit, or release in any way any potential liability insurance carrier and/or

underinsured motorist carrier because of the terms and conditions stated herein.” (R. p. ____) (Agm’t at 4, ¶ 8).

No action or claim against SCPA existed when the covenants were signed. Respondents did not sue SCPA until January 24, 2025, three months after the covenants. SCPA’s brief concedes the sequence. (Initial Br. of Appellant at 1-2). On the day Ms. Holloway signed, AMIC’s counsel emailed SCPA’s counsel that time was of the essence “to protect the insureds from a potential suit being filed any day.” (R. p. ____) (AMIC Mot. to Dismiss Ex. 4, Email of Oct. 18, 2024). Nothing in the record shows that any written claim was presented to SCPA under the Tort Claims Act before the covenants were signed, and SCPA does not contend otherwise. (The order denying reconsideration states that “SCPA was a named defendant at the time the covenant not to execute was executed.” (R. p. ____) (Order Denying Mot. to Reconsider at 3). The record and SCPA’s own brief show the suits were filed afterward. The misstatement does not affect the ruling, which rests on the absence of any settlement “entered pursuant to the Tort Claims Act.” *Id.*)

SCPA objected to the covenants. At the hearing, SCPA’s counsel told the court that before the covenants were executed, SCPA instructed AMIC: “Do not execute that agreement. We do not believe that it sufficiently protects the Port We object. Do not enter it.” (R. p. ____) (Tr. 19:2-12). Counsel said SCPA did not learn the covenants had been signed until after suit was filed. (Tr. 19:13-20). He repeated: “We did object to it. We were provided it, but we thought it wasn’t good enough.” (Tr. 26:22-24). SCPA’s Third-Party Complaints seek damages from AMIC for entering the covenants over that objection. (Tr. 20:24-21:7).

SCPA’s pleadings say the same. Its Third-Party Complaint alleges that in the fall of 2024 AMIC asked SCPA to “consent to a proposed settlement agreement”; that SCPA “objected and did not consent”; that SCPA threatened to sue AMIC if it settled “without protecting Defendant

SCPA”; and that AMIC never told SCPA the agreement was signed or gave SCPA a copy. (R. p. ____) (SCPA Am. Answer & Third-Party Compl. ¶¶ 94-102). In opposing AMIC’s motion to dismiss, SCPA told the circuit court that the agreement “was entered into solely for the benefit of AMIC and its other Insureds,” was executed “without SCPA’s consent and without SCPA’s knowledge,” and “was written in such a way to circumvent protections afforded to SCPA under the South Carolina Tort Claims Act.” (R. p. ____) (SCPA Mem. in Opp’n to AMIC Mot. to Dismiss at 12-14).

After it was served, SCPA demanded that Anagkaso and AMIC defend and indemnify it against Respondents’ “Claims,” reserving the right to recover “any other amounts the SCPA may be required to pay in settlement or by judgment in connection with the Claims.” (R. p. ____) (Letter from N. Stewart to AMIC, Apr. 16, 2025, at 2). AMIC responded that it had exhausted its limits through covenants executed “prior to the Lawsuits being filed,” and agreed to defend SCPA under a reservation of rights. (R. p. ____) (Letter from AMIC, May 1, 2025, at 2).

AMIC’s counsel explained that AMIC included SCPA in the covenant on its own initiative, because SCPA “had the potential to be an insured under our policy,” and that AMIC had the right under its policy to settle “without the consent of the insured,” including SCPA. (Tr. 14:22-15:6; 23:15-25). SCPA’s counsel likewise described the document as “really a covenant” and said SCPA was sued as “an effort to locate some more insurance proceeds.” (Tr. 3:20-22; 8:8-21).

Standard of Review

Whether an order is immediately appealable is governed by S.C. Code Ann. § 14-3-330 and is decided by this Court as a threshold matter.

On the merits, Respondents agree that this Court reviews the denial of a Rule 12(b)(6), SCRCF, motion under the same standard as the circuit court, and that the motion may not be granted if the facts alleged and the reasonable inferences from the pleadings would entitle Respondents to relief on any theory. (Initial Br. of Appellant at 5). The meaning of § 15-78-70(d) is a question of law. This Court may affirm on any ground appearing in the Record on Appeal. Rule 220(c), SCACR.

A ruling on a Rule 12(b)(6) motion must rest solely on the allegations of the complaint. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). SCPA's motions relied on documents outside the pleadings: the covenants and, through them, the insurance and indemnity arrangement. Under Rule 12(b), SCRCF, when "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." SCPA acknowledged this below and briefed the summary judgment standard in the alternative. (R. p. ____) (SCPA Mem. in Supp. of Mot. to Dismiss at 3 & n.1). Under either standard, the evidence and every reasonable inference from it must be viewed in Respondents' favor. Rule 56(c), SCRCF. Any doubt about what the covenants settled, and with whom, cannot be resolved against Respondents at this stage.

Summary of Argument

The appeal should be dismissed. The denial of a motion to dismiss is not immediately appealable, and the orders here neither finally determine SCPA's defense nor strike it. SCPA may raise § 15-78-70(d) again later in the case and on appeal from final judgment.

If the Court reaches the merits, it should affirm. Section 15-78-70(d) bars further action only after "a settlement or judgment in an action or a settlement of a claim *under this chapter*." Our Supreme Court has held that "under this chapter" modifies both clauses, so the bar applies only to a settlement of an action or claim brought under the Tort Claims Act. *Wade v. Berkeley Cnty.*, 348 S.C. 224, 230, 559 S.E.2d 586, 588-89 (2002). In *Wade*, the bar did not apply because, when the covenant was signed, no action had been filed, and no claim had been presented against the governmental entity. *Id.* at 230, 559 S.E.2d at 589. This Court reaffirmed that holding this year. *Whetstone v. Office of the Governor*, 931 S.E.2d 322 (S.C. Ct. App. 2026), *cert. granted* (S.C. June 17, 2026).

The same facts control here. When Respondents signed covenants not to execute with AMIC, a private insurer, no action had been filed against SCPA, and no written claim had been presented to it. SCPA's name in AMIC's form document did not create a "claim," a defined term meaning a written demand against the State. S.C. Code Ann. § 15-78-30(b). SCPA paid nothing, signed nothing, and told AMIC not to sign. The covenants expressly reserve Respondents' right to establish liability against the insureds and to pursue other liability coverage. The liberal-construction provisions SCPA invokes were before the *Wade* Court, which acknowledged them and applied the statute's text and history anyway.

Argument

I. The orders denying SCPA's motions to dismiss are interlocutory and not immediately appealable.

This Court's April 14, 2026, order allowed the appeal to proceed but did "not finally determine whether the underlying orders are subject to immediate review," and invited Respondents to raise the issue here. Respondents do so and ask the Court to dismiss the appeal.

A. The denial of a motion to dismiss is not immediately appealable.

Appellate jurisdiction in a law case is governed by S.C. Code Ann. § 14-3-330. An interlocutory order is immediately appealable only if it involves the merits, § 14-3-330(1), or affects a substantial right by, among other things, determining the action, granting or refusing a new trial, or striking out a pleading, § 14-3-330(2). The Supreme Court has held that the denial of a motion to dismiss is not immediately appealable under § 14-3-330. *McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526, 443 S.E.2d 539, 540 (1994). The same is true of the denial of summary judgment. *Ballenger v. Bowen*, 313 S.C. 476, 477-78, 443 S.E.2d 379, 380 (1994).

B. The orders do not involve the merits.

An order involving the merits "must finally determine some substantial matter forming the whole or a part of some cause of action or defense." *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). The orders here determined only that SCPA had not shown, on the pleadings and the covenants, that § 15-78-70(d) applies. They did not strike the defense or bar SCPA from raising it again. SCPA remains free to reassert § 15-78-70(d) at summary judgment, at trial, and on appeal from final judgment, when this Court "may . . . review any intermediate order or decree necessarily affecting the judgment." § 14-3-330(1).

C. A statutory immunity defense does not create an immediate appeal.

The Supreme Court has refused to treat the denial of a statutory immunity claim as immediately appealable. In *State v. Isaac*, the Court held that an order denying immunity from prosecution under the Protection of Persons and Property Act “does not finally determine a substantial cause of action or defense” and may be reviewed after final judgment. *State v. Isaac*, 405 S.C. 177, 747 S.E.2d 677 (2013). The Court explained: “Absent an unambiguous expression of legislative intent, we see no reason to alter settled law concerning appealability.” *Id.* at 184, 747 S.E.2d at 680. That statute expressly granted immunity from prosecution. Section 15-78-70(d) is less: it says a qualifying settlement is “a complete bar to any further action,” language that describes the effect of a defense if proven, like a statute of limitations. It says nothing about appellate jurisdiction. The denial of a motion to dismiss on limitations grounds is not immediately appealable. *McLendon*, 313 S.C. at 526, 443 S.E.2d at 540.

D. The circuit court did not deny SCPA’s immunity.

The circuit court did not hold that SCPA lacks immunity, that the Act’s waiver is broader than written, or that SCPA is subject to suit outside the Act. Respondents sued SCPA under the Act, and SCPA retains every limitation the Act provides. The court decided only that a private insurer’s covenant was not a settlement “under this chapter.” Federal collateral-order cases involving Eleventh Amendment immunity do not govern; appealability in this State is set by § 14-3-330. *See Isaac*, 405 S.C. 177, 747 S.E.2d 677.

Because the orders neither involve the merits nor affect a substantial right, the appeal should be dismissed.

II. Section 15-78-70(d) does not bar Respondents' claims because there was no action and no claim under the Tort Claims Act when the covenants were signed.

Section 15-78-70(d) provides: "A settlement or judgment in an action or a settlement of a claim under this chapter constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence." The parties agree the covenants are settlements. The only question is whether they were settlements of an action or claim "under this chapter." They were not.

A. *Wade* controls: the bar applies only to a settlement of an action or claim "under this chapter," and none existed.

In *Wade*, the plaintiff sued a county employee individually and signed a covenant not to execute with the employee's personal insurer. 348 S.C. at 226, 559 S.E.2d at 586-87. He then sued the county under the Act. *Id.* The county argued that § 15-78-70(d) barred the suit, stressing that the plaintiff knew of his potential claim against the county when he settled. *Id.* at 229, 559 S.E.2d at 588. The Supreme Court rejected that argument.

The Court held that "under this chapter" means "within the South Carolina Tort Claims Act," and that the phrase modifies both a "settlement or judgment in an action" and a "settlement of a claim." *Id.* at 229-30, 559 S.E.2d at 588. "Consequently, to invoke the provisions of § 15-78-70(d), there must be a settlement or judgment in an action under the Act or a settlement of a claim under the Act." *Id.* at 230, 559 S.E.2d at 588. Because "no action had been initiated, nor had any claim been filed, against County" when the covenant was signed, there were "no actions 'under this chapter,'" and the settlement "did not invoke the provisions of § 15-78-70(d)." *Id.* at 230, 559 S.E.2d at 589.

This Court applied *Wade* this year in *Whetstone v. Office of the Governor*, 931 S.E.2d 322 (S.C. Ct. App. 2026), *cert. granted* (S.C. June 17, 2026). There, the plaintiff recovered the limits of a state employee’s personal liability and underinsured motorist policies and signed a settlement agreement and covenant not to execute that “specifically preserved her right to pursue claims against ‘any other parties.’” *Id.* at 323. This Court reversed summary judgment for the State, explaining that *Wade* requires “a settlement or judgment in an action or claim under the TCA before a government defendant may invoke the bar against further action.” *Id.* at 324. Respondents cite *Whetstone* for its application of *Wade*, which remains controlling.

The facts here satisfy *Wade* even more clearly. When Respondents signed the covenants in October 2024, they had filed no action against SCPA; their suits came three months later. (Initial Br. of Appellant at 1-2). No written claim had been presented to SCPA under the Act. The only parties to the covenants were Respondents and AMIC, a private insurer acting “as liability insurance carrier” under a policy Anagkaso bought. (R. p. ____) (Agm’t at 1). As in *Wade*, there was nothing “under this chapter” to settle.

SCPA’s attempts to distinguish *Wade* and *Whetstone* fail. SCPA says those cases differ because SCPA was named in the covenants. (Initial Br. of Appellant at 8). But *Wade*’s test does not ask who is listed in a private settlement document. It asks whether an action had been initiated or a claim filed against the governmental entity under the Act. 348 S.C. at 230, 559 S.E.2d at 589. SCPA also quotes *Whetstone*’s observation that there “were no allegations of tortious conduct by the government entity.” (Initial Br. of Appellant at 8). That sentence describes the plaintiff’s derivative-liability theory in *Wade*; it was part of this Court’s explanation of why the common-law rule of *Andrade* did not apply. It says nothing about what a settlement document must recite. Neither case suggests that a recital in a private insurer’s form can create a claim under the Act.

Being named as an insured and covenantee shows that SCPA received the contractual protection AMIC's policy afforded its insureds: Respondents will not execute against SCPA's assets. It does not show that Respondents compromised a Tort Claims Act claim against SCPA, which had never been presented. The covenants must be read as a whole, and their operative terms (§§ 1, 2, 3, 7, and 8) govern over a party list in the preamble.

B. Naming SCPA in a private insurer's covenant did not create a "claim" under the Act.

The Act defines "claim" as "any written demand against the State of South Carolina or a political subdivision for money only, on account of loss, caused by the tort of any employee of the State or a political subdivision while acting within the scope of his official duty." S.C. Code Ann. § 15-78-30(b). Respondents made no written demand on SCPA before the covenants. The covenants were not demands on SCPA at all. They were contracts with AMIC, reciting claims against AMIC's insureds and paid from AMIC's policy. (R. p. ____) (Agm't at 1-2).

SCPA argues that because its tort liability exists only by virtue of the Act, any settlement that names it "inherently invokes the Tort Claims Act." (Initial Br. of Appellant at 9). That argument cannot be squared with *Wade*. The county in *Wade* could be liable only under the Act, and the plaintiff knew of that potential claim when he settled. 348 S.C. at 229-30, 559 S.E.2d at 588-89. The Court still held the bar did not apply, because no action or claim under the Act yet existed. *Id.* The source of a governmental entity's potential liability does not answer whether a settlement was made "under this chapter."

SCPA conceded the governing test below. It told the circuit court that under *Wade*, § 15-78-70(d) "applies when there is a claim made against the governmental entity at the time the settlement agreement is executed." (R. p. ____) (SCPA Mem. in Supp. of Mot. to Dismiss at 6). Its only proof that such a claim existed was "the fact that the Settlement Agreement itself specifically

names Defendant SCPA.” (*Id.* at 6-7). That reasoning is circular: it uses the settlement to prove the claim the settlement supposedly resolved. It also ignores the statutory definition. A recital in AMIC’s document is not a “written demand against” SCPA. § 15-78-30(b).

The circuit court identified the consequence of SCPA’s rule: it “would allow any settlement, so long as a governmental entity is named, to operate as a statutory bar, regardless of whether the governmental entity actually settled a Tort Claims Act claim.” (R. p. ____) (Order Denying Mot. to Reconsider at 2). A private insurer could extinguish an injured person’s statutory remedy against the State simply by adding the State’s name to its own form, without the State’s consent and over its objection. That is what SCPA says happened here.

C. The liberal-construction provisions do not override Wade’s construction of § 15-78-70(d).

SCPA argues the circuit court failed to apply §§ 15-78-20(f) and 15-78-200, which direct that the Act’s limitations on liability be liberally construed in favor of limiting the State’s liability. (Initial Br. of Appellant at 6-7). The Supreme Court considered that directive in *Wade* and quoted it. 348 S.C. at 229, 559 S.E.2d at 588. It then held: “While this construction may not limit County’s liability as required under the Act, we cannot ignore the clear legislative history of § 15-78-70(d).” *Id.* at 230, 559 S.E.2d at 588-89 (footnote omitted). The Court acknowledged that its reading “circumvents” a policy of the Act but concluded that “our construction of the statute is limited by its legislative history.” *Id.* at 230-31, 559 S.E.2d at 589. In *Whetstone*, this Court recognized the same tension: “We find ourselves in the same position here.” *Whetstone*, 931 S.E.2d at 325.

The circuit court applied *Wade*, as it was required to do, and this Court is bound by it as well. Liberal construction cannot supply an action or a claim that never existed.

D. The covenants are not a settlement by SCPA; they preserve Respondents' right to establish liability and pursue other coverage.

A covenant not to execute “is not a release,” though “it is nonetheless a settlement between the parties to the agreement.” *Wade*, 348 S.C. at 228, 559 S.E.2d at 588. The parties here were Respondents and AMIC. AMIC entered the covenants “as liability insurance carrier” for its insureds and paid “of the liability policy limit.” (R. p. ____) (Agm’t at 1). SCPA did not sign them and paid nothing. As the circuit court found, the settlement “was pursuant to an indemnity agreement between two parties, and by a private insurance company.” (R. p. ____) (Order Denying Mot. to Dismiss at 4).

SCPA calls the source of payment “beside the point.” (Initial Br. of Appellant at 10). It is not. Under *Wade*, the question is whether the settlement occurred within the Act, through an action or claim brought under it. A payment by a private carrier, under a private policy, to resolve claims presented to that carrier, is a settlement outside the Act.

The covenants’ own terms confirm they did not end Respondents’ claims against SCPA:

- Respondents “reserve[] the right to attempt to establish that Claimant is legally entitled to recover damages from Insureds,” and agree only not to collect “directly from Covenantees and/or their assets.” (R. p. ____) (Agm’t at 2, ¶ 1).
- No release takes effect until a future event, such as final adjudication of Respondents’ claims for additional liability or excess coverage. (Agm’t at 2-3, ¶ 2).
- The covenants contemplate entry of a “judgment against Insureds.” (Agm’t at 3, ¶ 3).
- The bar in ¶ 7, on which SCPA relies, reaches only “any claim against the assets of Insureds.” (Agm’t at 4, ¶ 7). That is the function of a covenant not to execute: a promise not to execute a judgment, not a release of the claim. *Wade*, 348 S.C. at 228, 559 S.E.2d at 588.

- Respondents “do[] not waive, limit, or release in any way any potential liability insurance carrier.” (Agm’t at 4, ¶ 8).

Reading the covenants as a statutory bar to any further action against SCPA would nullify every one of these provisions. SCPA’s response, that a party “can’t contract around the law” (Tr. 10:12-14), assumes the statute applies. It does not. Respondents did not contract around § 15-78-70(d); the statute never reached a private settlement made before any action or claim existed under the Act.

Powell’s covenant illustrates the point. SCPA concedes it names Ms. Holloway, not Ms. Powell, as the Claimant in its opening paragraph. (Initial Br. of Appellant at 4 n.2). That is the mark of an insurer’s form reused across claimants, not a negotiated settlement of a Tort Claims Act claim against a state agency. Finally, SCPA expressly declines to rely on Ms. Holloway’s March 9, 2023, property-damage release. (*Id.* at 7 n.3). That release is limited by its terms to “property damage only” and states that it “does not have any bearing on the claim for bodily injury.” (R. p. ____) (Release at 1).

E. SCPA’s own positions confirm it settled nothing.

SCPA’s objection does not depend on whether AMIC had authority to settle on its behalf. Even assuming it did, AMIC’s settlement was not a settlement of an action or claim under the Act. SCPA’s own positions confirm it. SCPA told the circuit court that before the covenants were signed, it instructed AMIC: “Do not execute that agreement. . . . We object. Do not enter it.” (Tr. 19:2-12). It said it did not learn the covenants had been signed until after suit. (Tr. 19:13-20). It is suing AMIC for bad faith and breach of contract because AMIC signed them over that objection. (Tr. 20:24-21:7). AMIC agrees it settled without SCPA’s consent, relying on its policy right to settle “without the consent of the insured.” (Tr. 23:15-25).

SCPA's own Answer treated AMIC's payment the same way. SCPA admitted it "is subject to suit under the provisions of the South Carolina Tort Claims Act." (R. p. ____) (SCPA Answer ¶ 3). That original Answer, filed April 18, 2025, did not plead § 15-78-70(d); SCPA added the defense only in its May 14, 2025, Amended Answer. The original Answer instead asserted a right to "a set off for a credit for any monies paid to Plaintiff by any third parties." (*Id.* ¶ 34). A party that settled a claim does not describe its own settlement as money paid by a third party.

SCPA's own filings go further. In opposing AMIC's motion to dismiss, SCPA argued that the agreement was "entered into solely for the benefit of AMIC and its other Insureds" and "was written in such a way to circumvent protections afforded to SCPA under the South Carolina Tort Claims Act." (R. p. ____) (SCPA Mem. in Opp'n to AMIC Mot. to Dismiss at 12-13). An agreement that circumvents the Act's protections is not a settlement "under this chapter." SCPA cannot tell the circuit court in one memorandum that the covenant fell outside the Act's protections and tell this Court that it triggered the Act's strongest protection.

SCPA's April 16, 2025, demand letter confirms the point. Months after the covenants, SCPA demanded a defense against Respondents' "Claims" and indemnity for "any other amounts the SCPA may be required to pay in settlement or by judgment in connection with the Claims." (R. p. ____) (Letter of Apr. 16, 2025, at 2). A party that believed it had already settled those claims would not expect to pay a settlement or judgment on them.

SCPA cannot be both the objecting stranger to these covenants in its claims against AMIC and the settling party to a Tort Claims Act settlement in its defense against Respondents. As Respondents pointed out below, SCPA's position that the covenant did not sufficiently protect it cannot be reconciled with its position that the same covenant is a complete statutory bar. (Tr. 26:1-12). Whatever AMIC owed SCPA under the Chassis Interchange Agreement and the policy, the

covenants were AMIC's settlement, not SCPA's, and not a settlement of any action or claim under the Act.

Conclusion

The orders on appeal deny a motion to dismiss and are not immediately appealable. Respondents respectfully request that the Court dismiss the appeal. If the Court reaches the merits, the circuit court correctly applied *Wade v. Berkeley County*: when Respondents signed covenants not to execute with a private insurer, no action had been filed and no claim had been presented against SCPA under the Tort Claims Act. Section 15-78-70(d) therefore does not bar Respondents' claims, and the orders denying SCPA's motions to dismiss should be affirmed.

Respectfully submitted,

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