THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Kristi F. Curtis, Circuit Court Judge

Case No. 2019-CP-26-07075

Meswaet Abel, as Personal Representative of the Estate of Zerihun Wolde……. Respondent,

v.

Lack's Beach Service, Inc.,……. Appellant,

RESPONDENT'S RETURN TO APPELLANT'S MOTION FOR LIMITED REMAND AND MOTION TO STAY BRIEFING DEADLINES UNTIL CONCLUSION OF LIMITED REMAND

Respondent submits the instant return opposing Appellant's motion for remand and to stay briefing deadlines during remand. Appellant's remand request ignores the jurisdictional rules of issue preservation and seeks an exception to cure its decision to appeal before obtaining a ruling on issues Appellant was required—but failed—to raise in a 59(e) motion. A motion for remand is not a vehicle to circumvent well-settled issue preservation requirements. Nor can Appellant bypass the strict jurisdictional rules divesting the circuit court of jurisdiction. Having waived its opportunity to seek a 59(e) ruling on its conditional motion, Appellant is barred from doing so now.

Not only did Appellant waive appellate review of the issues raised in its conditional post-trial motion, but it also waived these issues in the circuit court by failing to raise them at any time during the litigation and trial of the case. The instant motion is, therefore, moot. Appellant's

motion also fails on the merits. The doctrine of derivative sovereign immunity relied on in the conditional motion has never been adopted in this state, nor would it even apply in this case.

For these reasons and those that follow, Appellant's motion for limited remand should be denied as waived, moot, and without merit.

ARGUMENT

I. Appellant's remand request contravenes the strict jurisdictional rules of issue preservation and inappropriately seeks a second chance to preserve issues already waived and barred in this appeal.

Appellate issue preservation requirements are mandatory and cannot be exempted by way of a remand once an appeal is perfected—as in this case. Only issues and arguments raised to *and ruled on* by the trial court are preserved for appeal.[1] When an issue has been raised, but not ruled on, an appealing party *must* file a Rule 59(e) motion to preserve the issue for appellate review.[2] Under Rule 59(e), this motion *must* be made within ten days of entry of the final order, or the issue will be waived.[3] Failure to file a 59(e) motion bars any issue raised, but not ruled on, from consideration on appeal.[4]

Here, the jury's judgment in favor of Respondent was entered on August 1, 2022. Appellant timely filed post-trial motions, including a conditional motion alleging derivative

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[1] *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-780 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to *and ruled on* by the lower court.") (citing (citing *e.g., Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *Long v. Dunlap,* 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court); *Gaffney v. Peeler,* 21 S.C. 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal); Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court)).

[2] *Elam*, 361 S.C. at 24, 602 S.E.2d at 780.

[3] *Id.*; Rule 59(e), SCRCP.

[4] *Id.*

sovereign immunity as an alternative basis to reduce the judgment. The circuit court entered its final order denying Appellant's post-trial motions on April 10, 2023. However, the order did not address the derivative sovereign immunity arguments raised in the conditional motion. Under Rule 59(e), Appellant had ten days, or until April 20, 2023, to move for a ruling on the issues argued in the conditional motion, or the arguments would be waived. Appellant opted instead to immediately notice its appeal, leaving the issues in the conditional motion unaddressed and, thus, unpreserved for appellate review.[5] No rule or other authority permits any form of relief, much less a remand, to correct this critical preservation error.

Issue preservation is perhaps the most fundamental aspect of an appeal and for this reason the rules are mandatory and strictly applied. The rules of issue preservation further the appellate process by enabling the circuit court to rule properly after it has considered all relevant facts, law, and arguments.[6] Strict preservation requirements also serve as "a keen incentive for a party to prepare a case thoroughly."[7] "It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case."[8]

Though perhaps hasty, there is no doubt Appellant's decision to immediately appeal *within hours* of the order denying Appellant's post-trial motions and without filing a Rule 59(e) motion was a deliberate and strategic decision. Likewise, the jurisdictional significance of this decision

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[5] *See Elam*, 361 S.C. at 24, 602 S.E.2d at 780 ("A party *must* file ... a [Rule 59(e), SCRCP,] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review."

[6] *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

[7] *Id.*

[8] *I'On, LLC.,* 526 S.E.2d at 724-25 (citing *Brown v. Singletary,* 226 S.C. 482, 85 S.E.2d 738 (1955) (party may not neglect or ignore vices in the trial, then expect to assert those vices on appeal in case of disappointment at trial); *State v. Warren,* 207 S.C. 126, 134, 35 S.E.2d 38, 41 (1945) (same).

cannot be ignored or undone. Appellant divested the circuit of jurisdiction and conferred exclusion jurisdiction in the appellate court on all matters relevant to the appeal when it chose to immediately notice its appeal. In doing so, Appellant voluntarily abandoned the issues argued in its conditional post-trial motion in favor of moving forward with its appeal of other issues. The rules of civil and appellate procedure governing jurisdiction and preservation are strict for this very reason: appeals must be noticed not simply for calendaring purposes, but for the purpose of resolving which court has exclusive jurisdiction over a case. And where a litigant does not timely notice an appeal, these same rules are strictly enforced.

Appellant offers no excuse for its failure to abide by the rules of civil and appellate procedure, let alone any citation to the applicable rules or case law. Appellant instead asks this court to ignore these critical and well-established rules to cure a mistake it caused. Permitting Appellant a second bite at the apple by way of remand contravenes mandatory preservation requirements and rules of appellate jurisdiction. Appellant's motion must, therefore, be denied.

II. Appellant failed to timely raise the Tort Claims Act limitations on liability argued in the conditional post-trial motion, rendering the instant motion moot.

Waiver of the South Carolina Tort Claims Act's limitations on governmental liability—even assuming the extraordinary suggestion that the Act could apply to a private for-profit contractor like Appellant—bars consideration of the issue post-trial and renders moot Appellant's motion for limited remand.

Appellant's conditional motion asserts the novel and unfounded argument that, despite being a private for-profit entity, Appellant's status as a contractor to the City of Myrtle Beach should entitle it to the same limitations and protections enjoyed by publicly funded state entities under the South Carolina Tort Claims Act. Though there is no legal authority supporting such a blatant reach for governmental immunity, this Court need not reach the substance of Appellant's

argument on procedural grounds. The limitations on liability under the Tort Claims Act, such as the $300,000.00 cap and the complete bar on punitive damages, must be pled as an affirmative defense under Rule 8, SCRCP, or the limitation is waived.[9] Appellant never raised the Act's limitations upon liability as an affirmative defense nor did it assert any immunities under the Act. Thus, Appellant's failure to plead the Act's limitation on liability in the underlying litigation is "deemed a waiver of the right to assert it" on appeal.[10]

While Appellant maintains it orally moved to amend its answer to assert this defense, Appellant's oral motion was not made until *eight months after trial* during the post-trial motions hearing on March 8, 2023, and no written motion was ever filed.[11] Appellant further waived any claimed Tort Claims Act defenses—none of which could be deemed to apply—by litigating this action for almost three years without putting the court or Respondent on notice that it was asserting such a defense. "Central to requiring the pleading of affirmative defenses is the prevention of unfair surprise. A defendant should not be permitted to 'lie behind a log' and ambush a plaintiff with an unexpected defense."[12] Had Respondent been made aware of this specious defense at any time prior to trial, it could have been quickly disposed of through written discovery and depositions that would dispel the myth that Appellant had any entitlement to Tort Claims Act immunities.

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[9] *Washington v. Whitaker,* 317 S.C. 108, 451 S.E.2d 894 (1994) (sovereign immunity must be affirmatively pled); *James v. Lister*, 331 S.C. 277, 283, 500 S.E.2d 198, 201 (Ct. App. 1998) (applying requirement of affirmative pleading of SCTCA limitations on liability to charitable immunity and rejecting argument that statutory limitations on liability need not be affirmatively pled); *see also Steinke v. S.C. Dep't of Lab., Licensing & Regul.*, 336 S.C. 373, 393, 520 S.E.2d 142, 152 (1999) ("The burden of establishing a *limitation upon liability* or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense.") (emphasis added).

[10] *Plyer v. Burns*, 373 S.C. 637, 647 S.E.2d 188 (2007).

[11] Appellant did not include a hearing transcript concerning the oral motion as an exhibit to the instant motion.

[12] *Garrison v. Target Corp.*, 429 S.C. 324, 360-61, 838 S.E.2d 18, 37 (Ct. App. 2020).

Not only did Appellant fail to plead the Act's limitation on liability as an affirmative defense or raise it during discovery, Appellant again waived the argument by failing to object to the compensatory and punitive damages awards at trial.[13] Having waived the Act's limitations at all stages of the case in the circuit court—at the pleading stage, during discovery, and again at trial—remand to address these moot issues would be futile and a waste of judicial resources.

III. Even if not barred on preservation grounds or mooted by waiver, Appellant's substantive argument to apply the South Carolina Tort Claims Act to a private for-profit party fails on the merits.

The doctrine of derivative sovereign immunity has *never* been accepted in this state. Nor could it be adopted for obvious reasons: (1) monetary judgments against private companies do not impact public taxpayer dollars; and (2) extending Tort Claims Act protections and immunities to private, for-profit entities would violate public policy by creating a dangerous incentive for corporations to engage in negligent and hazardous conduct to enhance profits with little to no legal repercussions—as would be the unfortunate result in this case were this doctrine applied.

Likewise, the plain language of the Act simply cannot be read to extend its protections to private contractors like Appellant. Appellant cannot read into the Tort Claims Act words that simply do not exist or confer protections of the Act to entities against the will of the South Carolina legislature. "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute[;] . . . [w]here the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning."[14] Further, "[w]hat a legislature says in the text of

[13] *See Washington*, 317 S.C. 108, 451 S.E.2d 894 (by failing to raise contemporaneous objection to plaintiffs' request for punitive damages in § 1983 action, city waived any objection to propriety of punitive damages against municipality).
[14] *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citation omitted).

a statute is considered the best evidence of the legislative intent or will[;] therefore, the courts are bound to give effect to the expressed intent of the legislature."[15]

Despite these rules of statutory construction, Appellant argued in its conditional motion that the word "agents" in § 15-78-20 confers limited sovereign immunity on a private for-profit entity that contracts with a state entity. But in doing so, Appellant disregards the following subsection defining "agency" as "the individual office, agency, authority, department, commission, board, division, instrumentality, or institution, including a state-supported governmental health care facility, school, college, university, or technical college, which employs the employee whose act or omission gives rise to a claim under this chapter."[16] Nothing within this definition or elsewhere in the Act could be construed to extend the Act's limitations on liability to a private for-profit lifeguard and beach chair and umbrella vendor. If the legislature intended the Act's protections to extend to third-parties who contract with a government entity, it would have indicated as such in the plain language of the Act. To hold otherwise would mark a dramatic expansion of the Tort Claims Act limited immunities. Indeed, the South Carolina Supreme Court recently rejected a similar grasp at Tort Claims Act immunity by a private, for-profit corporation providing insurance coverage to South Carolina towns and municipalities. *See Reeves v. S.C. Mun. Ins. & Risk Fin. Fund*, 434 S.C. 18, 36, 862 S.E.2d 248, 257 (2021), reh'g denied (Sept. 21, 2021) ("We vacate the court of appeals' determination that a bad faith claim against the Fund is barred by the South Carolina Tort Claims Act.").

Further, even if South Carolina recognized derivative immunity as a substantive affirmative defense, it still would not apply to Appellant. The doctrine of derivative immunity was adopted in

[15] *Id*. (citation omitted).
[16] S.C. Code Ann. § 15-78-30.

federal cases by the U.S. Supreme Court in *Yearsley v. W.A. Ross Constr. Co.*, 390 U.S. 18 (1940). "Under the concept of derivative sovereign immunity . . . agents of the sovereign are also sometimes protected from liability for carrying out the sovereign's will."[17] Here, however, Appellant's conduct was not pursuant to the "sovereign's will" or authorization, *i.e.,* it was not within the scope of official duty because Appellant repeatedly violated the terms governing the scope of services it contracted to provide.[18]

The limitations on liability provided for in the Act are contingent on the state actor acting within its authorized powers.[19] Such is also the case under federal law. Appellant is, therefore, entitled to no such protection because "when a contractor violates both federal law and the government's explicit instructions . . . no derivative immunity shields the contractor from suit by persons adversely affected by the violation."[20] While there is both State and municipal authorization for Appellant's operation of a beach safety service, Appellant is not shielded from liability for its intentional and pervasive violation of this limited governmental authorization. In other words, Appellant's conduct exceeding the scope of its limited authorization is against the "sovereign's will" and, thus, Appellant is not entitled to protection from liability. Accordingly, Appellant's motion for remand to address an immunity argument that is neither recognized nor applicable is without merit and must be denied.

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[17] *Cunningham v. Gen. Dynamics Information Tech., Inc.*, 888 F.3d 640, 643 (4th Cir. 2018) (citations omitted).
[18] *See* S.C. Code Ann. § 15-78-20 ("The General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein.").
[19] *See id.*
[20] *Cunningham*, 888 F.3d at 647 (internal quotations and citations omitted).

CONCLUSION

Appellant's motion for remand is merely a request for a second chance to cure its failure to properly preserve its derivative sovereign immunity argument for review. Appellant cannot circumvent the rules of civil and appellate procedure by requesting a remand within two weeks of Appellant's briefing deadline. Indeed, such a remand would be futile as Appellant's derivative sovereign immunity argument was already waived by Appellant's failure to raise it until after trial. It also fails on the merits. Accordingly, Appellant's motion for limited remand and its companion request to stay this appeal should be denied.

Given the delay caused by the filing of this motion as well as the 30-day briefing extension previously granted to Appellant, Respondent further opposes any additional requests by Appellant to extend the briefing deadline.

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned Paralegal, of the offices of McLeod Law Group, LLC, attorneys for Meswaet Abel, as Personal Representative of the Estate of Zerihun Wolde, do hereby certify that I have served all counsel in this action with a copy of the Respondent's Return to Appellant's Motion for Limited Remand, pursuant to the Supreme Court Order 2022-05-06-03, and a copy of that electronic mail is attached to this certificate.

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June 8, 2023

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Subject: Meswaet Abel v. Lack's Beach Service - Appellate Case No. 2023-000569
Attachments: 2023.06.08.Return to Motion for Limited Remand.pdf; Proof of Service - Return to Motion for Limited Remand.pdf

Good afternoon,
Attached for service upon you please find Respondent's Return to Motion for Limited Remand along with the Proof of Service in the above-referenced case.
Thank you,
Brooke

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