

RECEIVED

Mar 15 2024

SC Court of Appeals

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
Appellate Case No. 2023-000569

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, City of Myrtle Beach, and
John Doe Lifeguard, Defendants,

Of which Lack’s Beach Service is the.....

Appellant.

RESPONSE TO *AMICUS CURIAE* BRIEF OF THE
MUNICIPAL ASSOCIATION OF SOUTH CAROLINA

W. Mullins McLeod, Jr.
H. Cooper Wilson, III
McLeod Law Group, LLC
3 Morris Street, Suite A
Charleston, SC 29403
(843) 277-6655

G. Murrell Smith, Jr.
Austin T. Reed
Frederick N. Hanna, Jr.
Smith Robinson
126 N. Main Street
Sumter, SC 29150
(803) 778-2471

John Christopher Pracht, V
PO Box 4025
Anderson, SC 29622
(864) 293-7793

Attorneys for Respondent Meswaet Abel

TABLE OF CONTENTS

Table of Authorities..... iii

Introduction..... 1

Argument 2

 I. The General Assembly has not authorized dual-role lifeguarding 2

 II. The Municipal Association of South Carolina’s derivative immunity and “policy”
 arguments are procedurally improper and meritless 5

 III. Even assuming South Carolina recognized derivative immunity, Lack’s unsafe and
 reckless conduct violated both § 5-7-145 and the franchise agreement and, thus,
 falls outside the scope of authorized government conduct 8

Conclusion 14

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Corbett v. City of Myrtle Beach, SC</i> , 336 S.C. 601, 521 S.E.2d 276 (Ct. App. 1999).....	6-7
<i>Cunningham v. Gen. Dynamics Information Tech., Inc.</i> , 888 F.3d 640 (4th Cir. 2018).....	8, 14
<i>Dorrell v. South Carolina Department of Transportation</i> , 361 S.C. 312, 605 S.E.2d 12 (2004)	7
<i>Hodges v. Rainey</i> , 341 S.C. 79, 533 S.E.2d 578 (2000)	4, 7
<i>James v. Anne's Inc.</i> , 390 S.C. 188, 701 S.E.2d 730 (2010)	6
<i>Parker v. Spartanburg Sanitary Sewer Dist.</i> , 362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005).....	6
<i>Shelley Const. Co. v. Sea Garden Homes, Inc.</i> , 287 S.C. 24, 336 S.E.2d 488 (Ct. App. 1985).....	4
<i>Yearsley v. W.A. Ross Const. Co.</i> , 390 U.S. 18 (1940).....	8
 Statutes	
S.C. Code Ann. § 5-7-145(A)	9-10
S.C. Code Ann. § 5-7-145(B).....	2, 9-10
S.C. Code Ann. § 5-7-145(B)(3).....	2-4, 9
S.C. Code Ann. § 5-7-145(B)(4).....	4, 10
S.C. Code Ann. § 5-7-145(B)(5).....	11
S.C. Code Ann. § 15-78-10.....	5
S.C. Code Ann. § 15-78-20(b)	8-9
S.C. Code Ann. § 15-78-30(c)	7
S.C. Code Ann. § 27-3-10.....	5
 Rules	
Rule 213, SCACR.....	1, 6

Other

Order Denying Preliminary Injunction, Civil Action No.: 4:22-cv-02198-RBH
(D.S.C. Sept. 9, 2022)..... 2-4

INTRODUCTION

The Municipal Association of South Carolina (“MASC”) seeks to muddy the waters in an otherwise straightforward case. The issues in this appeal center upon the evidence presented at trial in support of Respondent’s claims and the propriety of the jury’s verdict against Appellant Lack’s Beach Service (“Lack’s”). Instead of discussing these issues, MASC injects arguments that unequivocally are not before the Court. Because *amici* are explicitly “limited to argument of the issues on appeal as presented by the parties[,]” Rule 213, SCACR, the Court should not consider these arguments.

Since MASC devotes much of its brief to the perceived impact this appeal will have on the City of Myrtle Beach (“the City”), Respondent will briefly discuss the procedural posture of this appeal. Although Respondent named the City as a defendant in her suit, the trial court granted the City summary judgment. (R. pp. 91-92). Respondent did not appeal that ruling, and it is now the law of the case. Regardless of how the Court decides this appeal, therefore, the City will not be held liable for Mr. Wolde’s tragic drowning.

Relatedly, the issue of whether Lack’s is entitled to derivative sovereign immunity is *not* before the Court. Although Lack’s filed a conditional post-trial motion asserting this novel argument, Lack’s failed to raise the issue prior to trial. Additionally, the trial court never addressed Lack’s conditional motion, and Lack’s never filed a motion for reconsideration to obtain a ruling from the trial court. As Lack’s concedes in its brief, this issue is not before the Court. (App. Br. pp. 3-4).

Overlooking these procedural roadblocks, MASC raises two primary arguments. First, MASC parrots Lack’s untenable position that South Carolina law authorizes dual-role lifeguarding. (Amicus Br. pp. 3-5). As Respondent explains in her merits briefing and below, that

position is unfounded. Second, MASC contends the Court should not affirm the “full verdict amount” because Lack’s is entitled to derivative immunity and because doing so would result in higher costs to municipalities that contract with private beach safety companies to provide lifeguarding. (Amicus Br. pp. 2, 7-10). Apart from being procedurally improper, these arguments lack the support of South Carolina law and common sense.

ARGUMENT

I. The General Assembly has not authorized dual-role lifeguarding.

MASC first argues that South Carolina law sanctions the use of lifeguards for conducting beach sales. To reach that conclusion, MASC begins by noting that section 5-7-145 of the South Carolina Code authorizes municipalities providing lifeguard services to either provide the services themselves or to hire a private beach safety company. (Amicus Br. p. 3); S.C. Code Ann. § 5-7-145(B). MASC contends that whichever choice the municipality makes, the lifeguards are permitted to engage in commercial activities. This is true for municipality employee lifeguards, according to MASC, because the City of North Myrtle Beach has a “Beach Services Division” that rents beach chairs and umbrellas. (Amicus Br. p. 4) (quoting Order Denying Preliminary Injunction, Civil Action No.: 4:22-cv-02198-RBH, page 3 (D.S.C. Sept. 9, 2022)). For private beach safety companies, on the other hand, MASC contends dual-role lifeguarding is explicitly sanctioned by section 5-7-145(B)(3). (Amicus Br. pp. 4-5).

Respondent does not dispute that South Carolina law permits municipalities to provide lifeguard services “using municipal employees or by service agreement with a private beach safety company.” S.C. Code Ann. § 5-7-145(B). But MASC goes too far when it suggests that both municipal and private employees are permitted to engage in safety and commercial services

simultaneously. As Respondent has explained in its merits brief (Resp. Br. pp. 14, 18), the General Assembly has never authorized the dangerous dual-role practice.

Take first MASC's arguments with respect to municipal employee lifeguards. MASC points to the City of North Myrtle Beach's practices as evidence that the dual-role practice is authorized. Specifically, MASC relies on a federal court order noting that the Beach Services Division for the City of North Myrtle Beach "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 [the City's] beach." (Amicus Br. p. 4). However, the City of North Myrtle Beach's commercial employees do not also provide lifeguard services. Rather, consistent with the standard of care, the City of North Myrtle Beach employs separate lifeguard only personnel. The order MASC relies on makes this abundantly clear:

Additionally, [the City of North Myrtle Beach] takes specific steps to ensure the equipment rented by [the City] is safe. **Rentals are not conducted by lifeguards, but by a separate Beach Services Division** with separate beach rental attendants who are stationed at 50 rental stations along nine miles of beach and who are trained in proper set up of the equipment in safe locations and monitor weather conditions so they can remove equipment when there is a threat of bad conditions.

Order Denying Preliminary Injunction, Civil Action No.: 4:22-cv-02198-RBH, at 11-12 (D.S.C. September 9, 2022) (emphasis added). MASC cannot support its contention that municipal employees are permitted to be both lifeguards and salesmen.

MASC's arguments regarding private beach safety employees are equally flawed. With respect to these employees, MASC argues the legislature "expressly accounted for the 'dual role'" in section 5-7-145(B)(3). (Amicus Br. p. 4). Section 5-7-145(B)(3) provides that municipalities cannot grant companies the right to rent beach equipment that was not allowed on the statute's effective date, "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.” S.C. Code Ann. § 5-7-145(B)(3).

MASC’s arguments rest on an improper interpretation of South Carolina law. “[The court’s] duty is to apply the statute according to its own terms.” *Shelley Const. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 29, 336 S.E.2d 488, 491 (Ct. App. 1985). Accordingly, “a court cannot rewrite the statute and inject matters into it which are not in the legislature’s language[.]” *Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000). MASC’s interpretation of section 5-7-145(B)(3) does not comport with these rules of construction for three primary reasons.

First, section 5-7-145(B)(3) speaks only in terms of a municipality granting commercial rights to “the beach safety company[.]” (emphasis added). The statute is simply devoid of any authorization allowing lifeguards to engage in the dual-role practice. *Second*, MASC incorrectly assumes section (B)(3)’s mention of employee burden relates to lifeguarding duties. Instead, section (B)(3) seeks to prevent the dangers that can arise when commercial employees are unable to manage rental items on crowded beaches. As the federal order cited by MASC notes, “[the City of North Myrtle Beach] has a safety interest in ensuring rental equipment is properly installed and removed in the event of weather conditions.” Order Denying Preliminary Injunction, Civil Action No.: 4:22-cv-02198-RBH, at 12 (D.S.C. September 9, 2022); *see also id.* at 12 n.4 (discussing an incident where an individual was “killed by an umbrella on a South Carolina beach”). *Finally*, MASC overlooks the fact that section 5-7-145(B)(4) expressly speaks in terms of “lifeguard personnel employed by the private beach safety company.” S.C. Code Ann. § 5-7-145(B)(4) (“[L]ifeguard personnel employed by the private beach safety company must be tested and certified as required by the municipality.”). If the legislature authorized private beach safety

lifeguards to also engage in commercial activity, there would be no reason for the statute to separately discuss “lifeguard personnel.”

The language of section 5-7-145 simply does not contemplate dual-role lifeguarding. The Court should reject MASC’s (and Lack’s) untenable position that the legislature has blessed a practice that violates the established standard of care.¹

II. MASC’s improper derivative immunity and “policy” arguments are meritless.

MASC’s remaining arguments stray far afield from the issues at play in this appeal. MASC boldly decrees, without any supporting South Carolina law, that private lifeguarding companies should not be subject to “unlimited liability.” (Amicus Br. pp. 2, 7). Otherwise, MASC contends, the private companies “would either refuse to provide such services or dramatically increase the costs payable under the contract.” (Amicus Br. p. 2).

MASC begins this argument by discussing the statutory protections afforded to municipalities under the South Carolina Recreational Use Statute, S.C. Code Ann. §§ 27-3-10 to -70, and the Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.* (Amicus Br. pp. 5-7). Uncontroversially, MASC argues these statutes may offer coastal municipalities immunity or limited liability for beach-related accidents. *See id.* But MASC follows that point with a giant leap when it contends private beach companies should receive the same protections under the doctrine of derivative sovereign immunity. *Id.* at 7-9. Clinging to outdated precedent from other jurisdictions for support, MASC argues private companies should not be subject to liability when they cause damages performing services at “the direction of the public contractee.” *Id.* at 8. Again,

¹ MASC also repeats Lack’s argument that the Franchise Agreement between the City of Myrtle Beach and Lack’s permitted dual-role lifeguarding. (Amicus Br. p. 5). This argument is equally without merit, as Respondent explains in her brief. (Resp. Br. pp. 4 n.3, 13-14).

MASC argues this must be so to prevent private beach companies from raising the price of their services.

As explained above, the Court should refuse to consider these arguments. The South Carolina Appellate Court Rules explicitly prohibit *amici* from raising arguments that are not before the appellate court: “[t]he brief shall be limited to argument of the issues on appeal as presented by the parties[.]” Rule 213, SCACR (emphasis added); *see also James v. Anne's Inc.*, 390 S.C. 188, 193-94, 701 S.E.2d 730, 733 (2010) (“In the current appeal, it is not a party, but the amici who are attempting to belatedly raise standing, but we find they are similar precluded from asserting the issue on error preservation grounds because the amici can argue only the issues that were raised by the parties.”). Because issues relating to the City’s liability and Lack’s claim for derivative immunity are not part of this appeal, the Court should refrain from considering MASC’s arguments on this point.

Even assuming that MASC’s arguments were procedurally proper, they find no support. As an initial matter, Respondent does not dispute that municipalities like the City may receive significant protection under the Recreational Use Statute (“RUS”) and the Tort Claims Act. Crucially, however, the legislature has afforded government entities that protection because of their public status. *See, e.g., Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 285, 607 S.E.2d 711, 716 (Ct. App. 2005) (“The Tort Claims Act is imbued with public policy considerations limiting and qualifying liability of governmental entities.”). And while Respondent has not appealed the trial court’s grant of summary judgment to the City, Respondent vigorously contests MASC’s suggestion that Lack’s is entitled to similar protection.

Contrary to MASC’s position, our courts have routinely refused to extend immunity to private companies. In fact, this Court has refused to do so in this precise setting. In *Corbett v.*

City of Myrtle Beach, SC, another Myrtle Beach drowning case, this Court assessed the liability of a private beach company, Johns Beach Service. 336 S.C. 601, 521 S.E.2d 276 (Ct. App. 1999). The circuit court granted summary judgment to both the City of Myrtle Beach and Johns Beach Service under the RUS. *Id.* at 605 n.1, 521 S.E.2d at 278 n.1. The decedent’s personal representative appealed the circuit court’s ruling as to Johns Beach Service, and this Court reversed, concluding “Johns Beach is not entitled to the immunity provided by the Recreational Use Statute.” *Id.* at 609, 521 S.E.2d at 280.

Similarly, in direct contravention of MASC’s argument, the South Carolina Supreme Court has rejected the proposition that private companies cannot be held liable for acts taken at the direction of government entities. In *Dorrell v. South Carolina Department of Transportation*, the Supreme Court reversed the circuit court’s ruling that a paving company was not liable for an accident caused by work the company performed pursuant to a contract with SCDOT. 361 S.C. 312, 605 S.E.2d 12 (2004). The Court held: “[b]ased on the plain language of the contract, APAC had a duty to provide for the safety of the traveling public This duty arises out of APAC’s contractual relationship with SCDOT, and the absence of privity between APAC and motorists such as Dorrell does not eliminate this duty.” *Id.* at 319, 605 S.E.2d at 15.

Further, the South Carolina Tort Claims Act specifically exempts from its protections “independent contractor[s] doing business with the State or a political subdivision of the State.” *See* S.C. Code Ann. § 15-78-30(c) (defining the scope of the term employee, stating, “but the term does not include an independent contractor doing business with the State or a political subdivision of the State”). Indeed, “[w]hat a legislature says in the text of 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.” *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581 (citation omitted).

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.

Finally, the Court should also reject MASC's argument that "unlimited tort liability"² prevents municipalities from contracting with private beach service companies. Respondent does not question that private beach companies like Lack's will charge more for their services if they cannot use their lifeguards as salesmen. Contrary to MASC's suggestion, that economic fact in no way "undermine[s] the policy determinations" of the State and its municipalities. (Amicus Br. p. 9). Rather, coastal municipalities and private beach service companies alike should be encouraged to provide beach safety services that comply with the standard of care.

III. Even assuming South Carolina recognized derivative immunity, Lack's unsafe and reckless conduct violated both § 5-7-145 and the franchise agreement and, thus, falls outside the scope of authorized government conduct.

Derivative immunity, even if recognized in this State, would still not apply to Lack's conduct in this case. The doctrine of derivative immunity was adopted in federal cases by the U.S. Supreme Court in *Yearsley v. W.A. Ross Const. 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*." *Cunningham v. Gen. Dynamics Information Tech., Inc.*, 888 F.3d 640, 643 (4th Cir. 2018) (citations omitted) (emphasis added). Likewise, the Tort Claims Act's limited protections from liability are contingent on the state actor acting *within its authorized powers*. See S.C. Code Ann. § 15-78-20(b) ("The General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions, and employees,

² Of course, MASC's suggestion that this case involves "unlimited tort liability" is simply unfounded. Private beach safety companies like Lack's are entitled to the same statutory and constitutional protections afforded to any other tortfeasor. Here, however, the trial court correctly concluded those protections were not implicated by the jury's verdict.

while acting within the scope of official duty, only to the extent provided herein.”). Limited protections from liability are thus only extended to actions taken in furtherance of the “sovereign’s will” or within the scope of its authorized powers. Here, however, Lack’s conduct was neither.

a. Lack’s conduct violated § 5-7-145’s limited authorization of its beach safety services.

The General Assembly in § 5-7-145 provided municipalities with limited authorization to provide lifeguard services on the State’s property. Additionally, the statute authorizes the City of Myrtle Beach to grant a beach safety company the exclusive right to rent beach equipment. S.C. Code Ann. § 5-7-145(B)(3). However, to benefit from this exclusive right, Lack’s was required to comply with certain conditions set out in § 5-7-145.

Yet, Lack’s failed to comply with even the most basic conditions of § 5-7-145. For instance, the statute sets forth an elemental condition that the contract between the City and Lack’s be labeled a “service agreement.” S.C. Code Ann. § 5-7-145(A)-(B) (providing “authoriz[ation] to provide lifeguard and other safety related services on and along the public beaches within its corporate limits . . . using municipal employees or *by service agreement with a private beach safety company.*” (emphasis added)). Despite this plain and unambiguous requirement, the parties instead entered a “franchise agreement.” *See* R. pp. 2144-2158 (Franchise Agreement). Though perhaps merely an issue of semantics, the term “franchise” as opposed to “service” underscores the significance of the revenue generating component of Lack’s beach concessions business—which Lack’s should have used to offset the cost of providing effective beach safety services, *i.e.*, provide effective levels of lifeguard staffing and training as required by the standard of care.

The statute further required Lack’s to be a private beach safety company. S.C. Code Ann. § 5-7-145(A)-(B) (providing “authoriz[ation] to provide lifeguard and other safety related services on and along the public beaches within its corporate limits . . . using municipal employees or *by*

service agreement with a private beach safety company.” (emphasis added)). However, as evidenced throughout the trial of this case, Lack’s did not operate as a legitimate beach safety company. Lack’s was instead a profitable beach concessions business. Lack’s own evidence established that two of the lifeguards involved in this case were actually “beach attendants.” (R. pp. 2204, 2221 (state department documents listing occupation as “beach attendant”)). George Lack further admitted in cross-examination that his employees perform beach concession duties 99.995% of the time. (R. p. 561, lines 21-25). Even the franchise agreement acknowledged that Lack’s was merely a “concessionaire of beach equipment,” stating, “[w]hereas the [protection of the tourist population and the successful implementation of a water safety program] can be optimally achieved through the cooperation of the City of Myrtle Beach and the Concessionaires of beach equipment.” (R. p. 2144, lines 3-11).

As further evidence of Lack’s failure to operate as a legitimate beach safety company, Lack’s failed to appropriately test and certify its lifeguard personnel—another requirement of the statute that was ignored. The personnel Lack’s masqueraded as lifeguards were not certified, trained, or competent to perform their important public safety responsibilities. *See* S.C. Code Ann. § 5-7-145(B)(4) (“[L]ifeguard personnel employed by the private beach safety company must be tested and certified as required by the municipality.”). In fact, Lack’s failed to call a single witness with personal knowledge that its personnel were trained at all, much less in accordance with USLA criteria. Conversely, Chris Brewster, the former president of the USLA, testified that Lack’s training violated USLA criteria because Lack’s required its beach attendants to perform conflicting responsibilities of commercial sales and public safety. That Lack’s conducted no testing or certification is significant because its limited authority to perform lifeguard services granted by the General Assembly was conditioned on “test[ing] and certif[ication] as required by [the City].”

See id. In other words, Lack’s was not authorized to provide lifeguard services if the lifeguards were not “tested and certified.” *See id.*

Finally, § 5-7-145(B)(5) requires that “the conduct of the limited commercial activities granted to the private beach safety company shall not prevent or interfere in a substantial way with the peaceful, recreational use of the public beach by the general public.” There is little doubt that Lack’s hazardous dual-role lifeguarding practice interfered substantially in the peaceful, recreational use of the beach by the public, as evidenced by the drowning death of Mr. Wolde and the numerous other drowning deaths occurring on Lack’s watch. The USLA repeatedly warned Lack’s that its dual-role lifeguarding threatened public safety, yet Lack’s continued this practice anyway despite knowledge that it could—and did—create a life-threatening safety risk to the public. (R. p. 630, line 3-p. 633, line 23; p. 636, lines 4-18; p. 637, line 18-25).

Given Lack’s numerous violations of the conditions of § 5-7-145, there is no plausible argument that Lack’s conduct was in accordance with the “sovereign’s will” to justify derivative immunity even if it were recognized in this State.

b. Lack’s conduct violated the terms of the franchise agreement governing the scope of municipal services Lack’s contracted to provide.

Lack’s numerous violations of the Franchise Agreement likewise fail to evince conduct in furtherance of the municipality’s “will” that would entitle Lack’s to derivative immunity. The Franchise Agreement, which was approved by the citizens of Myrtle Beach, is the only municipal authorization provided to Lack’s. As established at trial, Lack’s committed numerous violations of this municipal authorization.

First, the Franchise Agreement *does not* allow or contemplate lifeguards renting umbrellas and beach chairs. Both George Lack and John Pedersen conceded as much at trial. Moreover, Lack’s failed to call a single witness authorized to speak on behalf of the citizens of Myrtle Beach

to support any argument to the contrary. George Lack testified that the Franchise Agreement was prepared by the City's attorney who was not called to testify. From this, the jury could have easily inferred that the City attorney would not draft a document for City Council approval that included a manner of operation which clearly violated a well-known standard of care.

When forced to concede the Franchise Agreement does not allow lifeguards to rent beach equipment, John Pedersen, the former city manager, testified that he "told" City Council before they voted on the Franchise Agreement that Lack's lifeguards rented beach equipment. Given this testimony, the absence of any reference to the sale of such merchandise by lifeguards in the Franchise Agreement shows that City Council *rejected* this unsafe practice. That City Council rejected the performance of dual roles by lifeguards is further found in Section 4 of the Franchise Agreement, stating, "[n]o commercial or retail activity except as authorized herein shall be permitted on the public beach." *See* R. p. 2148, lines 16-17. As John Pedersen further conceded, the word "lifeguard" does not appear anywhere in Section 4 of the Agreement.

That City Council rejected this dangerous practice is also evidenced in Section 2 of the Franchise Agreement, stating: "Franchisee shall not employ any individual as a lifeguard *or* beach concession employee . . ." *See* R. p. 2146, line 50 (emphasis added). This language clearly establishes that City Council delineated between (1) a beach attendant, and (2) a lifeguard. These personnel were never intended to be one in the same. When confronted with this fact at trial neither George Lack nor John Pedersen could point to language that authorized lifeguards to sell umbrellas.

Moreover, George Lack's testimony as to a side deal allowing lifeguards to rent beach equipment is yet additional support that Lack's practices exceeded the authorization contained in the Franchise Agreement. A side deal that was not approved by City Council does not advance any

public interest or legitimate governmental function to support any claim of entitlement to the protections of the Tort Claims Act.

Lack's further violated the Franchise Agreement by placing the personnel it hired as beach attendants in the role of performing public safety when they were not appropriately trained or equipped to do so. The Franchise Agreement specifically required that, "all lifeguards shall attend all pre-certification and in-service training sessions." (R. p. 2146, lines 23-26). According to Lack's own witnesses, the three employees at issue in this case *did not* attend all the in-service training in 2018. (R. p. 977, line 1-p. 982, line 15; *see also* R. pp. 2191-96, surf school training agenda and details). Rather, many of the lifeguards, which mostly comprised Eastern European students, were *not even in the country* during Lack's alleged training. *Id.*

Lack's further violated the City's authorization by failing to provide the number of "Lifeguard Only" ("LGO") towers required by the Franchise Agreement. There was no evidence at trial from which any reasonable juror could conclude the lifeguard towers were properly staffed on the day Mr. Wolde drowned. The evidence instead showed that only three LGO towers were staffed on August 24, 2018. The LGO tower with responsibility for overseeing Mr. Wolde's section of beach was tragically vacant. In fact, the closest LGO tower to Mr. Wolde's location was *eight city blocks away*. (R. p. 912, lines 4-15). Lack's own witness, Holly Robinson, conceded that Lack's did not provide the level of lifeguard protection required in the franchise agreement. She testified Lack's was understaffed and had to "move some people around." (R. p. 911, line 12-p. 912, line 9). George Lack further admitted that that being short a "lifeguard only" in the section where Mr. Wolde drowned was enough to make a difference between life and death. (R. p. 593, lines 14-18). While critical LGO towers went unoccupied, Lack's commercial sales towers were, however, fully staffed.

Based on these multiple and monumental violations of the Franchise Agreement, Lack's conduct was not in furtherance of the municipality's "will." Lack's numerous standard of care violations certainly were not authorized by City Council, nor were they authorized by state statute. "[W]hen 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." *Cunningham*, 888 F.3d at 647 (internal quotations and citations omitted). Thus, while there is both State and municipal authorization for Lack's operation of a beach safety service, derivative immunity would not apply to Lack's intentional and pervasive violation of this limited governmental authorization.

CONCLUSION

MASC's arguments are without merit, both procedurally and substantively. For the foregoing reasons, as well as those raised in Respondent's final brief, the Court should affirm the trial court's rulings and the verdict against Lack's.

Respectfully submitted,

By: /s/ W. Mullins McLeod, Jr.
W. Mullins McLeod, Jr.
H. Cooper Wilson, III
MCLEOD LAW GROUP, LLC

G. Murrell Smith, Jr.
Austin T. Reed
Frederick N. Hanna, Jr.
SMITH ROBINSON

John Christopher Pracht, V

Attorneys for Respondent Meswaet Abel

March 15, 2024

RECEIVED

Mar 15 2024

SC Court of Appeals

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
Appellate Case No. 2023-000569

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

Respondent,

v.

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

Appellant,

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 at the addresses below with a copy of the Respondent's Response to Amicus Curiae Brief of the Municipal Association of South Carolina, pursuant to the Supreme Court Order 2022-05-06-03, and a copy of that electronic mail is attached to this certificate.

C. Mitchell Brown
Nelson Mullins Riley & Scarborough, LLP
1320 Main Street/17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
mitch.brown@nelsonmullins.com

Blake T. Williams
Nelson Mullins Riley & Scarborough, LLP
1320 Main Street/17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
blake.williams@nelsonmullins.com

Joseph D. Thompson, III
Hall Booth Smith, P.C.
111 Coleman Blvd., Suite 301
Mount Pleasant, South Carolina 29464

Elizabeth F. Morrison
Hall Booth Smith, P.C.
111 Coleman Blvd., Suite 301
Mount Pleasant, South Carolina 29464

jthompson@hallboothsmith.com

Daniel R. Fuerst
Hall Booth Smith, P.C.
111 Coleman Blvd., Suite 301
Mount Pleasant, South Carolina 29464
dfuerst@hallboothsmith.com

emorrison@hallboothsmith.com

B. Eric Shytle
General Counsel
Municipal Association of South Carolina
1411 Gervais Street
Columbia, South Carolina
eshytle@masc.sc



Brooke A. DiMeo, paralegal

March 15, 2024

From: [Brooke Dimeo](#)
To: mitch.brown@nelsonmullins.com; [Blake Williams](#); [Joseph Thompson, III](#); emorrison@hallboothsmith.com; dfuerst@hallboothsmith.com; eileen.hindman@nelsonmullins.com; [Mullins McLeod](#); [Cooper Wilson](#); [Chris Pracht](#); [Murrell Smith](#); [Austin Reed](#); [Fred Hanna](#); eshytle@masc.sc
Subject: Meswaet Abel v. Lack's Beach Service - Appellate Case No. 2023-000569
Date: Friday, March 15, 2024 1:33:00 PM
Attachments: [Response to MASC Amicus Brief.pdf](#)
[Proof of Service - Amicus Brief.pdf](#)

Good afternoon,

Attached for service upon you please find Respondent's Response to Amicus Curiae Brief of the Municipal Association of South Carolina and Proof of Service in the above-referenced case.

Thank you,

Brooke



Brooke A. DiMeo | Office Manager/Paralegal | McLeod Law Group, LLC
3 Morris Street, Suite A | Charleston, SC 29403
P: 843.277.6655 | F: 843.277.6660 | brooke@mcleod-lawgroup.com