THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2023-000569
Case No. 2019-CP-26-07075

Meswaet Abel, as Personal Representative of the Estate of Zerihun Wolde and as Natural Parent and Legal Guardian of Adam Wolde and Wubit Wolde.....Respondent,

v.

Lack's Beach Service, Inc., City of Myrtle Beach, and John Doe Lifeguard, Defendants,

Of which Lack's Beach Service is the.....Appellant.

AMICUS CURIAE BRIEF OF MUNICIPAL ASSOCIATION OF SOUTH CAROLINA

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STATEMENT OF INTEREST OF THE AMICUS

The Municipal Association of South Carolina (the "Association") is a nonpartisan, nonprofit association of South Carolina's incorporated cities and towns. All 271 municipalities in South Carolina are members of the Association. The Association provides services and programs directly to its member municipalities, offers education and training resources, and represents the collective interests of municipalities throughout the State before the General Assembly and in the courts of this State.

The Association's interest in this case is twofold. First, state statutory law explicitly gives municipalities a choice between providing lifeguard services themselves or contracting with a private entity to provide such services. S.C. Code § 5-7-145. The statute further allows municipalities that outsource lifeguard services the right to award a commercial franchise to a third party or to the lifeguard company itself, *see* S.C. Code § 5-7-145(B)(3), in which case a "dual role" is permitted for the company's employees subject to the terms of the statute and the franchise. Therefore, to the extent that Respondent argues on page 14 of its brief that "the South Carolina Code contains no mention of lifeguards performing dual roles," the Association disagrees.

Second, South Carolina's coastal municipalities should be free to decide whether to provide public services themselves or to outsource them based on considerations of sound public policy and efficiency, not on potential liability that may attach to provision of the public service. If private lifeguard companies were subject

to unlimited liability when providing services to local governments, then these companies would either refuse to provide such services or dramatically increase the costs payable under the contract. In either event, local governments in South Carolina would be effectively denied a right to contract that is expressly authorized by state law. Therefore, although the question of derivative sovereign immunity is not currently before this court, for the reasons described in Appellant's Initial Brief, the Association writes to emphasize the importance of this issue.

STATEMENT OF THE CASE AND OF THE FACTS

The Association adopts the Statement of the Case and Statement of the Facts in the Initial Brief of Appellant.

SUMMARY OF ARGUMENT

State law explicitly authorizes the contractual relationship between the City of Myrtle Beach, South Carolina (the "City"), and Appellant in this case. Pursuant to this authority, the City engaged Appellant to provide lifeguard services and awarded a franchise for commercial activities on the beach. The resulting agreement contains clear and objective performance standards. Both the state statute and the franchise agreement implicitly approve a shared function in which the contractor's employees provide lifeguard services and perform commercial functions. Under these circumstances, this Court should find that the franchise agreement complies with state law and that awarding the full verdict amount to Respondent would undermine the policy determinations of the State of South Carolina and the City.

ARGUMENT

I. STATE LAW EXPLICITLY ALLOWS A COASTAL MUNICIPALITY THE CHOICE BETWEEN PROVIDING LIFEGUARD SERVICES ITSELF, CONTRACTING WITH A PRIVATE COMPANY FOR LIFEGUARD SERVICES, OR PROVIDING NO LIFEGUARD SERVICES AT ALL.

Act 113 of 1999 established a comprehensive framework for the provision of lifeguard services within "[e]ach municipality bordering on the Atlantic Ocean." *See* 1999 South Carolina Laws Act 113 (H.B. 3357), § 21, *now codified at* S.C. Code § 5-7-145. Under this framework, each such municipality "is authorized," but not required, "to provide lifeguard and other safety related services on and along the public beaches within its corporate limits." *Id*. If the municipality does provide such services, they "may be provided using municipal employees or by service agreement with a private beach safety company." *Id*. Finally, the municipality may defray the expenses of its lifeguarding program by awarding an exclusive franchise for designated commercial activities on the beach.

With respect to municipalities that provide lifeguard services themselves, Act 113 of 1999 amended S.C. Code § 5-7-30, the primary implementation of municipal Home Rule, to specifically authorize them to "grant franchises and make charges for the use of public beaches." The authority to grant a franchise implies the ability to deny other franchises, either expressly or by implication. Thus, the municipality may either engage in designated commercial activities on the beach itself while denying all private companies the right to engage in such commercial activity, or it may award an exclusive franchise for such commercial activities to one or more private entities. In either event, the revenues from such commercial activities may be used to defray

the expenses of lifeguard services. For example, the City of North Myrtle Beach "has a separate Beach Services Division that owns and maintains heavy-duty wooden framed beach chairs and wooden construction beach umbrellas that are rented through approximately 50 rental stations along the nine miles of Defendant's beach." *Order Denying Preliminary Injunction*, Civil Action No.: 4:22-cv-02198-RBH, page 3 (D.S.C. September 9, 2022). The entire income derived from such rentals is "earmarked and used to pay 100 percent of Defendant's costs for the safety-related function of lifeguard services and to defray the costs of the safety-related functions of beach patrol and beach cleaning." *Id*.

With respect to municipalities that hire a private company to provide lifeguard services, Act 113 of 1999 added new Section 5-7-145 to the South Carolina Code. Under that Section, "the municipality may grant the exclusive right to the beach safety company to rent only the beach equipment and to sell only the items to the public on the beach that are allowed by the municipality on the effective date of this section." S.C. Code § 5-7-145(B)(3). Again, the revenues from such commercial activities are intended to be used to defray the expenses of the lifeguard services. The General Assembly expressly accounted for the "dual role" questions at issue in this case by limiting the scope of the permitted commercial activities to those already offered "on the effective date of this section." *Id*. For commercial activities outside that scope:

> [T]here shall be no granting of the right to rent any additional tangible items, or to sell any beverages to the public on the beach, or otherwise, unless and until additional personnel are hired for the additional rentals and additional activities sufficient in number so that employees already employed on the

effective date of this section will not be unduly burdened as determined by the appropriate municipal governing body.

Id. Two critical considerations arise from this language. First, the General Assembly determined in 1999 that the existing allocation of responsibilities between lifeguarding and rental functions was appropriate. Second, the municipality itself has the statutory right to determine whether additional commercial functions would "unduly burden" the private lifeguard company.

Moreover, as noted on page 3 of Appellant's reply brief, the franchise agreement itself establishes a required complement of "lifeguard only" employees, meaning that regular lifeguards are by definition permitted to engage in commercial activities. Therefore, the City exercised its statutory right to determine whether the commercial activities "unduly burdened" the lifeguard services by specifying the requisite number of lifeguard only employees in the franchise.

As such, the Association disagrees with Respondent's assertion that neither state law nor the franchise permitted a dual role function in which some lifeguards – but not all – were permitted to engage in commercial transactions.

II. HAD THE CITY OF MYRTLE BEACH PROVIDED LIFEGUARD SERVICES ITSELF, OR EVEN DECLINED TO PROVIDE ANY LIFEGUARD SERVICES, IT WOULD BE ENTITLED TO IMMUNITY UNDER BOTH THE RECREATIONAL USE STATUTE AND THE TORT CLAIMS ACT.

The potential liability of the City of Myrtle Beach for providing lifeguard services has already been determined. In a case involving the same defendants and arising from a drowning incident in 2005, the federal District Court found that "the City owed [plaintiff] no duty of care to keep the premises safe, or to warn of any

dangerous condition…. Therefore, the City owed [plaintiff] no duty of care to protect him, or warn him of, any dangers inherent in" using the beach. *Mena v. Lack's Beach Serv., Inc.*, No. 4:06-CV-2536-TLW, 2008 WL 8850813, at *3 (D.S.C. Apr. 16, 2008). The decision turned on the South Carolina Recreational Use Statute, S.C. Code §§ 27-3-10 to -70. Under that statute, "an owner of land owes no duty of care to keep the premises safe for entry or use by persons who have sought and obtained his permission to use it for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity…." S.C. Code § 27-3-30. This protection extends to local governments, even if the land is privately owned but leased to the government. S.C. Code § 27-3-50. The statute exempts from immunity "grossly negligent, willful or malicious" conduct. S.C. Code § 27-3-60. In *Mena*, the court found insufficient evidence of gross negligence or willful or malicious conduct, and therefore dismissed the suit against the City. *Mena*, 2008 WL 8850813, at *8.

Even in the absence of the Recreational Use Statute, the City would have been entitled to significant protection and perhaps total immunity under the South Carolina Tort Claims Act, S.C. Code §§ 15-78-10 to -220. Several exceptions to the waiver of immunity would likely apply, for example the "the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee," S.C. Code § 15-78-60(5), or the "maintenance, security, or supervision of any public property, intended or permitted to be used as a park, playground, or open area for recreational purposes," S.C. Code § 15-78-60(16).

And in any event, the City's liability would have been subject to the monetary cap and prohibition of punitive damages contained in S.C. Code § 15-78-120.

Returning to the three options for the City discussed above, the City could have directly provided exactly the lifeguard services at issue in this case – including with respect to a "dual role" in which lifeguards engage in limited commercial activity – or provided no lifeguard services at all. In either case, under the Recreational Use Statute and the Tort Claims Act, the City would have been virtually immune to liability. And even in cases in which the City was liable (for example, for gross negligence or willful misconduct), that liability would have been capped and would have excluded punitive damages. See S.C. Code § 15-78-120(b). Only the third option, contracting for lifeguard services with a private company, presents the question of unlimited tort liability. For the reasons discussed below, the threat of unlimited tort liability should not dictate the local government's policy determinations.

III. UNDER THESE FACTS, DERIVATIVE SOVEREIGN IMMUNITY SHOULD APPLY TO THE SERVICES PROVIDED BY APPELLANT PURSUANT TO CLEAR STATUTORY DIRECTIVE.

The courts have long recognized that "[i]mposing liability on private agents of the government would directly impede the significant governmental interest in the completion of its work. … particularly in light of the government's unquestioned need to delegate governmental functions." *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) (quotations omitted). In the federal courts, this recognition takes the form of derivative sovereign immunity under *Yearsley v. W.A. Ross Const. Co.*, 309

U.S. 18, 60 S. Ct. 413, 84 L. Ed. 554 (1940). A significant number of states, but not yet South Carolina, apply the same rule for state and local government contractors:

> In every jurisdiction in this Country where the question has been passed upon (and that includes the Supreme Court of the United States, other Federal courts and courts of approximately half of the States), it has been uniformly held that in the absence of negligence or wilfully tortious conduct on the part of an independent contractor, he is not liable for injury to another's property which is caused by the performance of his contract with a governmental instrumentality in accordance with its plans and specifications. There has not been cited to us, nor has our independent research disclosed, a single case holding to the contrary

Valley Forge Gardens, Inc. v. James D. Morrissey, Inc., 385 Pa. 477, 481–82, 123 A.2d 888, 890 (1956). In this context, "the absence of negligence" means an unwarranted departure from the terms of the contract. The question is thus whether there is "at least some factual basis for a finding that the act of the contractor causing the damage was not necessary or incidental to the carrying out of the contract, and was not done under the direction of the public contractee." A.E. Korpela, *Right of Contractor with Federal, State, or Local Public Body to Latter's Immunity from Tort Liability*, 9 A.L.R.3d (1966).

Here, acting pursuant to the clear statutory authority described above, the City contracted with Appellant to provide lifeguard services. The franchise itself clearly specified the number of lifeguards to be provided at any given time, the duties such lifeguards must perform, and the scope of the permitted commercial activities. For example, Section 1 of the franchise establishes the zones in which "lifeguard only" services are required.

Therefore, Respondent's case implicitly depends on an embedded attack on either (a) the General Assembly's determination in 1999 to allow private lifeguard companies to also offer commercial services on the public beaches, or (b) the City of Myrtle Beach's specifications for the number of personnel required and their attendant duties. Both of these determinations, however, would themselves be protected by public immunity. To allow Respondent to recover the full verdict amount in this case would undermine the policy determinations of both the State and the City.

CONCLUSION

The Association views its primary mission to be the support of effective and efficient municipal government in South Carolina. For a coastal municipality, providing lifeguard services on the public beach is a critical function that supports tourism, drives economic development, and protects the health and safety of its residents and visitors. The South Carolina General Assembly has crafted a comprehensive framework in which such lifeguard services may be offered to the public and funded with the proceeds of commercial activity on the beach. The City of Myrtle Beach, acting within this framework, awarded a franchise to Appellant with clear and objective standards for performance.

This careful balancing of the competing policy interests should not be disrupted by the contingency of the method by which the lifeguard services are delivered. Instead, this Court should find that state law allows the City to determine the

appropriate method to provide lifeguard services, and that the method of delivery specified in the franchise complies with this right.

Respectfully Submitted,

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