



ALAN WILSON
ATTORNEY GENERAL

March 6, 2012

John J. Fantry, Jr., Esquire
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Blythewood, South Carolina 29016

Dear Mr. Fantry:

In an opinion of this Office dated March 18, 2011, we advised that your client—the Gilbert-Summit Rural Water District—could not obligate itself by contract to indemnify a private entity, absent specific statutory authorization.¹ Letter to John J. Fantry, Jr., Op. S.C. Att’y Gen. (March 18, 2011). Highlighting the conceptual distinction between indemnity and defense, you now inquire whether your client may “as a condition for receipt of a service necessary for carrying out its governmental function, agree to defend a Contractor if the Contractor is named a Defendant along with the Political Subdivision, made a Third Party Defendant, or individually sued for matters connected to the Contractor’s service to the Political Subdivision.”

As an initial matter, we distinguish between an agreement to defend a contractor from liability arising from the District’s conduct and an agreement to defend a contractor from liability arising from the contractor’s conduct. We will address each scenario in turn.

Law/Analysis

Defense against liability arising from District’s acts or omissions

Our Supreme Court has upheld a contract by which a municipality agreed to defend and indemnify a private company for claims arising from the municipality’s acts or omissions. Specifically, in *Green v. City of Rock Hill*, our Supreme Court held that a contract to defend and hold harmless a private entity was not *ultra vires* or contrary to public policy where the claims against which the city agreed to defend and indemnify were those for which “the liability, if any, as between the city and the [private] company, would clearly be the legal liability of the city and not of the company.” 149 S.C. 234, 147 S.E. 346, 361 (1929). The *Green* Court clarified that the city had “assume[d] no liability for the company’s negligence.” *Id.*

¹ We have stated previously that the Gilbert-Summit Rural Water District is a rural community water district established pursuant to chapter 13 of title 6 of the South Carolina Code. Letter to John J. Fantry, Jr., Op. S.C. Att’y Gen. (June 14, 2007).

However, in 1994, the General Assembly provided as follows:

No payment shall be made from state appropriated funds or other public funds to satisfy claims or judgments against governmental entities or governmental employees acting within the scope of their official duties arising under the Uniform Contribution Among Tortfeasors Act. The South Carolina Tort Claims Act is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of his official duty. The Uniform Contribution Among Tortfeasors Act shall not apply to governmental entities.

S.C. Code Ann. § 15-38-65 (2005). We view this as a clear demonstration of the General Assembly's intent that claims arising from the acts or omissions of employees of a government entity must be pursued according to the procedures set forth in the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.* (2005 & Supp. 2011), and if such claims are not pursued in such manner, no "public funds" may be employed to satisfy them.

While we agree that there is a conceptual distinction between indemnity and defense, section 15-38-65 is one of several statutes that demonstrate the General Assembly's intent to preclude government entities from being called upon to answer for their torts in any manner other than via the Tort Claims Act. *E.g.*, S.C. Code Ann. § 15-78-20(b) (providing the Tort Claims Act is the "exclusive civil remedy" for the torts of a "governmental entity, its employees, or its agents" except as concerns conduct "not within the scope of [their] official duties or that . . . constitute[s] actual fraud, actual malice, intent to harm, or a crime involving moral turpitude."); *id.* § 15-78-200 (providing the Tort Claims Act is the "exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty."). If a government entity could be called upon to defend a third party against a claim arising from the government's (or its employees') acts or omissions in a manner inconsistent with the Tort Claims Act, this intent would be defeated.

Therefore, it is the opinion of this Office that, absent specific statutory authorization, an agreement to appear and defend a contractor against claims arising from the District's tortious conduct would constitute an impermissible attempt to contract around the public policy of this State, which policy demands that claims arising from the conduct of government entities or their employees be pursued only in accord with the Tort Claims Act.² *See id.* § 15-78-20(a) ("[I]t is declared to be the public policy of the State of South

² As a caveat, we note that an agreement to defend a contractor that qualifies as an employee for purposes of the Tort Claims Act would be nothing more than an agreement to do what is required by law. *See* S.C. Code Ann. § 15-78-70(c) ("In the event that [an] employee is individually named [as a party defendant], the agency or political subdivision for which the employee was acting must be substituted as the party defendant."); *id.* § 15-78-130 ("The defense for a political subdivision against an action brought pursuant to this chapter, when the political subdivision does not purchase insurance through the Budget and Control Board, must be provided by the political subdivision or its designee."). Pursuant to section 15-78-30, an employee is defined in relevant part as follows:

Carolina that the State, and its political subdivisions, are only liable for torts within the limitations of this chapter and in accordance with the principles established herein.”).

Defense against liability arising from contractor’s acts or omissions

Our previous opinions suggest that, absent specific statutory authority, a government entity may not agree to defend a contractor against claims arising from the contractor’s acts or omissions. Cf. Letter to The Honorable Charles H. Witten, Op. S.C. Att’y Gen. (Jan. 8, 1968) (“The proposed contract includes the following paragraph: ‘The University of South Carolina agrees to indemnify and hold harmless the printer The University also agrees . . . to defend and continue to defend any civil demand, claim, action or proceeding that may be brought or asserted against the printer.’ It is a general rule of law that no State agency is liable for suit except as provided by statute or constitutional provision. . . . This being so, the University is not empowered to assume such liability.”).

A fundamental principle underlying this view is that contracting to provide such a defense is likely to result in the expenditure of public funds for a private purpose. See generally Letter to The Honorable John M. “Jake” Knotts, Jr., Op. S.C. Att’y Gen. (Nov. 18, 2010) (municipal attorneys may not be assigned duties that would result in the expenditure of public funds for a private purpose). In other contexts involving the reimbursement of attorneys’ fees or employment of counsel on behalf of private parties, we have opined that a government entity may not engage in such activities unless the representation serves the government’s interests. E.g., Letter to Miles Loadholt, Op. S.C. Att’y Gen. No. 77-206 (July 1, 1977) (“[A] municipality may not employ counsel in matters in which it is not directly interested or which lie outside its corporate affairs.”). If the District contracts in advance to provide such representation, it would be deprived of the ability to make a fact-specific determination regarding whether a particular representation serves the District’s interests. Cf. Letter to Miles Loadholt, *supra* (whether reimbursement of private citizens’ attorneys’ fees would serve a public purpose would depend upon the facts). We believe a court would be unlikely to uphold a contractual provision that limited the discretion of the District in this way. Cf. *City of Beaufort v. Beaufort-Jasper County Water and Sewer Authority*, 325 S.C. 174, 179-180, 480 S.E.2d 728, 731 (1997) (“For purposes of determining the validity of a contract requiring or involving a particular action by a municipality, the test for whether the action is governmental or proprietary should be ‘whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired.’” (quoting *Piedmont Public Service District v. Cowart*, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995))).

On or after January 1, 1989, “employee” means any officer, employee, agent, or court appointed representative of the State or its political subdivisions, including elected or appointed officials . . . and persons acting on behalf or in service of a governmental entity in the scope of official duty . . . but the term does not include an independent contractor doing business with the State or a political subdivision of the State.

Cf. Letter to Larry C. Batson, Op. S.C. Att’y Gen. No. 85-81 (Aug. 8, 1985) (describing a potential relationship between the State and a private corporation as one of employment).

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that a contract obligating the District to answer for such a claim in a manner different from that procedure would violate the public policy of this State. With regard to claims arising from the acts or omissions of a contractor, an agreement obligating the District in advance to defend the contractor from such claims would be likely to result in an invalid expenditure of public funds for a private purpose.

Very truly yours,



Dana E. Hofferber
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General